**Nos. 14-2386, 14-2387, 14-2388, 14-2526**

# United States Court of Appeals
# for the Seventh Circuit

MARILYN RAE BASKIN, *et al.*, *Plaintiffs-Appellees*,

— v. —

PENNY BOGAN, *et al.*, *Defendants-Appellants*.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
NOS. 1:14-CV-355-RLY-TAB, 1:14-CV-404-RLY-TAB, 1:14-CV-406-RLY-MJD
THE HONORABLE RICHARD L. YOUNG, PRESIDING

VIRGINIA WOLF, *et al.*, *Plaintiffs-Appellees*,

— v. —

SCOTT WALKER, *et al.*, *Defendants-Appellants*.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN, NO. 3:14-CV-64-BBC
THE HONORABLE BARBARA B. CRABB, PRESIDING

## BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT JUDGMENTS

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Penny Bogan, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Amicus Curiae NAACP Legal Defense & Educational Fund, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

NAACP Legal Defense & Educational Fund, Inc.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: s/ Sherrilyn Ifill Date: August 5, 2014

Attorney's Printed Name: Sherrilyn Ifill

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Christina A. Swarns Date: August 5, 2014

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N/A

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Attorney's Signature: s/ Rachel M. Kleinman Date: August 5, 2014

Attorney's Printed Name: Rachel M. Kleinman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Ria Tabacco Mar Date: August 5, 2014

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## INTEREST OF *AMICUS 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); *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, --- F.3d ---, 2014 WL 3702493 (4th Cir. July 28, 2014); Br. of *Amicus Curiae* NAACP Legal Defense & Educ. Fund, Inc., *DeBoer v. Snyder*, No. 14-1341, *Henry v. Himes*, No. 14-3464, *Bourke v. Beshear*, No. 14-5291, and *Tanco v. Haslam*, No. 14-5297 (6th Cir. June 16, 2014); Br. of *Amicus Curiae* NAACP Legal Defense & Educ. Fund, Inc., *Jackson v. Abercrombie*, Nos. 12-16995, 12-16998, and *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013); *Perry v.*

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

*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); *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 these cases.

## SUMMARY OF THE ARGUMENT

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 Courts of Appeals as well as the District Courts here and others around the nation have uniformly recognized since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, --- F.3d ---, 2014 WL 3702493 (4th Cir. July 28, 2014); *Kitchen v. Herbert*, No. 13-4178, --- F.3d ---, 2014 WL 2868044 (10th Cir. June 25,

2014); Baskin Short App. 33 ("In less than a year, every federal district court to consider the issue has reached the same conclusion in thoughtful and thorough opinions – laws prohibiting the celebration and recognition of same-sex marriage are unconstitutional."). 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 these appeals.

Furthermore, the rationales advanced by Defendants-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 statutes 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 laws 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 these cases and *Loving*, this Court should affirm the District Courts' rulings and hold that the states' 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. THE STATES' PROHIBITIONS AGAINST MARRIAGE FOR SAME-SEX COUPLES VIOLATE 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, while the Fourteenth Amendment's anti-discrimination principles were first articulated in 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 the classification 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

[2] *Amicus curiae* adopts the argument of Plaintiffs-Appellees that, consistent with *Loving*, the states' prohibitions against marriage for same-sex couples violate the constitutional guarantee of due process. *See* Baskin Br. 13-25.

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 more searching judicial review 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"); Wolf A-Ap. 153-59 (applying heightened scrutiny to laws that classify on the basis of sexual orientation). 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 heightened 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); Wolf A-Ap. 154. 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 "participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 2014 WL 3702493, at *17. 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.

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.

That some of the state laws at issue involve recognition of marriages of lesbian and gay couples who were legally married in other jurisdictions does not alter the conclusion. *Cf.* Bogan Br. 46. The Lovings themselves were married in the District of Columbia before returning to Virginia, where they were convicted of violating Virginia's ban on marriage for interracial couples. *Loving*, 388 U.S. at 2-3. The Court in *Loving* struck down not only Virginia's statute imposing criminal punishment on interracial couples who married, but also Virginia's "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages," a scheme that prohibited marriage for interracial couples within Virginia and denied recognition to marriages of interracial couples solemnized outside Virginia. *See id.* at 4, 12. *Loving* thus applies with equal force to laws, like Indiana Code § 31-11-1-1(b), that prohibit recognition of lawful marriages of same-sex couples celebrated outside the state as it

does to laws, like Indiana Code § 31-11-1-1(a), that prohibit celebration of those marriages within the state.

Moreover, the *Loving* decision did not link the right to marry to a couple's ability to procreate. *Cf.* Bogan Br. 22-23. 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. Safley*, 482 U.S. 78, 95 (1987) (holding that incarcerated persons have the right to marry); *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").

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

[3] Defendants-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* Bogan Br. 18-19. 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 in 1972 issued a summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), and declined the opportunity to apply the principles announced in *Loving* to the prohibition against marriage for same-sex couples. *See*

### 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 married couples. As noted by the District Court in *Baskin*, Indiana was among the 27 states that enacted prohibitions against marriage for lesbians and gay men in direct response to court decisions in other states recognizing the right to marry for same-sex couples. Baskin Short App. 31-32. In other words, the express purpose of the prohibitions against marriage for same-sex couples was to create and perpetuate a social hierarchy that disadvantages gay people based on their sexual orientation. *Id.* at 32. 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

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*Windsor*, 699 F.3d at 178-79; *see, e.g.*, *Bostic*, 2014 WL 3702493, at *6-8 (collecting cases); *Kitchen*, 2014 WL 2868044, at *10.

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).

[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, Defendants-Appellants are wrong to suggest that racial restrictions, unlike restrictions based on sex or sexual orientation, on the right to marry were never central to "traditional parameters of marriage (which took no account of race)." Bogan Br. 21-22; *see also* Walker Br. 24-25.

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, the states' 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 laws, this Court should reject the states' prohibitions against marriage for same-sex couples.

### C. The States' Prohibitions Against Marriage for Same-Sex Couples Discriminate on the Basis of Sexual Orientation and Sex in Violation of the Equal Protection Clause.

There is no serious dispute that the state laws at issue single 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 both from the operation of those laws – that they prohibit lesbian and gay couples but not different-sex couples from marrying – and in their intent to "place same-sex marriages in a second class category." Baskin Short App. 32. 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 & n.125 (citing *Loving*, 388 U.S. at 7, 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. As previously noted, *Loving* explicitly rejected the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8.

In *Loving*, Virginia argued that its anti-miscegenation statutes were not discriminatory because a "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 their symmetrical application to members of

[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, 106 U.S. at 585 – 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).

different races, Virginia's laws operated in a racially discriminatory manner because they "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 the state laws at issue treat men and women equally must also be rejected in these appeals. Baskin Br. 30-31. The *Loving* Court found that Virginia's anti-miscegenation laws 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 v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd*, No. 13-4178, --- F.3d ---, 2014 WL 2868044 (10th Cir. June 25, 2014). The states' laws here 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 DEFENDANTS-APPELLANTS WERE ALSO ADVANCED BY VIRGINIA IN DEFENSE OF ITS ANTI-MISCEGENATION STATUTES IN *LOVING*.

Defendants-Appellants have proffered a variety of justifications for their prohibitions against marriage for same-sex couples including: (1) that such prohibitions "encourage responsible procreation," *see, e.g.*, Bogan Br. 33; and (2) that "traditional marriage laws" have been "adopted and applied by virtually every worldwide culture and proven over time," *see, e.g.*, Walker Br. 50. *Amicus curiae* adopts Plaintiffs-Appellees' positions on these two issues, *see* Baskin Br. 21-25, 40-44, and writes 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; Wolf A-Ap. 175.

### 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 130-33. Indeed, the belief that interracial couples would produce

[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. State*, 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.").

damaged children was one of the rationales proffered by the Virginia Supreme Court in upholding Virginia's anti-miscegenation statutes 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).

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 v. Board of Education*, 347 U.S. 483, 494 (1954)).

In defending its anti-miscegenation statutes 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, Inc., *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

[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.

unfounded, post-hoc rationalizations for Virginia's discriminatory marriage laws. *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding 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 Defendants-Appellants and their *amici* in their attempt to defend bans on marriage for same-sex couples. Despite claims that prohibitions against marriage for same-sex couples merely "focus . . . on getting biological parents to care in tandem for the babies produced by their sexual intercourse," Bogan Br. 34, Defendants-Appellants' position is premised on the notion that lesbian and gay couples make for inferior parents. *See, e.g.*, Alvaré Br. 4 ("[C]ommunities benefit when children are reared by their biological parents because those parents best assist children to become well-functioning citizens."); Family-Pac Br. 9 ("[T]he permanence, comprehensiveness, and exclusivity of male-female marriage make it the best environment for raising children."); *cf. Windsor*, 133 S. Ct. at 2693 (noting that the federal Defense of Marriage Act was intended to express "moral disapproval of homosexuality"); *Bostic*, 2014 WL 3702493, at *16 (proponents of Virginia's prohibition against marriage for same-sex couples argued that the state laws "safeguard children by preventing same-sex couples from marrying and starting inferior families"). These arguments are as misplaced today as they were in 1967. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994 n.20 (S.D. Ohio 2013) (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." (emphasis omitted)); *see also 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 Kitchen*, 2014 WL 2868044, at *28-29; *see also* Wolf A-Ap. 175.

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

Defendants-Appellants' appeals to history and tradition to justify their discriminatory exclusions of adult couples from the right to marriage are nothing new. *See, e.g.*, Walker Br. 50-51 ("Thousands of years of collective experience has established traditional marriage, between one man and one woman, as optimal for the family, society, and civilization."); *cf. Kitchen*, 2014 WL 2868044, at *12. In 1955, the Virginia Supreme Court rejected a challenge to its anti-miscegenation statutes 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. 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 *6.[8] The *Loving* 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 Defendants-Appellants contend, *see, e.g.*, Bogan Br. 49; Walker Br. 30-43, striking down the state laws at issue here would subvert the federalist, democratic process. *See Bostic*, 2014 WL 3702493, at *12; *Kitchen*, 2014 WL 2868044, at *31; Wolf A-Ap. 117-24, 185-86. Contrary to the notion that invalidating the states' prohibitions 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). 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 . . . .").

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 – 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

[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 law until 1998, and Alabama did not do so until 2000. *See* Kennedy, *supra*, at 279-80.

1968).[11] Despite widespread disapproval of marriage for interracial couples, "[n]either the *Perez* court nor the *Loving* Court was content to permit an 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.").

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[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.

[12] Though constitutional principles, not public opinion polls, govern these cases, today, 55% of Americans support marriage for same-sex couples, *see* Gallup, *Same-Sex Marriage Support Reaches New High at 55%* (May 21, 2014) [hereinafter Gallup, *Same-Sex Marriage* Support], *available at* http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx, 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*.

Notwithstanding the Court's repeated rejection of these arguments, Defendants-Appellants now contend that the states' bans on marriage for same-sex couples are constitutional because marriage for same-sex couples is not a "historical right," but one recognized only in "the past 10-15 years." *See, e.g.*, Bogan Br. 21-22. 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 v. Beshear*, No. 3:13-CV-750-H, --- F. Supp. 2d ---, 2014 WL 556729, at *2 & n.6, *9 (W.D. Ky. Feb. 12, 2014). And while a majority of Americans now oppose such prohibitions, fully 42% continue to support excluding same-sex couples from lawful marriage. Gallup, *Same-Sex Marriage Support*, *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. *See 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."); *Bostic*, 2014 WL 3702493, at *12 ("'[A]ncient lineage of a legal concept does not give it immunity from attack.'" (quoting *Heller v. Doe*, 509 U.S. 312, 326 (1993)); Wolf A-Ap. 169.

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 negative effect on any individual marriage or on the institution of marriage as a whole. *See 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 Plaintiffs-Appellees, the Court should affirm the judgments of the District Courts.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh 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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