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

United States Court of Appeals
for the Fourth Circuit

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

JOANNE HARRIS, *et al.*, on behalf of themselves and all others similarly situated, *Intervenors*,

— v. —

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court, JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, *Defendants-Appellants*,

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN OF VIRGINIA, Civil No. 2:13-cv-00395

BRIEF OF *AMICI CURIAE*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1167 Caption: Bostic, et al. v. Schaefer, et al.

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NAACP Legal Defense & Educational Fund, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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

Signature: s/ Ria Tabacco Mar Date: 4/18/2014

Counsel for: Amicus

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I certify that on 4/18/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 14-1167 Caption: Bostic, et al. v. Schaefer, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association for the Advancement of Colored People
(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: s/ Ria Tabacco Mar Date: 4/18/2014

Counsel for: Amicus

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McLaughlin v. Florida,
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McLaurin v. Oklahoma State Regents for Higher Education,
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Other Authorities

Brief for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), Civ. No. 395, 1967 WL 113931 (Mar. 20, 1967) .... *passim*

Peyton M. Craighill & Scott Clement, *Support for Same-Sex Marriage Hits New High; Half Say Constitution Guarantees Right*, Washington Post (Mar. 5, 2014) 25, 26

Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105 (2009) 10, 17

David H. Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest 1780-1930* (1987) 12

Gallup, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, July 25, 2013, *available at* http://www.gallup.com/poll/163697/approve-marriage-blacks-whites-aspx 24, 25

Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954) 12

Dr. Albert I. Gordon, *Intermarriage – Interfaith, Interracial, Interethnic* (1964) 19

John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15 (2007) 13

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John LaFarge, *The Race Question and the Negro* (1943) 19

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Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113929 (Feb. 20, 1967) 19

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INTERESTS OF *AMICI CURIAE*[1]

The **NAACP Legal Defense and Educational Fund, Inc. (LDF)** is a non-profit legal organization that, for more than seven decades, has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Since its inception, LDF has worked to eradicate barriers to the full and equal enjoyment of social and political rights, including those arising in the context of partner or spousal relationships. *See, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964). Thus, LDF has participated as *amicus curiae* in cases across the nation that affect the rights of gay people, including *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Jackson v. Abercrombie*, Nos. 12-16995, 12-16998, and *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008);

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

Conaway v. Deane, 932 A.2d 571 (Md. 2007); and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of the Fourteenth Amendment to the United States Constitution, which provides important protections for all Americans, and submits that its experience and knowledge will assist the Court in this case.

Founded in 1909, the **National Association for the Advancement of Colored People (NAACP)** is the country's largest and oldest civil rights organization, incorporated by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, and to eliminate racial hatred and racial discrimination. In fulfilling its mission, the NAACP has filed and joined numerous *amicus curiae* briefs supporting marriage equality in federal and state courts across the country.

PRELIMINARY STATEMENT

Over 40 years ago, in *Loving v. Virginia*, 388 U.S. 1 (1967) – a case in which LDF participated as *amicus curiae* – the Supreme Court was called upon to consider the constitutionality of prohibitions against marriage for interracial couples. At that time – nearly one hundred years after the Fourteenth Amendment was adopted in 1868 – sixteen states prohibited marriage between individuals of different races. With its decision in *Loving*, however, the Court struck down this lasting and

notorious form of discrimination by holding that anti-miscegenation laws violate the constitutional guarantees of Equal Protection and Due Process.

The basic Fourteenth Amendment principles addressed in *Loving* are not limited to race, as the District Court and others around the nation have recognized. *See Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *9 (W.D. Ky. Feb. 12, 2014) (collecting cases); Harris Br. 1-2 & nn.1-2. To the contrary, they govern any state action that denies two consenting adults – including those of the same sex – the right to marry. While the nature of discrimination against lesbians and gay men differs fundamentally from the *de jure* racial segregation at issue in *Loving*, the legal issues addressed by *Loving* are analogous to the legal issues raised in this appeal.

Furthermore, the rationales advanced by Defendant-Appellant Schaefer and Intervenor-Defendant-Appellant McQuigg (together, "Appellants") in support of the state laws prohibiting marriage for same-sex couples bear a striking resemblance to those proffered by Virginia in defense of the anti-miscegenation statute at issue in *Loving*. There, as here, the proponents of a ban on marriage for certain couples relied on purportedly scientific studies to argue that the state law was necessary to prevent harm to any children who would be raised in the unions they sought to prohibit. There, as here, the defenders of the facially discriminatory state law argued that permitting an individual to exercise the right to marry the person of his or her

choice would break from history and tradition, entailing a fundamental redefinition of the institution of marriage itself. The Supreme Court rejected those arguments in *Loving*, recognizing that they merely advanced the very "discrimination which it was the object of the Fourteenth Amendment to eliminate." 388 U.S. at 11.

Given the similarities between this case and *Loving*, this Court should affirm the District Court's ruling and hold that Virginia's denial of the fundamental right to marry to same-sex adult couples violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[2]

ARGUMENT

I. VIRGINIA'S PROHIBITION AGAINST MARRIAGE FOR SAME-SEX COUPLES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Neither the Fourteenth Amendment's Guarantee of Equal Protection, nor the Holding of *Loving v. Virginia*, Is Limited to Race-Based Discrimination.

Although the Fourteenth Amendment was ratified in the wake of the Civil War after a long struggle to eradicate slavery, its reach is not limited to racial discrimination. Over time, the Supreme Court made clear that, although the Fourteenth Amendment's anti-discrimination principles were first articulated in

[2] *Amici curiae* adopt the argument of Plaintiffs-Appellees and Harris Intervenors (together, "Appellees") that, consistent with *Loving*, Virginia's prohibition against marriage for same-sex couples violates the constitutional guarantee of due process. *See* Bostic Br. 26-31; Harris Br. 12-16.

cases involving racial discrimination, they are also applicable to governmental classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of certain groups. The Court has held that the determination of whether the Fourteenth Amendment governs a particular governmental classification should involve consideration of such factors as whether it was predicated upon "social stereotypes," *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976), and/or whether it "create[s] or perpetuate[s] the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *United States v. Virginia* (*VMI*), 518 U.S. 515, 534 (1996). Relying on this analysis, the Court has held that the Fourteenth Amendment protects against governmental classifications which discriminate based not only on race, but also on such factors as national origin, sexual orientation, and sex. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual orientation); *VMI*, 518 U.S. 515 (sex); *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex); *Oyama v. California*, 332 U.S. 633 (1948) (national origin). This interpretation of the Fourteenth Amendment's Equal Protection Clause has been a critical component of our nation's ongoing effort to eliminate entrenched discrimination. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470, 1547 (2004) ("[C]oncerns about group

subordination are at the heart of the modern equal protection tradition . . . ."); *cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.").

A faithful application of these principles to lesbians and gay men reveals that equal protection applies to laws which burden them as a group. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014) (equal protection jurisprudence "refuses to tolerate the imposition of a second-class status on gays and lesbians"); JA 381-83 & n.16; *see also* Bostic Br. 33-38; Harris Br. 25-29. This is because, by virtually any measure, lesbians and gay men have been subjected to the kind of systemic discrimination that the Supreme Court has contemplated would trigger Fourteenth Amendment protection. *See Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) ("It is easy to conclude that homosexuals have suffered a history of discrimination. . . . Ninety years of discrimination is entirely sufficient . . . ."), *aff'd on alternative grounds*, 133 S. Ct. 2675 (2013); *De Leon v. Perry*, No. SA-13-CA-00982, 2014 WL 715741, at *12 (W.D. Tex. Feb. 26, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987-88 (S.D. Ohio 2013). And the state laws at

issue here plainly burden lesbians and gay men as a class, because they ban lesbian and gay couples from marrying and, thus, exclude them from "legal institutional status in society." *See* JA 371 (quoting Affirmation of Marriage Act, H.B. 751 (2004) (enacted)). Accordingly, equal protection principles govern analyses of the constitutionality of laws that deny the right to be married to lesbian and gay couples who "aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *See Windsor*, 133 S. Ct. at 2689; JA 377.

Similarly, the *Loving* decision is not solely about race. In the course of declaring anti-miscegenation statutes unconstitutional, *Loving* made clear that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness" and that "all the State's citizens" possess a fundamental right to marry. 388 U.S. at 12; *see also id.* ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." (internal quotation marks omitted)). And later, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court reiterated the fact that *Loving* did not just condemn racially biased restrictions on marriage but, instead, recognized a fundamental right to marry. In *Zablocki*, which involved the right to marry of so-called "deadbeat dads," the Supreme Court explained that in *Loving*, its

> opinion 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.

Id. at 383. Thus, *Loving* is plainly applicable to laws that seek to deny same-sex couples the right to marry.

Appellant Schaefer argues that the *Loving* decision does not apply to lesbians and gay men who seek to marry because *Loving* "did not create new rights[,] but removed another state law barrier to the exercise of rights that had been recognized for years" under *Brown v. Board of Education*, 347 U.S. 483 (1954). Schaefer Br. 27. The argument proves too much. For, insofar as *Loving* removed Virginia's barrier to marriage for interracial couples under principles announced in *Brown*, so the District Court removed Virginia's barriers to marriage for same-sex couples under principles announced in *Loving*. *See De Leon*, 2014 WL 715741, at *19-20; *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013).

Moreover, *Loving*'s decision did not link the right to marry to a couple's ability to procreate. *Cf.* Amicus Br. of Helen M. Alvaré 5; Amicus Br. of Scholars of History & Related Disciplines et al. 17. Although the Lovings happened to have biological children, there was not a single reference to that fact in the Supreme Court's opinion, let alone a suggestion that the Court's decision rested in any part on the Lovings' intention or ability to procreate. And other decisions by the Supreme Court have made clear that the right to marriage is not dependent on the capacity for procreation but is, instead, an "expression[] of emotional support and public commitment." *Turner v. Safly*, 482 U.S. 78, 95 (1987) (holding that incarcerated

persons have the right to marry); *see also Windsor*, 133 S. Ct. at 2689 (same-sex couples seek the right to marry to "affirm their commitment to one another before their children, their family, their friends, and their community . . . and so live with pride in themselves and their union").

Virginia's scheme, like any other that demeans and denigrates an entire class of people, cannot be reconciled with the Fourteenth Amendment and *Loving*.[3]

B. The Discriminatory History of Racial Restrictions on the Right to Marry Illustrates How Exclusion from Marriage Perpetuates and Enforces a Caste System in Violation of Equal Protection Principles.

The state laws at issue here were explicitly fashioned to ensure that lesbian and gay couples would not be afforded the same status and benefits as heterosexual

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[3] Appellants claim that the Supreme Court's summary dismissal, "for want of a substantial federal question," of a challenge to a decision of the Minnesota Supreme Court – finding that the denial of a marriage license to a gay couple did not violate the Fourteenth Amendment – somehow compels the same result here. *See* Schaefer Br. 28-34; McQuigg Br. 15-18. They are wrong. In *Loving*, the Court struck down Virginia's anti-miscegenation law based on the Equal Protection principles enunciated in *Brown*, notwithstanding the fact that it had previously denied *certiorari* to a similar challenge to Alabama's anti-miscegenation statute in *Jackson v. State*, 72 So. 2d 114 (Ala.), *cert. denied*, 348 U.S. 888 (1954). Likewise, courts today are not precluded from relying on *Loving* to strike down laws that deny same-sex couples the fundamental right to marry even though the Court previously issued a summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), and declined the opportunity in 1972 to apply the principles announced in *Loving* to the prohibition against marriage for same-sex couples. *See Windsor*, 699 F.3d at 178-79; *see, e.g.*, *De Leon*, 2014 WL 715741, at *10 (collecting cases); JA 362-64; *see also* Bostic Br. 23-25; Harris Br. 57-58.

married couples. As noted by the District Court, Virginia's constitutional amendment prohibiting marriage for lesbians and gay men was proposed in direct response to court decisions in other states recognizing the right to marry for same-sex couples. JA 355 (quoting S.J. Res. 91, Reg. Sess. (Va. 2004)); *see also* Bostic Br. 10-11; Harris Br. 4-5. In other words, the express purpose of the prohibition against marriage for same-sex couples was to create and perpetuate a social hierarchy that disadvantages gay people based on their sexual orientation. *Cf. Bourke*, 2014 WL 556729, at *7. Because, historically, slaves and, later, interracial couples were also denied the right to marry, that history is instructive as to how the denial of that right to marry operates to perpetuate and enforce a caste system, which is contrary to the core purpose of equal protection.

"The idea that the freedom to marry is a symbol of American freedom has roots in the institution of slavery," because the denial of the slaves' right to marry was a significant limitation on their freedom and a crucial feature of their dehumanization. Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105, 110-12 (2009); *see also id.* at 142-43 ("[P]rior to Reconstruction no Southern state, with the arguable exception of Tennessee, granted full legal recognition to marriage between slaves." (footnote omitted)).

With Emancipation came the right to marry, but not across racial lines because anti-miscegenation statutes remained in place.[4] As Chief Justice Taney explained in his infamous *Dred Scott v. Sandford* decision, anti-miscegenation statutes

> show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

60 U.S. 393, 409 (1857); *see also* Hon. A. Leon Higginbotham, Jr., *Shades of Freedom* 44 (1996) ("Interracial marriages represented a potentially grave threat to the fledgling institution of slavery. Had blacks and whites intermarried, the legal process would have been hard pressed to recognize the union while keeping blacks in slavery."). Even after the adoption of the Fourteenth Amendment, anti-miscegenation statutes were upheld by the Supreme Court. This is perhaps unsurprising, given that "when the Fourteenth Amendment was drawn up and ratified, the vast majority of its supporters did not envision it as a bar to antimiscegenation laws." Randall Kennedy, *Interracial Intimacies* 277 (2003).

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[4] The first statute in the United States expressly prohibiting marriage for interracial couples was enacted in the seventeenth century. *See* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Calif. L. Rev. 839, 870 (2008).

Indeed, racial restrictions on marriage were so prevalent as to constitute a near universal and defining feature of marriage: "*Every state* whose black population reached or exceeded 5 percent of the total eventually drafted and enacted anti-miscegenation laws." *Id.* at 219 (emphasis added) (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)). Ultimately, forty-two states maintained, at one point in time, criminal prohibitions against marriage for interracial couples. *See* David H. Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest 1780-1930* 336 (1987). Thus, Appellants' *amici curiae* are wrong to contend that racial restrictions, unlike restrictions based on sex or sexual orientation, on the right to marry were limited or "never central to marriage." *See* Amicus Br. of Scholars of History & Related Disciplines et al. 19-20.

Although, in 1883, the Supreme Court held that anti-miscegenation statutes were not discriminatory because they "appl[y] the same punishment to both offenders, the white and the black," *Pace v. Alabama*, 106 U.S. 583, 585 (1883), the *Loving* Court rejected this cramped, formalistic reasoning and recognized that such laws target individuals and deny them the right to marry strictly on the basis of their race. *See* 388 U.S. at 12. Given the crucial role that anti-miscegenation laws played in maintaining our nation's racial caste system, *Loving* is "one of the major

landmarks of the civil rights movement." Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004); *cf.* John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15, 52 (2007) ("Legalizing interracial marriage was an essential step toward racial equality.").

Like early laws that were designed to oppress African Americans, Virginia's denial of the right to marry to lesbian and gay couples consigns them by law to an unequal and inferior status as a group by denying them "a dignity and status of immense import": the status of state-sanctioned marriage. *See Windsor*, 133 S. Ct. at 2692. This exclusion – which is premised on stereotypes regarding the fitness of lesbian and gay partnerships and moral condemnation of gay people more generally – is both stigmatizing and demeaning, and it perpetuates the historical discrimination that lesbian and gay people have long suffered as a group. Just as the Court in *Loving* struck down Virginia's degrading and oppressive anti-miscegenation law, this Court should reject Virginia's prohibition against marriage for same-sex couples.

C. Virginia's Prohibition Against Marriage for Same-Sex Couples Discriminates on the Basis of Sexual Orientation and Sex in Violation of the Equal Protection Clause.

There is no serious dispute that Virginia singles out lesbians and gay men for denial of the right to marry the person of their choice because of their sexual orientation. That the laws discriminate on the basis of sexual orientation is plain

from both the operation of those laws – that they prohibit lesbian and gay couples but not different-sex couples from marrying – and in their intent to relegate lesbian and gay relationships to "private behavior conducted outside the sanction of the law" without "legal institutional status in society." *See* JA 371 (quoting H.B. 751). As *Loving* made clear, the Equal Protection Clause prohibits classifications that perpetuate a system of hierarchy based on the characteristic according to which the classification is drawn, *see* Siegel, *supra*, at 1504 (citing *Loving*, 388 U.S. at 11), here, sexual orientation.

That these laws are facially neutral, because they prohibit both men and women from marrying a person of the same sex,[5] does not undermine the conclusion that they violate the Equal Protection Clause. Indeed, as previously noted, *Loving* explicitly rejected the "notion that the mere 'equal application' of a statute containing racial classification is enough to remove the classifications from the

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[5] This "equal application" argument – like the one set forth in *Pace*, where the Court reasoned that anti-miscegenation laws were not discriminatory because they punish both white and black offenders equally – derives from the flawed reasoning in *Plessy v. Ferguson*, which held that segregation was not discriminatory because it applied "equally" to individuals of all races:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. 537, 551 (1896).

Fourteenth Amendment's proscription of all invidious racial discrimination." 388 U.S. at 8.

Indeed, in *Loving*, Virginia argued that its anti-miscegenation law was not discriminatory because the "law forbidding marriages between whites and blacks operates alike on both races." Br. for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), Civ. No. 395, 1967 WL 113931, at *17 (Mar. 20, 1967) [hereinafter "*Loving* Appellee's Brief"] (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866)). However, the Supreme Court recognized that despite its symmetrical application to members of different races, Virginia's law operated in a racially discriminatory manner because it "proscribe[d] generally accepted conduct if engaged in by members of different races." *Loving*, 388 U.S. at 11; *see also Romer*, 517 U.S. at 633 ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

For the same reason that it was rejected in *Loving*, the contention that there is no sex discrimination in the instant cases because Virginia treats men and women equally, Schaefer Br. 42; McQuigg Br. 18, must also be rejected in this appeal. Bostic Br. 38-40; Harris Br. 30 & n.13. The *Loving* Court found that Virginia's anti-miscegenation law classified – and discriminated against – persons on the basis of race because the question of whether a marriage was legal turned on the races of the

adults seeking to exercise their right to marry (*i.e.*, only same-race marriages were permitted). *See Kitchen*, 961 F. Supp. 2d at 1206. Virginia's laws similarly classify – and discriminate against – persons on the basis of sex because the question of whether a marriage is legal turns on the sex of the adults seeking to exercise their right to marry (*i.e.*, only different-sex marriages are permitted). Both circumstances violate the Equal Protection Clause.

II. THE RATIONALES ADVANCED BY APPELLANTS WERE ALSO ADVANCED BY VIRGINIA IN DEFENSE OF ITS ANTI-MISCEGENATION STATUTE IN *LOVING*.

Appellants have proffered a variety of justifications for their prohibitions against marriage for same-sex couples including: (1) that such prohibitions further the state's interest in "promoting the welfare of children and society," McQuigg Br. 25; and (2) that "there is a long history and tradition of exclusively recognizing opposite sex marriages in Virginia." Schaefer Br. 47. *Amici curiae* adopt Plaintiffs-Appellees' positions on these two issues, *see* Bostic Br. 42-55; Harris Br. 37-51, and write separately to emphasize the fact that versions of these very same arguments were advanced by proponents of anti-miscegenation statutes and expressly rejected by the Supreme Court in *Loving*. *See* 388 U.S. at 11; *cf. Kitchen*, 961 F. Supp. 2d at 1215.

A. *Loving* Rejected Claims that Anti-Miscegenation Statutes Were Necessary to Protect Children.

Historically, opponents of interracial marriage relied on the "misplaced, but often sincerely held" belief that such unions would be harmful to children.[6] *See* François, *supra*, at 130-35. Indeed, the belief that interracial couples would produce damaged children was one of the rationales proffered by the Virginia Supreme Court in upholding Virginia's anti-miscegenation statute in a decision twelve years before *Loving*: "We are unable to read in the Fourteenth Amendment to the Constitution . . . any words or any intendment . . . which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens." *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955).

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[6] Nineteenth century challenges to anti-miscegenation statutes were also denied by the courts on the basis of irrational beliefs about the harm to children that would result from interracial marriages. *See, e.g.*, *State v. Jackson*, 80 Mo. 175, 179 (1883) ("It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . . ."); *Lonas v. State*, 50 Tenn. 287, 299 (1871) (interracial couples are "unfit to produce the human race in any of the types in which it was created"); *Scott v. Georgia*, 39 Ga. 321, 323 (1869) ("[A]malgamation of the races is . . . unnatural" because biracial children are "generally sickly and effeminate, and . . . inferior in physical development and strength, to the fullblood of either race.").

Four years later, the Louisiana Supreme Court upheld its state's anti-miscegenation statute on the grounds that doing so was necessary to protect mixed race children from social disadvantages:

> [T]he state . . . has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, 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.'

State v. Brown, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown*, 347 U.S. at 494).

In defending its anti-miscegenation statute before the Supreme Court in *Loving*, Virginia did not rely on the blatantly offensive rhetoric of the Virginia Supreme Court in *Naim*, but it nevertheless cited purportedly scientific sources for its contention that prohibitions against marriage for interracial couples were in the interest of children. These arguments took various forms, including: (1) pseudoscientific assertions that interracial children might be genetically disadvantaged, *Loving* Appellee's Brief, 1967 WL 113931, at *43 ("[T]he evidence is sufficient to call for immediate action against the intermarriage of widely distinct races. . . . [W]here two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny . . . ." (internal quotation marks omitted)); (2) cultural arguments that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing, *id.* at *44-45 ("[M]uch that is best in human existence is a matter of social inheritance, not of biological

inheritance. Race crossings disturb social inheritance. That is one of its worst features." (internal quotation marks and citations omitted)); and (3) sociological claims that marriages of interracial couples were more likely to end in divorce:

> When children enter the scene the difficulty is further complicated . . . . Inasmuch as we have already noted the higher rate of divorce among the intermarried, it is not proper to ask, Shall we then add to the number of children who become the victims of their intermarried parents? If there is any possibility that this is likely to occur – and the evidence certainly points in that direction – it would seem that our obligation to children should tend to reduce the number of such marriages.

Id. at *45, *47-48 (internal quotation marks omitted) (quoting John LaFarge, *The Race Question and the Negro* (1943); Dr. Albert I. Gordon, *Intermarriage – Interfaith, Interracial, Interethnic* 334-35 (1964)).[7] These arguments, however, amounted to an "amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense summoned up to support the theories of white supremacy and racial 'purity.'" Br. of *Amicus Curiae* NAACP Legal Defense & Educ. Fund, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113929, at *9-10 (Feb. 20, 1967). Thus, the Supreme Court recognized these arguments for what they were and rejected them as unfounded, post-hoc rationalizations for Virginia's discriminatory marriage law. *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding

[7] Dr. Gordon's study was characterized at the time by one Harvard psychologist as the "definitive book on intermarriage." *See Loving* Appellee's Brief, 1967 WL 113931, at *47.

purpose independent of invidious racial discrimination which justifies this classification.").

These discredited arguments about the purported harm to children of interracial couples have been re-raised by Appellants in their attempt to defend bans on marriage for same-sex couples. Despite claims that prohibitions against marriage for same-sex couples merely "encourage[e] the rearing of children by both their mother and father," McQuigg Br. 34, Appellants' position is premised on the notion that lesbian and gay couples make for inferior parents. JA 378; *Bishop v. United States*, 962 F. Supp. 2d 1252, 1295 (N.D. Okla. 2014); *see, e.g.*, McQuigg Br. 59 ("[T]he Commonwealth has reservations about promoting motherless and fatherless homes, particularly in light of research indicating that children raised in stable, intact biological families generally fare better across a wide range of outcomes than children raised in virtually any other environment."); *id.* at 38 n.2 ("The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive . . . ." (internal quotation marks omitted)); *cf.* JA 371 (quoting legislative history reflecting fears that "same sex unions would obscure certain basic moral values and further devalue the institution of marriage and the status of children"); *Windsor*, 133 S. Ct. at 2693 (noting that the federal Defense of Marriage Act was intended to express "moral disapproval of homosexuality"). These arguments are as misplaced today as they were in 1967.

See Obergefell, 962 F. Supp. 2d at 994 n.20 (collecting authorities) ("The overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well-adjusted as those raised by heterosexual couples."); *see also DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *10 (E.D. Mich. Mar. 21, 2014) (rejecting testimony of social scientists who opined that children of lesbian or gay parents are disadvantaged as "a fringe viewpoint that is rejected by the vast majority of their colleagues across a wide variety of social science fields"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 963 (N.D. Cal. 2010) (citing position statement of American Psychiatric Association that marriage benefits children of same-sex couples). This Court should not credit the rehash of similarly unsupported and irrational arguments here. *See Bourke*, 2014 WL 556729, at *8.

B. *Loving* Rejected the Notion that History and Tradition Alone Can Justify Discrimination.

Appellants' appeals to history and tradition to justify their discriminatory exclusions of same-sex adult couples from the right to marriage are nothing new. JA 372; *see, e.g.*, McQuigg Br. 19 ("Throughout history, marriage as a man-woman institution . . . has been ubiquitous, spanning diverse cultures, nations, and religions."). In 1955, the Virginia Supreme Court rejected a challenge to its anti-miscegenation statute on the grounds that the institution of marriage "may be maintained in accordance with established tradition and culture and in furtherance

of the physical, moral and spiritual well-being of its citizens." *Naim*, 87 S.E.2d at 756. And, in *Loving* itself, the trial court reasoned that marriage for interracial couples was aberrant and contrary to a proper understanding of the nature of marriage:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. at 3. And, when before the Supreme Court, Virginia again appealed to tradition:

> The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries . . . . They have stood – compatibly – with the Fourteenth Amendment, though expressly attacked thereunder – since that Amendment was adopted.

Loving Appellee's Brief, 1967 WL 113931, at *52. Sentiments such as these were broadly shared amongst proponents of anti-miscegenation laws. *Perry*, 704 F. Supp. 2d at 957.

In *Loving*, however, the Supreme Court rejected the notion that long-held beliefs (including those held by the framers of the Fourteenth Amendment) about the incompatibility of interracial relationships and a traditional understanding of marriage should be controlling. *See* 388 U.S. at 9-10; JA 372; *Kitchen*, 961 F. Supp. 2d at 1198. And, significantly, the Supreme Court declared anti-miscegenation statutes unconstitutional in spite of the fact that the majority of states ratifying the

Fourteenth Amendment had such laws in place as recently as 1950. *Loving* Appellee's Brief, 1967 WL 113931, at *4.[8] The *Loving* Court held that, regardless of the precise intentions of the framers of the Fourteenth Amendment with respect to interracial marriage, anti-miscegenation statutes were inconsistent with the "broader, organic purpose" of the Amendment, which was "to remove all legal distinctions among 'all persons born or naturalized in the United States.'" 388 U.S. at 9 (quoting *Brown*, 347 U.S. at 489). The Court deemed this long history of prohibitions against marriage for interracial couples to be irrelevant to its equal protection analysis and was undeterred by the fact that, in 1967, only a single court

[8] Although it is true that a minority of states maintained anti-miscegenation laws when *Loving* was decided, it does not follow that, as Appellants contend, *see, e.g.*, McQuigg Br. 23-27, striking down the state laws at issue here would subvert the federalist, democratic process. JA 373-75. Contrary to the notion that invalidating Virginia's prohibition against marriage for same-sex couples would overstep the role of the courts, equal protection law locates *in the judiciary* a special responsibility of prodding society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that, in turn, entrench social caste. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JA 375, 382. While all branches of government have a role to play in ensuring the equal protection of the laws, the judicial branch is best situated to safeguard historically subordinated groups, including lesbians and gay men, whom the majoritarian political processes are often unwilling or unable to protect against constitutional violations. *Nixon v. Condon*, 286 U.S. 73, 89 (1932) ("[Equal protection] lays a duty upon the court to level by its judgment these barriers . . . .").

– the Supreme Court of California[9] – had held that anti-miscegenation statutes violate the Fourteenth Amendment.[10]

The Court was equally undeterred by the fact that anti-miscegenation statutes enjoyed widespread popular support throughout the vast majority of our nation's history, as demonstrated by the fact that nearly three in four Americans still opposed marriage for interracial couples one year after *Loving* was decided. *See* Gallup, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, July 25, 2013 [hereinafter "Gallup, 87% Approve"], *available at* http://www.gallup.com/poll/163697/approve-marriage-blacks-whites-aspx (citing survey results that 73% of Americans opposed marriage for interracial couples in 1968).[11] Despite widespread disapproval of marriage for interracial couples, "[n]either the *Perez* court nor the *Loving* Court was content to permit an

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[9] Indeed, the California Supreme Court struck down its state's anti-miscegenation statute in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), at a time when a majority of states still had anti-miscegenation statutes in place, and all of the courts to confront the question had ruled that there was no constitutional right to marry a person of another race. *See* Lenhardt, *supra*, at 857.

[10] In fact, notwithstanding the decision in *Loving*, South Carolina did not revoke its anti-miscegenation statute until 1998, and Alabama did not do so until 2000. *See* Kennedy, *supra*, at 279.

[11] As recently as 1994, less than one-half of Americans approved of marriages between interracial couples. *See* Gallup, 87% Approve, *supra*. And, when Alabama finally repealed its anti-miscegenation law in 2000, 40% of the state's electorate voted to *retain* the prohibition against marriage for interracial couples. *See* Kennedy, *supra*, at 280.

unconstitutional situation to fester because the remedy might not reflect a broad social consensus." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 n.16 (Mass. 2003).[12]

And, even beyond the context of *Loving*, the Court has refused to credit the maintenance of tradition as a rational justification that might satisfy the equal protection analysis under the Fourteenth Amendment. *See Lawrence*, 539 U.S. at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *see also Windsor*, 133 S. Ct. at 2689, 2692-93 ("The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion. . . . [This] reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."); JA 370-72.

Notwithstanding the Court's repeated rejection of these arguments, Appellants now contend that Virginia's ban on marriage for same-sex couples is

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[12] Though constitutional principles, not public opinion polls, govern this case, today, 59% of Americans support marriage for same-sex couples, *see* Peyton M. Craighill & Scott Clement, *Support for Same-Sex Marriage Hits New High; Half Say Constitution Guarantees Right*, Washington Post (Mar. 5, 2014) [hereinafter *Support for Same-Sex Marriage*], a level of support that marriage for interracial couples did not achieve until the mid-1990s, *see* Gallup, 87% Approve, roughly thirty years *after Loving*.

constitutional because marriage for same-sex couples runs contrary to "the history and tradition of marriages only being recognized in opposite sex relationships." *See, e.g.*, Schaefer Br. 47. They are wrong. Neither the widespread prevalence of anti-miscegenation statutes, nor the broad public support for such statutes, prevented the Court from vigorously enforcing the principles underlying the Fourteenth Amendment in *Loving*. Express prohibitions against marriage for same-sex couples have a more recent, but no less pernicious, history: "[S]ince 1990 anti-gay marriage statutes or constitutional amendments have been passed by 41 states," *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 327 (D. Conn. 2012), although more than a dozen have now been repealed. *Bourke*, 2014 WL 556729, at *9. And while a majority of Americans now oppose such prohibitions, fully 34% continue to support excluding same-sex couples from lawful marriage. *Support for Same-Sex Marriage*, *supra*. Here, as in *Loving*, the equality principles of the Fourteenth Amendment, rather than the longstanding or widespread nature of the legal restriction on marriage at issue, should guide the Court. JA 370; *cf. Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking [the requisite constitutional] basis."); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era.").

Despite concerns that marriage by interracial couples would fundamentally alter the definition of marriage itself, the end of prohibitions against miscegenation has not fundamentally altered the nature of marriage as an institution. This is because recognizing the right of consenting adults to marry one another has no effect on any individual marriage or on the institution of marriage as a whole. *See Bourke*, 2014 WL 556729, at *10; JA 377; *Goodridge*, 798 N.E.2d at 965 ("Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.").

CONCLUSION

Loving v. Virginia dictates the conclusion that consenting adults should not be denied the right to marry solely because of their sexual orientation or sex. For this reason, as well as those outlined by Appellees, the Court should affirm the judgment of the District Court.

April 18, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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