Nos. 14-556, 14-562, 14-571, 14-574

In The Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MARK R. HERRING
Attorney General of Virginia

CYNTHIA E. HUDSON
Chief Deputy Attorney General

CYNTHIA V. BAILEY
Deputy Attorney General

ALLYSON K. TYSINGER
Senior Assistant Attorney General

CARLY L. RUSH
Assistant Attorney General

March 5, 2015

STUART A. RAPHAEL*
Solicitor General of Virginia
**Counsel of Record*

TREVOR S. COX
Deputy Solicitor General

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

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1) Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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VIRGINIA'S INTEREST AS AMICUS CURIAE

Virginia is proud to be "the home of many of the Founding Fathers."[1] We revere James Madison as the "father of the Constitution"[2] and the "drafter"[3] of the Bill of Rights. The Bill of Rights included the Fifth Amendment's guarantee of "due process of law,"[4] a protection that implicitly prohibits the Federal Government from "denying to any person the equal protection of the laws."[5] The Bill of Rights followed in the tradition of the Virginia Declaration of Rights, in which George Mason wrote that "all men are by nature equally free and independent and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[6] And Thomas Jefferson's Declaration of Independence proclaimed the new nation's commitment to

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[1] *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring).

[2] *Gonzales v. Raich*, 545 U.S. 1, 57 (2005).

[3] *Edwards*, 482 U.S. at 606 (Powell, J., concurring).

[4] U.S. Const. amend. V.

[5] *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)).

[6] 9 William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia* 109 (1821); *see also* 1 Robert A. Rutland, ed., *The Papers of George Mason* 274-91 (1970).

the "self-evident" truth that "all men are created equal."[7]

We are proud of our Commonwealth's contributions to America's exceptional form of democracy, yet it is also self-evident that the scope of the equality-of-right principle that these Virginians shared with the world and helped enshrine in our Constitution was not fully recognized in their day. Slavery was not abolished until 1865, after a bitter civil war that nearly split our country in two. Women were not guaranteed the right to vote until 1920. And State-sponsored segregation was not declared unconstitutional until 1954, when *Brown v. Board of Education*[8] overruled the 1896 decision in *Plessy v. Ferguson*.[9]

The Founders and the majority in *Plessy* were not the only ones who failed in their own era to appreciate the full majesty of the equality-of-right principle that they otherwise regarded as sacred. Virginia's government fell short of fidelity to that principle in defending:

- the segregation of public school students in the companion case to *Brown v. Board*;[10]

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[7] The Declaration of Independence para. 2 (U.S. 1776).

[8] 347 U.S. 483 (1954).

[9] 163 U.S. 537 (1896).

[10] *Davis v. Prince Edward Cnty. Sch. Bd.*, No. 3 (U.S. 1954), *decided sub nom. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

- the prohibition of interracial marriage in *Loving v. Virginia*;[11] and
- the exclusion of female cadets from the Virginia Military Institute in *United States v. Virginia*.[12]

Yet the arguments offered to defend those unjust laws are the same arguments offered by marriage-equality opponents today. Virginia invoked federalism, arguing that education policy and marriage regulation are quintessentially State prerogatives that federal courts should leave alone.[13] Virginia also invoked history and tradition to justify segregation and anti-miscegenation laws, arguing that such laws were acceptable to the Founders because they were commonplace when the Bill of Rights and the Fourteenth Amendment were ratified.[14] But Virginia's

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[11] 388 U.S. 1 (1967).

[12] 518 U.S. 515 (1996).

[13] *See* Initial Brief: Appellee Respondent, *Davis v. Prince Edward Cnty. Sch. Bd.*, No. 3 (U.S. Nov. 30, 1953), 1954 U.S. Briefs 1, 33 ("[T]o interpret the Fourteenth Amendment as authority for the judicial abolition of school segregation would be an invasion of the legislative power and an exact reversal of the intent of the framers of the Amendment.") [hereinafter Va. Br. *Prince Edward Cnty. Sch. Bd.*]; Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 93641, at *7 (Mar. 20, 1967) (arguing that a judicial decision overriding Virginia's laws "would be judicial legislation in the rawest sense of that term") (quoting *Loving v. Virginia*, 147 S.E.2d 78, 82 (Va. 1966)) [hereinafter Va. Br. *Loving v. Virginia*].

[14] Va. Br. *Prince Edward Cnty. Sch. Bd.*, 1954 U.S. Briefs at 31 ("The Congress that proposed the Fourteenth Amendment did

(Continued on following page)

government was wrong then, and the four States that reprise modern-day versions of those failed arguments are wrong here.

"Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.'"[15] The purpose of that oath is to "preserve [the Federal Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . ."[16]

In fidelity to that oath, and to a comparable oath under the Virginia Constitution,[17] the Attorney General of Virginia changed the Commonwealth's legal position in *Bostic v. Rainey*, acknowledging that Virginia's ban on same-sex marriage violated the

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not understand that it would be within the judicial power . . . to construe the Amendment as abolishing school segregation of its own force."); Va. Br. *Loving v. Virginia*, 1967 WL 93641, at *5 ("[T]he legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes.").

[15] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[16] *Id.* (quoting *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1859)).

[17] Va. Const. art. II, § 7 (requiring all constitutional officers to swear oath to "support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia").

Fourteenth Amendment.[18] After full adversarial proceedings in which Virginia's marriage ban was vigorously defended by two circuit court clerks, the Attorney General's conclusion was vindicated by the district court[19] and the Fourth Circuit.[20]

And on the same day that *Bostic* took effect, hours after this Court refused certiorari,[21] the executive branch of Virginia State Government implemented the district court's injunction requiring the Commonwealth to license and recognize same-sex marriages.[22] *Bostic* also ended Virginia's practice of prohibiting same-sex spouses from adopting their partner's adopted or biological children.[23] Virginia's Attorney General advised circuit court clerks that laws providing benefits to a "husband and wife" must

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[18] *Bostic v. Rainey*, 970 F. Supp. 2d 456, 461 (E.D. Va.), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 190 L. Ed. 2d 140 (2014).

[19] 970 F. Supp. 2d at 483.

[20] 760 F.3d at 384.

[21] 190 L. Ed. 2d at 140.

[22] *See* Exec. Order No. 30: *Marriage Equality in the Commonwealth of Virginia* (Oct. 7, 2014), *available at* https://governor.virginia.gov/media/3341/eo-30-marriage-equality.pdf (ordering executive branch agencies to "take all necessary and appropriate legal measures to comply with" *Bostic* and to make health benefits available to State employees' same-sex spouses and their dependents).

[23] Press Release, Governor McAuliffe, *McAuliffe Administration to Local Divisions of Social Services: Same-Sex Spouses can now Legally Adopt* (Oct. 10, 2014), https://governor.virginia.gov/newsroom/newsarticle?articleId=6827.

be construed under *Bostic* to apply equally to same-sex spouses.[24] And although bills failed in the 2015 Virginia legislature to repeal Virginia's same-sex-marriage ban,[25] to prohibit sexual-orientation discrimination in public employment,[26] and to protect gay people from housing discrimination,[27] to our knowledge, no State or local official in Virginia has failed to comply with *Bostic*'s injunction.

Virginia's State Registrar of Vital Records advises that, during the short period between October 6, 2014 (when *Bostic* took effect) through January 2015 (the most recently completed reporting period), 1,289 same-sex couples have wed, and same-sex weddings account for between 6% and 8% of all marriages celebrated in Virginia. The State Registrar has also recorded six completed adoptions by same-sex spouses as well as nine birth certificates adding both spouses' names as the child's legal parents.

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[24] 2014 Op. Va. Att'y Gen. No. 14-074, at 3 n.14, *available at* http://ag.virginia.gov/files/14-074_Frey.pdf.

[25] *See* H.J. 492 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HJ492; H.J. 493 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HJ493; S.J. 213 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SJ213; S.J. 214 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SJ214.

[26] S.B. 785 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB785; S.B. 1181 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB1181.

[27] H.B. 1454 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HB1454; S.B. 917 (Va. 2015), http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB917.

Virginia's same-sex spouses and their children can now travel to the thirty-seven other States in which marriage equality is recognized without fear that those States will treat them as legal strangers to each other. But the Sixth Circuit's ruling below leaves them at risk of that consequence when they travel to or through Kentucky, Michigan, Ohio and Tennessee.

Virginia submits this amicus brief in support of reversal because its experience on the wrong side of *Brown* and *Loving*, and on the right side of this issue, has taught us the truth of what the Court recognized in *Lawrence v. Texas*: "those who drew and ratified . . . the Fourteenth Amendment" chose not to specify the full measure of freedom that it protected because they "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."[28]

SUMMARY OF ARGUMENT

1. *Substantive Due Process*. The fundamental right at issue in this case is the right of two people to marry—not the right of *same-sex couples* to marry. The respondents seek to define the fundamental right so narrowly that it disappears. They are wrong for two interrelated reasons.

[28] 539 U.S. 558, 578-79 (2003).

First, the Court's marriage cases teach that the right to marry cannot be restricted to the narrowest context in which it was historically practiced. Otherwise, the Court would not have recognized the right of interracial couples to marry, of a prisoner to marry, or of a person to marry in spite of child-support arrearages. Those cases cannot be distinguished on the ground that they all involved different-sex couples. Such arguments that "it had not been done before" would have restricted the fundamental right to marry in those cases too. No case before *Loving v. Virginia*,[29] for instance, had ever involved an interracial couple who married.

Second, this Court has expressly rejected the narrowest-historical-context theory of substantive-due-process analysis advocated by the respondents and by the panel below. That theory was proposed by Justice Scalia in footnote 6 of *Michael H. v. Gerald D.*[30] He based it on *Bowers v. Hardwick*,[31] where the Court (erroneously, as it turned out) held that the Constitution did not protect private sexual conduct between consenting adult men.[32] But only Chief Justice Rehnquist agreed with Justice Scalia's theory. And the theory was then repudiated by a majority of

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[29] 388 U.S. at 1.

[30] 491 U.S. 110, 127 n.6 (1989) (Scalia, J.).

[31] 478 U.S. 186 (1986).

[32] *See* 491 U.S. at 127 n.6.

this Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[33]

The Court did not silently revive that theory in *Washington v. Glucksberg*.[34] *Glucksberg* found no fundamental right to assisted suicide anywhere in 700 years of Anglo-American history. But it distinguished cases involving *established* fundamental rights, like the right to marry at issue here.

The coda to the swan song of footnote 6 came in 2003, when the Court in *Lawrence* overruled *Bowers*, concluding that its earlier opinion had construed the rights of gay persons too narrowly. *Lawrence* thereby demolished the doctrinal foundation on which the narrowest-historical-context theory had been constructed.

Rejecting the narrowest-historical-context theory is crucial to getting the right answer here. Virginia was on the wrong side of *Loving* and *Brown* precisely because interracial-marriage bans and segregation were commonplace when the Fourteenth Amendment was drafted. Applying the narrowest-historical-context theory in those cases yielded the wrong answer. The respondent States are committing the same mistake here.

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[33] 505 U.S. 833, 847-48 (1992).

[34] 521 U.S. 702 (1997).

2. *Equal Protection*. Although strict scrutiny applies because the same-sex-marriage bans substantially interfere with the fundamental right to marry, the Equal Protection Clause independently calls for heightened scrutiny because the bans discriminate on the basis of sexual orientation and gender.

The bans facially discriminate against gay people who wish to marry someone of their own gender. Gay men and lesbians as a class satisfy the factors that the Court has considered before in applying heightened scrutiny. The unifying principle behind those factors is that courts should be suspicious of governmental classifications when they single out a disfavored minority group for discriminatory treatment. The respondent States here cannot seriously maintain that there is no cause for suspicion when the government discriminates against gay people.

Heightened scrutiny also applies because the marriage bans classify persons according to gender: a man may not marry a man, nor a woman another woman. Express gender classifications such as these trigger heightened scrutiny: despite that they apply to men and women equally; without regard to the existence of invidious motive; and even if the asserted justification that "men and women are different" is true. The whole point of heightened scrutiny is to smoke out impermissible laws by requiring the government to give an exceedingly persuasive explanation that an express gender classification is substantially related to an important governmental objective. Heightened scrutiny is particularly appropriate

where, as here, the States invoke gender-based stereotypes about "mothers and fathers" to justify discriminating against same-sex couples and their children.

3. *Federalism*. This Court's federalism discussion in Part III of *Windsor*[35] does not support denying fundamental rights or equal protection to gay people. Part III explained that § 3 of the Defense of Marriage Act (DOMA) was suspect because it departed from the normal rule that the Federal Government defers to State-policy decisions involving domestic relations. That suspicion dovetailed with the Court's conclusion, in Part IV, that DOMA violated equal-protection principles implicit in the Due Process Clause of the Fifth Amendment. In *Windsor*, then, the arguments from federalism and equal protection pointed in the same direction and to the same conclusion: § 3 was unconstitutional.

In this case, by contrast, the respondents' invocation of federalism is at odds with the rights of same-sex couples and their children. Whenever these arguments point in opposite directions, however, the Fourteenth Amendment necessarily trumps federalism. Indeed, *Windsor* itself made clear that the States' power to regulate the incidents of marriage is subject to constitutional limitations. And while *Schuette v. Coalition to Defend Affirmative Action*[36]

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[35] *United States v. Windsor*, 133 S. Ct. 2675, 2689-93 (2013).

[36] 134 S. Ct. 1623 (2014).

upheld a Michigan constitutional requirement that State government discriminate neither in favor of nor against particular groups, the respondent States here do not practice such equality of treatment. Instead, they enshrine *unequal* treatment of gay people in their State constitutions.

The Constitution does not permit the "seeds of . . . hate to be planted under the sanction of law."[37] As with discrimination against other historically disfavored groups, the "way to stop discrimination" against gay people "is to stop discriminating" against gay people.[38]

4. *The need for a decisive ruling applying demanding scrutiny*. In one sense, it makes little practical difference if the Court applies strict scrutiny under substantive-due-process analysis, heightened scrutiny under equal-protection analysis, or mere rational-basis review. The States' proffered justifications for their same-sex-marriage bans cannot survive rational-basis review, let alone the more demanding standards. *Windsor* rejected the same procreation-channeling and optimal-child-rearing justifications, finding that Congress had "no legitimate purpose" in refusing to recognize valid same-sex marriages.[39] The States' excuses for denying marriage

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[37] *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

[38] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.).

[39] 133 S. Ct. at 2696.

equality are no stronger here. It is utterly implausible that permitting same-sex couples to marry and raise their children in two-legal-parent households will make *different*-sex couples less likely to marry and raise their children in two-legal-parent households. Other courts have justifiably ridiculed such excuses.

The Court should nevertheless apply more demanding scrutiny under both the Due Process and Equal Protection Clauses. *Loving* was a watershed ruling precisely because this Court invoked both grounds. Invoking both grounds will give the Court's decision here the same synergy and resilience. By combining the principle that the right to marry belongs to "all individuals"[40] with the principle that the Equal Protection Clause prohibits discrimination against gay people, the outcome is ineluctable.

A decisive ruling will also quell grumblings, already audible in some quarters, that State and local officials might invoke States' rights to withhold marriage equality, even if this Court rules that the Fourteenth Amendment demands otherwise. Cases like *Cooper v. Aaron*[41] show that decisive rulings help States overcome such urgings. And history teaches that adherence to the commands of the Constitution is indispensable to the protection of liberty for us all.

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[40] *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

[41] 358 U.S. at 19-20.

We revere the Founders and the drafters of the Fourteenth Amendment because they were committed to the principle of equal justice under law, even if they failed to live up to that principle in their respective generations. They may not have recognized that due-process and equal-protection principles forbid: segregated schools; restrictions on interracial marriage; the exclusion of women from preeminent military academies; or the criminalization of intimate relations between consenting adults. But the scope of the Fourteenth Amendment is governed by the words they used, and by how their words have been authoritatively construed by this Court.

The rights at issue in this case are not new. What is new is this generation's recognition that substantive-due-process and equal-protection principles cannot be reconciled with State-sanctioned discrimination against gay people. Because the Constitution protects a person's selection of a life-partner of the same gender, the Constitution likewise prohibits States from denying to same-sex couples and their children "the most important relation in life."[42]

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[42] *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

ARGUMENT

I. The fundamental right of marriage is protected by the Due Process Clause and cannot be restricted to the narrowest context in which it was historically practiced.

To defeat the fundamental right to marry at issue in this case, the respondent States seek to define the right so narrowly that it disappears. They would define it as the right of same-sex couples to marry, not the right of two people to marry. But two interrelated reasons show why respondents' cramped definition is untenable.

A. The Court's marriage cases do not limit the right of marriage to the narrowest context in which it was historically practiced.

First, this Court's marriage cases teach that the fundamental right of marriage is not limited to the historical context in which it was practiced. Until Virginia's interracial-marriage ban was struck down in *Loving*, such laws had been in effect "since the colonial period."[43] Yet that history could not save them. As *Casey* explained, the Fourteenth Amendment bars States from prohibiting interracial marriage *despite* that "interracial marriage was illegal in

[43] *Loving*, 388 U.S. at 6.

most States in the 19th century . . . ."[44] There was likewise no historical precedent to support the right of prisoners or dead-beat parents to marry. Yet the Court in *Turner v. Safley* held that prisoners are entitled to wed.[45] And it held in *Zablocki v. Redhail* that States could not deny marriage to persons who were behind in their child-support obligations.[46] Thus, most courts have correctly read *Loving*, *Zablocki*, and *Turner* as requiring the freedom to marry to be defined at a *broad* level of generality, even if the context in question, as here, was not one in which marriage rights had been traditionally recognized or historically practiced.[47]

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[44] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992).

[45] 482 U.S. 78, 95-96 (1987).

[46] 434 U.S. at 388-91.

[47] *See, e.g.*, *Bostic*, 760 F.3d at 377 ("We . . . have no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned. Accordingly, we decline . . . to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry."); *Kitchen v. Herbert*, 755 F.3d 1193, 1209 (10th Cir.) ("In numerous cases, the Court has discussed the right to marry at a broader level of generality than would be consistent with appellants' argument."), *cert. denied*, 135 S. Ct. 265 (2014); *Latta v. Otter*, 771 F.3d 456, 477 (9th Cir. 2014) (Reinhardt, J., concurring) ("In each case, the Supreme Court referred to—and considered the historical roots of—the general right of people to marry, rather than a narrower right defined in terms of those

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Those cases cannot be distinguished, as the panel tried below, on the ground that they all involved different-sex couples.[48] No case before *Loving* involved interracial marriage; no case before *Zablocki* involved betrotheds behind in their child-support obligations; and no case before *Turner* involved marriage to a prisoner. But the Court nonetheless described each case as involving the right to marry, a right "of fundamental importance for *all* individuals."[49]

Nor can those cases be restricted by sectarian notions that marriage exists only for procreative couples or purposes. *Turner* granted prisoners the right to marry despite that incarceration prevented consummation.[50] The "important attributes of marriage" that remained included "expressions of emotional support and public commitment," "spiritual significance," and considerable economic and non-economic benefits.[51] Although the Court noted that most inmates expect to be released someday and so may wed anticipating that the marriage "ultimately will be fully consummated,"[52] nothing in *Turner* suggested that consummation, let alone procreation,

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who sought the ability to exercise it."), *petitions for cert. filed* (U.S. Dec. 31, 2014, Jan. 2, 2015) (Nos. 14-765, 14-788).

[48] *DeBoer v. Snyder*, 772 F.3d 388, 411-12 (6th Cir. 2014).

[49] *Zablocki*, 434 U.S. at 384 (emphasis added).

[50] 482 U.S. at 95-96.

[51] *Id.*

[52] *Id.* at 96.

was indispensable, or that inmates serving life-terms could be prohibited from marrying.

But if there were any doubt whether a State could make procreation a condition of marriage, *Griswold* dispelled it.[53] *Griswold* upheld the right of married couples *not* to procreate.[54] The Court described marriage in poetic terms that apply with equal force to same-sex and different-sex marriages:

> 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.[55]

Justice Scalia put the point more bluntly in his dissent in *Lawrence*: "what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."[56]

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[53] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[54] *Id.* at 485-86.

[55] *Id.* at 486.

[56] 539 U.S. at 605 (Scalia, J., dissenting).

B. *Casey* and *Lawrence* rejected the narrowest-historical-context approach to restricting established fundamental rights.

A second basis requires rejecting the respondents' effort to define the fundamental right here as the narrow right of same-sex marriage, rather than the broader right of two people to marry. This Court in *Casey* squarely rejected the narrowest-historical-context approach, previously urged by Justice Scalia, that would limit established fundamental rights to the most specific level at which they were historically practiced.

In footnote 6 of the plurality opinion in *Michael H. v. Gerald D.*, Justice Scalia proposed that fundamental rights under the Due Process Clause be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[57] For that proposition he relied on *Bowers v. Hardwick*, where this Court upheld Georgia's "sodomy" law as applied to consenting male adults in the privacy of their own home.[58] To demonstrate the historical basis for *Bowers*, Justice Scalia noted that when "the Fourteenth Amendment was ratified all but 5 of the 37 States had criminal sodomy laws, that all 50 of the States had such laws prior to 1961, and that 24 States and

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[57] 491 U.S. 110, 127 n.6 (1989) (Scalia, J.).

[58] 478 U.S. 186, 192 (1986).

the District of Columbia continued to have them" in 1986, when *Bowers* was decided.[59] Thus, he argued, there was no "relevant tradition" and no fundamental right protecting two adult men who wished to engage in sexually intimate conduct in the privacy of their own home.

But only Chief Justice Rehnquist joined footnote 6.[60] The theory was rejected by Justice O'Connor, in a concurring opinion joined by Justice Kennedy, who explained that it "sketche[d] a mode of historical analysis . . . that may be somewhat inconsistent with our past decisions in this area."[61] "On occasion," she continued, "the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available."[62] She gave *Loving* and *Turner* as examples.[63] Justice O'Connor therefore rejected "the prior imposition of a single mode of historical analysis."[64]

Justices O'Connor and Kennedy were not alone; the three dissenting justices in *Michael H.* likewise rejected footnote 6, explaining that limiting rights to those "traditionally protected by our society" would

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[59] 491 U.S. at 127 n.6.

[60] *Id.* at 113.

[61] *Id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring).

[62] *Id.*

[63] *Id.*

[64] *Id.*

limit substantive-due-process protection to only those interests "already protected by a majority of the States," a position that would "mock[ ] those who, with care and purpose, wrote the Fourteenth Amendment."[65]

The separate views rejecting footnote 6 in *Michael H.* coalesced in *Casey*, where a full majority of the Court explicitly rejected the narrowest-historical-context theory. In a joint opinion by Justices O'Connor, Kennedy and Souter, in which Justices Blackmun and Stevens joined, the Court explained:

> 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* . . . .[66]

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[65] *Id.* at 141 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting).

[66] 505 U.S. at 847-48 (emphasis added).

Justice Scalia himself later acknowledged that his narrowest-historical-context theory had not gained traction. In dissenting from the Court's holding that Virginia could not exclude women from VMI, he wrote, "[i]t is my position that the term 'fundamental rights' should be limited to 'interest[s] traditionally protected by our society,' *Michael H.* [] (plurality opinion of SCALIA, J.); *but the Court has not accepted that view . . . .*"[67]

The epilogue in the story of the demise of footnote 6 then came in 2003, when *Lawrence* overruled *Bowers*, the primary authority on which Justice Scalia had based the narrowest-historical-context theory. Writing for the majority in *Lawrence*, Justice Kennedy explained that the Court had erred when it framed the question in *Bowers* too narrowly as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."[68] "That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake."[69] Those who define the right at issue here as the right to same-sex marriage make the same mistake.[70]

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[67] *United States v. Virginia*, 518 U.S. at 567-68 (emphasis added).

[68] 539 U.S. at 566.

[69] *Id.* at 567.

[70] To his credit, the late Justice Powell, another Virginian the Commonwealth proudly claims as her own, acknowledged in retirement that he erred in casting the fifth vote in *Bowers*. *See*

(Continued on following page)

Nothing in *Washington v. Glucksberg*[71] revivified the narrowest-historical-context theory that had been interred by *Casey*. *Glucksberg* declined to recognize a fundamental right to assisted suicide, finding no such right anywhere in "700 years [of] Anglo-American" history.[72] *Glucksberg* explained that the Court's "substantive-due-process analysis has two primary features":[73]

> First, . . . that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a *careful description* of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible

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John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 530 (1994). Before the vote, Powell confided to his law clerk (whom he did not know was gay) that "I don't believe I've ever met a homosexual." *Id.* " 'Certainly you have,' came back the reply, 'but you just don't know that they are.' " *Id.* at 521. Notably, countless Americans have modified their views about marriage equality after learning that a friend, neighbor, colleague, or family member is gay. *See generally* Michael J. LaCour & Donald P. Green, *When contact changes minds: An experiment on transmission of support for gay equality*, 346 Science 1366 (2014).

[71] 521 U.S. 702 (1997).

[72] *Id.* at 711.

[73] *Id.* at 720.

> decisionmaking that direct and restrain our exposition of the Due Process Clause.[74]

But it reads too much into the "deeply rooted" and "careful description" language in *Glucksberg* to conclude that the majority intended, without saying so, to restore Justice Scalia's theory from *Michael H.* and to overrule *Casey*'s rejection of that same theory. *Glucksberg*, rather, distinguished between asserted fundamental rights like assisted suicide, which lacked *any* basis in history or case law, and *established* fundamental rights, like the right to marry, which had been repeatedly identified by the Court as fundamental without regard to the narrowest context in which they had been practiced. *Glucksberg* listed such established rights in footnote 19, including the right to marry at issue in *Loving* and *Turner*.[75] The Court then distinguished such established rights from asserted ones (like assisted suicide) that lacked such pedigree.[76] *Glucksberg* only distinguished *Casey*; it did not overrule it. Notably, the handful of judges who have invoked *Glucksberg* to define marriage narrowly have uniformly ignored that this Court has

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[74] *Id.* at 720-21 (citations and quotations omitted; emphasis added).

[75] *Id.* at 727 n.19.

[76] *Id.* at 727-28 ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that *any and all* important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.") (citation omitted; emphasis added).

not applied the narrowest-historical-context approach to restrict established rights—like the right to marry—that had *already been recognized* as fundamental.[77]

Applying the correct legal doctrine is crucial to getting the right answer. Virginia mistakenly applied the narrowest-historical-context approach when it defended segregation in *Brown*, anti-miscegenation laws in *Loving*, and the exclusion of women from VMI, all practices with a long tradition and historical pedigree. Kentucky, Michigan, Ohio and Tennessee are simply repeating that mistake here.

II. The Equal Protection Clause prohibits States from denying marriage rights to same-sex couples and from refusing to recognize lawful out-of-state marriages.

Because the respondents' same-sex-marriage bans deprive citizens of the fundamental right to marry, the bans are subject to strict scrutiny.[78] Even apart from substantive-due-process analysis, however,

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[77] *See DeBoer*, 772 F.3d at 411 (opinion of Sutton, J., joined by Cook, J.); *Bostic*, 760 F.3d at 389 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1234 (Kelly, J., dissenting in part); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 922 (E.D. La. 2014) (opinion of Feldman, J.), *cert. before judgment denied*, 190 L. Ed. 2d 890 (2015).

[78] *Zablocki*, 434 U.S. at 383; *Bostic*, 760 F.3d at 375 n.6, 377; *Kitchen*, 755 F.3d at 1218; *Latta*, 771 F.3d at 477 (Reinhardt, J., concurring).

the Equal Protection Clause would mandate at least heightened scrutiny.

A. Same-sex-marriage bans are subject to heightened scrutiny under the Equal Protection Clause because they classify persons based on their sexual orientation, an inherently suspect classification.

The Court should apply heightened scrutiny because the bans facially discriminate on the basis of sexual orientation, and because gay men and lesbians, as a class, satisfy the factors this Court has considered in applying heightened scrutiny—whether the group:

- has experienced a "history of purposeful unequal treatment";[79]
- has been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities";[80]

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

[80] *Id*.

- has "obvious, immutable, or distinguishing characteristics that define them as a discrete group";[81] or
- has been "relegated to such a position of political powerlessness" as to warrant "extraordinary protection from the majoritarian political process."[82]

It is difficult to improve on the Government's discussion of those considerations in *United States v. Windsor*, where it explained at length how gay people as a class satisfy all four factors.[83]

Yet a single unifying principle underlies all four considerations. Courts apply heightened and strict scrutiny when they are properly *suspicious* of laws that discriminate based on traits that are often the subject of stereotypes and prejudice—traits like race, national origin, gender, alienage, and illegitimacy. We put a heavy burden on government to justify laws that rely on *suspect* classifications like those.

It defies credulity to argue that courts have no reason to be similarly suspicious of laws that discriminate against gay people. As Judge Posner recognized, "homosexuals are among the most stigmatized,

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

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

[83] U.S. Merits Br. 16-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

misunderstood, and discriminated-against minorities in the history of the world . . . ."[84] Laws targeting gay people for unfavorable treatment clearly warrant judicial skepticism.

B. Heightened scrutiny is also warranted because the marriage bans explicitly turn on the participants' gender.

The Equal Protection Clause also calls for heightened scrutiny because the marriage bans expressly classify persons by gender: a man may not marry a man, nor a woman another woman.[85]

The gender classification does not disappear because the marriage ban applies to men and women equally. Virginia maintained in *Loving* that its inter-racial-marriage ban did not discriminate on the basis of race because "its miscegenation statutes punish equally both the white and the Negro participants . . . ."[86] The Court disagreed, stating that "the *fact of equal application* does not immunize the statute from the very heavy burden of justification which the

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[84] *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014).

[85] *See, e.g.*, Ky. Const. § 233A (enacted 2004) ("Only a marriage between one man and one woman shall be valid or recognized . . . ."); Mich. Const. art. I, § 25 (enacted 2004) ("one man and one woman"); Ohio Const. art. XV, § 11 (enacted 2004) ("one man and one woman"); Tenn. Const. art. XI, § 18 (enacted 2006) ("one (1) man and one (1) woman").

[86] 388 U.S. at 8.

Fourteenth Amendment has traditionally required of state statutes *drawn according to race*."[87]

Just as Virginia's interracial-marriage ban applied equally to blacks and whites but was "drawn according to race," the respondents' same-sex-marriage bans apply equally to men and women but are drawn according to gender. It does not matter that the bans treat men and women equally any more than it matters that a peremptory challenge can be used equally (and unconstitutionally) to remove a male or female juror.[88]

Heightened scrutiny smokes out the *improper* uses of gender. It applies whenever the government expressly classifies by gender, regardless of whether the use of gender was *actually* motivated by gender bias, homophobia, or a legitimate purpose. Determining whether an important interest exists is the whole point of the exercise. In doctrinal terms, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."[89] So even assuming that the respondents' marriage bans were not actually intended to discriminate against men or women as a class,

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[87] *Id.* at 9 (emphasis added).

[88] *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (applying heightened scrutiny to peremptory strikes of men that resulted in an all-woman jury).

[89] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

it "does not undermine the conclusion that an explicit gender-based policy is sex discrimination" that triggers heightened scrutiny.[90]

That heightened scrutiny should apply is reinforced by the fact that marriage-ban proponents emphasize the different traits they say mothers and fathers bring to parenting. Michigan, for example, insists that "[m]en and women are different, moms and dad are not interchangeable,"[91] "different sexes bring different contributions to parenting,"[92] and "there are different benefits to mothering versus fathering."[93] The insinuation that same-sex parents cannot be as effective as different-sex parents suffers from the same prejudice ferreted out in *Stanley v. Illinois*, where the Court rejected the irrebuttable presumption that unmarried fathers were "unqualified to raise their children."[94]

But the Court need not evaluate the truth of Michigan's gender-loaded parenting claims to know that they trigger heightened scrutiny: heightened

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[90] *Id.* at 200.

[91] *E.g.*, Respondents' (Michigan's) Br. in Supp. of Pet'n for Writ of Cert. at 27, *DeBoer v. Snyder*, No. 14-571.

[92] *Id.* at 28.

[93] *Id.* at 28 (quotation omitted).

[94] 405 U.S. 645, 646 (1972). The Constitution prohibits a State from "conclusively presum[ing] that any particular unmarried father [is] unfit to raise his child; the Due Process Clause require[s] a more individualized determination." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974).

scrutiny applies even when gender-based stereotypes are *true*. That is why even if all of the "inherent differences" between men and women had been correctly discerned by Virginia, it would not have justified excluding women from VMI,[95] and why the government may not tie employee benefits or contributions to gender-based mortality tables, despite the truism that women generally outlive men.[96] We apply heightened scrutiny precisely because our distrust of gender-based classifications can be overcome only by "an exceedingly persuasive justification" showing "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[97]

Heightened scrutiny thus roots out the prejudice inherent in the "baggage of sexual stereotypes."[98] Judge Berzon hit the nail on the head: "[i]t should

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[95] *United States v. Virginia*, 518 U.S. at 533.

[96] *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084-85 (1983) ("The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute '[even] a true generalization about [a] class' cannot justify class-based treatment.") (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978)).

[97] *United States v. Virginia*, 518 U.S. at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

[98] *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979)).

be obvious that the stereotypic notion 'that the two sexes bring different talents to the parenting enterprise,' runs directly afoul of the Supreme Court's repeated disapproval of 'generalizations about 'the way women are,' or 'the way men are,'' as a basis for legislation."[99]

III. Federalism is not a valid basis on which to withhold fundamental rights and deny equal protection.

Marriage-ban defenders invoke States' rights, citing Part III of *Windsor*,[100] but they fundamentally misunderstand the function of the federalism discussion in that case. In *Windsor*, the argument that § 3 of the Defense of Marriage Act[101] violated federalism principles pointed to the *same* conclusion as the argument that DOMA violated the due-process rights of lawfully married same-sex couples; the two arguments worked in tandem. By defining marriage to be between a man and a woman, Congress invaded an area that by "history and tradition . . . has been treated as being within the authority and realm of the separate States."[102] That mark of invalidity dovetailed with the Court's conclusion, in Part IV, that

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[99] *Latta*, 771 F.3d at 491 (Berzon, J., concurring) (quoting *United States v. Virginia*, 518 U.S. at 550).

[100] 133 S. Ct. at 2689.

[101] 1 U.S.C. § 7.

[102] 133 S. Ct. at 2689-90.

"DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government."[103]

But in this case, the two arguments conflict: the States' claim here that they should be free to ban same-sex marriage is irreconcilably opposed to the equal-protection and due-process rights of same-sex couples, who seek the same marriage rights enjoyed by different-sex couples. Unlike in *Windsor*, then, where federalism and fundamental-rights analysis pointed to the same conclusion, here they are in tension.

But it is indisputable that whenever such conflicts arise, the Fourteenth Amendment trumps federalism. The Fourteenth Amendment was "specifically designed as an expansion of federal power and an intrusion on state sovereignty."[104] Thus, in *Cooper v. Aaron*, the Court rejected Arkansas's recalcitrance in implementing desegregation after *Brown v. Board*, explaining that even though "public education is primarily the concern of the States . . . such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action."[105]

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[103] *Id.* at 2693.

[104] *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

[105] 358 U.S. at 19.

Windsor's federalism discussion makes the same point. Writing for the majority, Justice Kennedy explained that "State laws defining and regulating marriage, *of course*, *must respect the constitutional rights of persons*."[106] He cited *Loving* for that point.[107] A few paragraphs later, the Court said that "the long-established precept" that marriage laws may vary from one State to another is "subject to constitutional guarantees."[108] In other words, if the Fourteenth Amendment prevents States from withholding the rights of marriage from same-sex couples, federalism cannot save such laws from being "discard[ed] . . . into the ash heap of history."[109]

The panel majority below erred in relying on *Schuette v. Coalition to Defend Affirmative Action*,[110] where there was no conflict between Fourteenth Amendment rights and federalism. *Schuette* rejected an equal-protection challenge to a provision in Michigan's constitution that the State "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation

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[106] 133 S. Ct. at 2691 (emphasis added).

[107] *Id.*

[108] *Id.* at 2692.

[109] *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa.), *order aff'd, appeal dismissed*, No. 13-3048 (3d Cir. July 3, 2014).

[110] 134 S. Ct. 1623 (2014). *See DeBoer*, 772 F.3d at 409 (discussing *Schuette*).

of public employment, public education, or public contracting."[111] In upholding Michigan's ability to prevent discrimination—whether for or against specific groups—the majority said that "[d]eliberative debate on sensitive issues such as racial preferences" should not be "remov[ed] . . . from the voters' reach."[112] But *Schuette* made clear that the provision at issue there did not authorize discrimination that the Federal Constitution forbids. The majority cautioned, for instance, that "when hurt or injury is *inflicted* on racial minorities by the encouragement or command of laws or other state action, *the Constitution requires redress by the courts* . . . ."[113]

Unlike the marriage bans at issue here, which make governmental discrimination against gay people part of each State's constitution, the Michigan provision in *Schuette* prohibited discrimination, whether for or against traditionally suspect groups. *Schuette* would be analogous here only if the States in this case *both* banned discrimination against gay people *and* prohibited governmental preferences that favored them. But if that were true, then Kentucky, Michigan, Ohio, and Tennessee would license and recognize same-sex marriage *equally* with different-sex marriage. Instead, they discriminate against same-sex couples, treating them as less than full citizens. Nothing in *Schuette* authorizes State-sanctioned

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[111] 134 S. Ct. at 1629.

[112] *Id.* at 1638.

[113] *Id.* at 1637 (emphasis added).

discrimination in the guise of letting the voters decide whether to deny their fellow citizens fundamental rights or "the equal protection of the laws."[114]

We should have heeded the first Justice Harlan when he warned in *Plessy* that "the common government of all [should] not permit the seeds of . . . hate to be planted under the sanction of law."[115] His wise counsel rings true today. "The way to stop discrimination" against gay people "is to stop discriminating" against gay people.[116]

IV. Even though the marriage bans fail the rational-basis test, the Court should hold that the Due Process and Equal Protection Clauses demand more exacting scrutiny here.

In one sense, it makes little practical difference if the Court applies strict scrutiny under substantive-due-process analysis, heightened scrutiny under equal-protection analysis, or mere rational-basis review. The States' proffered justifications for their same-sex-marriage bans cannot survive the rational-basis test, let alone the more demanding standards.

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[114] U.S. Const. amend. XIV, § 1.

[115] 163 U.S. at 560 (Harlan, J., dissenting).

[116] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.).

"Every one knows" what these marriage bans had as their "purpose,"[117] but even accepting the fiction that these States banned same-sex marriage to encourage "the raising of children by their biological parents" or "childrearing in a setting with both a mother and a father,"[118] those rationales were rejected in *Windsor*. The same justifications were defended by the dissenting court-of-appeals judge in *Windsor*[119] and pressed forcefully by the congressmen who took up those claims in this Court.[120] And yet *Windsor* held that "no legitimate purpose" could justify DOMA's refusal to recognize same-sex marriages from jurisdictions where they were lawful.[121]

Those same excuses are no more persuasive this time. It is utterly implausible that permitting same-sex couples to marry and raise their children in two-legal-parent households will make *different*-sex couples less likely to marry and raise their children in two-legal-parent households.[122] If protecting

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[117] *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

[118] *Windsor v. United States*, 699 F.3d 169, 198 (2d Cir. 2012) (Straub, J., dissenting in part), *aff'd*, 133 S. Ct. 2675 (2013).

[119] *Id*.

[120] BLAG Merits Br. 10-11, 46-47, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

[121] 133 S. Ct. at 2696.

[122] *See, e.g.*, *Bostic*, 760 F.3d at 383 ("Allowing infertile opposite-sex couples to marry does nothing to further the government's goal of channeling procreative conduct into marriage. Thus, excluding same-sex couples from marriage due to their inability to have unintended children makes little

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families and children were really the goal, these States would permit same-sex spouses to adopt children into their families, not obstruct their ability to do so, as Virginia did until *Bostic* ended that practice.[123] The Ninth Circuit was right that "[r]aising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples."[124] And the Seventh Circuit was justified in its acid-tongued rejection of the States' rationale as

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sense."); *id.* at 384 ("There is absolutely no reason to suspect that prohibiting same-sex couples from marrying and refusing to recognize their out-of-state marriages will cause same-sex couples to raise fewer children or impel married opposite-sex couples to raise more children."); *Kitchen*, 755 F.3d at 1223 ("We emphatically agree with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.") (collecting cases); *Baskin*, 766 F.3d at 669 ("[W]hile many heterosexuals (though in America a rapidly diminishing number) disapprove of same-sex marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of.").

[123] *See Bostic*, 760 F.3d at 382 ("Although same-sex couples cannot procreate accidentally, they can and do have children via other methods . . . . [A]s of the 2010 U.S. Census, more than 2500 same-sex couples were raising more than 4000 children under the age of eighteen in Virginia. The Virginia Marriage Laws therefore increase the number of children raised by unmarried parents."); *Latta*, 771 F.3d at 472-73 ("In extending the benefits of marriage only to people who have the capacity to procreate, while denying those same benefits to people who already have children, Idaho and Nevada materially harm and demean same-sex couples and their children.").

[124] *Latta*, 771 F.3d at 471.

being "so full of holes that it cannot be taken seriously."[125] Just as in *Romer*, the "breadth" of the State constitutional bans here "is so far removed from [the States'] particular justifications that [it is] impossible to credit them."[126] Rational-basis review alone invalidates the marriage bans because they serve no "proper legislative end but to make [gay people] unequal to everyone else."[127]

Yet the Court should take this opportunity to hold that significantly higher scrutiny applies. *Loving* is a beacon today because it rested on both substantive-due-process and equal-protection principles.[128] It showed that the right to marry is fundamental under the Due Process Clause despite that the case "arose in the context of racial discrimination."[129] And it showed that anti-miscegenation laws were intolerable under the Equal Protection Clause despite that "interracial marriage was illegal in most States"[130] when the Fourteenth Amendment was adopted. Combining both principles made the whole greater than the sum of its parts.

Invoking more demanding scrutiny under both clauses here will give this decision the same synergy

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[125] *Baskin*, 766 F.3d at 656.

[126] *Romer v. Evans*, 517 U.S. 620, 635 (1996).

[127] *Id*.

[128] 388 U.S. at 2, 11-12.

[129] *Zablocki*, 434 U.S. at 384.

[130] *Casey*, 505 U.S. at 847-48.

and resilience. By combining the principle "that the right to marry is of fundamental importance for *all* individuals"[131] with the Equal Protection Clause's prohibition of unjustified discrimination against gay people, the outcome is ineluctable.

A decisive ruling here also will help mute the siren song calling some individuals to think that States' rights can somehow justify disobeying this Court when it protects fundamental rights.[132] Some State and local governments were misled down similar paths of resistance before; cases like *Cooper v. Aaron* show that decisive rulings discourage such departures from the rule of law.[133] And history teaches that adherence "to the command of the Constitution [is]

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[131] *Zablocki*, 434 U.S. at 384 (emphasis added).

[132] *E.g.*, Kim Chandler, *Moore's Supporters in 10 Commandments Fight Return to Back Him on Gay Marriage Stand*, Daily Reporter (Feb. 25, 2015), http://www.greenfieldreporter.com/view/story/cc7f865e4e674884994871a6e672080c/AL—Gay-Marriage-Alabama ("Supporters who rallied around Alabama Chief Justice Roy Moore during his 2003 Ten Commandments fight returned to Alabama Wednesday to praise his stand on gay marriage . . . . The Rev. Patrick Mahoney, leader of the Christian Defense Coalition, said . . . Moore had embraced 'the very principles of this nation in resisting unjust federal orders.' ").

[133] *E.g.*, *Allen v. Prince Edward Cnty. Sch. Bd.*, 266 F.2d 507 (4th Cir.) ("[T]he total inaction of the School Board speak[s] so loudly that no argument is needed to show that the last delaying order of the District Judge cannot be approved, and that it has become necessary for this Court to give specific directions as to what must be done. This becomes even more clear in view of the decision of the Supreme Court . . . in *Cooper v. Aaron* . . . ."), *cert. denied*, 361 U.S. 830 (1959).

indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."[134]

* * *

We have learned that lesson in Virginia. Those who drafted and ratified the Fourteenth Amendment might not have thought that it prohibited a State from practicing segregation or from barring interracial marriage, even though we take for granted today that it does. Hypothesizing what the drafters might have thought about same-sex marriage likewise asks the wrong question. The scope of that Amendment is not governed by what its draftsmen might have thought, but by what they wrote, and by how their words have been authoritatively construed by this Court. We revere the Founders because their words and ideals are timeless, even if they failed to practice the full meaning of those words and ideals in their own day.

"The Constitution created a government dedicated to equal justice under law."[135] That principle is not new. What is new is *this generation's* recognition that that principle cannot be reconciled with governmental discrimination against gay people. Selecting a life-partner of the same gender is a "choice[ ]

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[134] *Cooper*, 358 U.S. at 19-20 (emphasis added).

[135] *Id.* at 19.

the Constitution protects."[136] So too, the principle of equal justice under law prohibits States from denying to gay couples and their children "the most important relation in life."[137]

CONCLUSION

The judgment of the court of appeals should be reversed, restoring the injunctions and declaratory judgments issued by the district courts in Kentucky,[138] Michigan,[139] Ohio,[140] and Tennessee,[141] and prohibiting

[136] *Windsor*, 133 S. Ct. at 2694.

[137] *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

[138] *Bourke v. Beshear*, 996 F. Supp. 2d 542, 557 (W.D. Ky. 2014); *Love v. Beshear*, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014).

[139] *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014).

[140] *Henry v. Himes*, 14 F. Supp. 3d 1036, 1061 (S.D. Ohio 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 997-98 (S.D. Ohio 2013).

[141] *Tanco v. Haslam*, 7 F. Supp. 3d 759, 772 (M.D. Tenn. 2014).

each of those States from denying marriage rights to same-sex couples.

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia

CYNTHIA E. HUDSON
Chief Deputy Attorney General

CYNTHIA V. BAILEY
Deputy Attorney General

ALLYSON K. TYSINGER
Senior Assistant Attorney General

CARLY L. RUSH
Assistant Attorney General

March 5, 2015

STUART A. RAPHAEL*
Solicitor General of Virginia
**Counsel of Record*

TREVOR S. COX
Deputy Solicitor General

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