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

IN THE

United States Court of Appeals for the Fourth Circuit

TIMOTHY B. BOSTIC, ET AL.,
Plaintiffs-Appellees,

JOANNE HARRIS, ET AL.,
Intervenors,

v.

JANET M. RAINEY, State Registrar of Vital Records,
GEORGE E. SCHAEFER, III, Clerk of Norfolk City Circuit Court,
Defendants-Appellants,

MICHÈLE B. MCQUIGG, Clerk of Prince William County Circuit Court,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of Virginia, Civ. No. 2:13-395

BRIEF *AMICI CURIAE* OF CATO INSTITUTE AND
CONSTITUTIONAL ACCOUNTABILITY CENTER
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that neither organization is a publicly-held corporation, nor do they issue stock or have parent corporations. *Amici* are non-profit 501(c)(3) organizations.

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. Cato's interest in this case lies in enforcing the age-old principle of "equality under the law," as enshrined in the Constitution through the Fifth and Fourteenth Amendments.

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for liberty and equality.

Amici filed joint briefs in the U.S. Supreme Court in *Hollingsworth v. Perry* and *United States v. Windsor*, and in *Kitchen v. Herbert* and *Bishop v. Smith*, Nos. 13-4178, 14-5003, 14-5006, currently pending in the U.S. Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The text of the Equal Protection Clause of the Fourteenth Amendment is sweeping and universal: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Drafted in 1866 and ratified in 1868, the Clause wrote into the Constitution the ideal of equality first laid out in the Declaration of Independence, establishing a broad guarantee of equality for all persons and demanding "the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). History shows that the original meaning of the Equal Protection Clause secures to all persons "'the protection of equal laws,'" *Romer v. Evans*, 517 U.S. 620, 634

(1996) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)), prohibiting arbitrary and invidious discrimination and securing equal rights for all classes and groups of persons.

The Constitution also protects fundamental rights under the substantive liberty provisions of the Fourteenth Amendment. The Supreme Court's cases protecting the equal right to marry have been rooted in both the Equal Protection Clause's guarantee of equality under the law and equality of rights and the Fourteenth Amendment's protection for substantive liberty. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating ban on marriages between interracial couples under the Equal Protection and Due Process Clauses); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that a state law that discriminatorily denied the right to marry violated the Equal Protection Clause); *Turner v. Safley*, 482 U.S. 78 (1987) (striking, even under rational basis review, regulations denying prisoners' right to marry); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (concluding that Defense of Marriage Act's discrimination against married same-sex couples violates "basic due process and equal protection principles").

The Fourteenth Amendment's protection of equality and substantive liberty converge in securing to all persons an equal right to marry.

In this brief, *amici* specifically focus on supporting Plaintiffs-Appellees' argument for marriage equality under the Equal Protection Clause of the Fourteenth Amendment. This brief will demonstrate that the text of the Equal Protection Clause was intended to be universal in its protection of "any person" residing within the jurisdiction of the United States; that this broad and sweeping guarantee of equality of rights was understood at the time of the Fourteenth Amendment's ratification to protect any person, of any group or class; and that, in looking to what rights were understood to be protected equally, the framers of the Fourteenth Amendment understood state-sanctioned marriage as a personal, individual right that must be made available on an equal basis to all persons. As the Supreme Court recently explained in *Windsor*, "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 S. Ct. at 2691.

The text and history of the Equal Protection Clause make clear that Virginia's marriage prohibition unconstitutionally denies the equal protection of the laws regarding marriage to same-sex couples, and

perpetrates an impermissible injury to these couples' "personal dignity." *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring). Like the provision of the Defense of Marriage Act invalidated in *Windsor*, Virginia's state law "impose[s] inequality," "demean[s] [same-sex] couple[s], whose moral and sexual choices the Constitution protects" and "humiliates . . . thousands of children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2694. Virginia's marriage prohibition, in treating same-sex and opposite-sex couples differently, denies gay men and lesbians the liberty to marry the person of their own choosing. It thus places a badge of inferiority—with the full authority of the State behind it—on same-sex couples' relationships and family life. This state action is "directly subversive of the principle of equality at the heart of the Fourteenth Amendment." *Loving*, 388 U.S. at 12. It denies the equal liberty to pursue one's own happiness that has guided our nation since its founding.

ARGUMENT

I. THE TEXT OF THE EQUAL PROTECTION CLAUSE UNAMBIGUOUSLY PROTECTS ALL PERSONS FROM ARBITRARY AND INVIDIOUS DISCRIMINATION

The plain text of the Fourteenth Amendment's guarantee of the "equal protection of the laws" is sweeping and universal. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects *all* persons. It secures the same rights and same protection under the law for all men and women, of any race, whether young or old, citizen or alien, gay or straight. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 31 (1883) ("The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."). No person, under the Fourteenth Amendment's text, may be consigned to the status of a pariah, "a stranger to [the State's] laws." *Romer*, 517 U.S. at 635.

The Fourteenth Amendment's framers crafted this broad guarantee to bring the Constitution back into line with fundamental principles of American equality as set forth in the Declaration of Independence, which had been betrayed and stunted by the institution of slavery. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and the Supreme Court found that African Americans, as an entire class of people, "had no rights which the white man was bound to respect," *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), the Fourteenth Amendment codified our founding promise of equality through the text of the Equal Protection Clause. As the Amendment's framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong. Globe, 39th Cong., 1st Sess. 2961 (1866), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal

rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539.

The Fourteenth Amendment, of course, was intended not only to restore the guarantee of equality to its rightful constitutional place, but also to secure a broad, universal guarantee of equal rights that would protect *all* persons. While the Amendment's framers were obviously focused on ensuring equality under the law for newly freed slaves, they wrote the Equal Protection Clause to eliminate a whole host of discriminatory state practices, not just discrimination on the basis of race, throughout the nation. This broad view of the scope of the Equal Protection Clause affirms that the Clause's "neutral phrasing," "extending its guarantee to 'any person,'" *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring), was intended to secure equality for all.

For example, the Fourteenth Amendment's framers wanted to guarantee equal protection of the laws to non-citizens, who faced pervasive discrimination in the western United States. Congressman John Bingham, one of those responsible for drafting the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers,

within this land . . . have equal protection in every State in this Union in the rights of life and liberty and property." Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Indeed, in 1870, two years after the Fourteenth Amendment's ratification, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the Enforcement Act of 1870. This Act secured to "all persons within the jurisdiction of the United States" the "same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien . . . ." 16 Stat. 140, 144; Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . .; let them be protected by all the laws and the same laws that other men are."); *id.* at 3871 (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws").

In addition, white Unionists needed the equal protection of the laws to ensure that Southern state governments respected their fundamental rights. *McDonald*, 130 S. Ct. at 3043 (discussing the "plight of whites in the South who opposed the Black Codes"); Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) ("The adoption of this amendment is essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them."); *id.* at 1263 ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

To secure equality not only for the newly freed slaves but for all persons within the United States, the Fourteenth Amendment's framers chose broad universal language specifically intended to prohibit arbitrary and invidious discrimination and secure equal rights for all.[2]

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[2] The Fourteenth Amendment's framers settled on the wording of the Equal Protection Clause after an exhaustive investigation by the Joint Committee on Reconstruction, which took the lead in drafting the Amendment in Congress. The Joint Committee's June 1866 report, "widely reprinted in the press and distributed by Members of the 39th Congress to their constituents," *McDonald*, 130 S. Ct. at 3039, found that the Southern states refused to "place the colored race" upon "terms even of civil equality," or "tolerat[e] . . . any class of people friendly to the Union, be they white or black . . . ." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION

The Joint Committee that drafted the Fourteenth Amendment rejected numerous proposals that would have limited the Fourteenth Amendment's equality guarantee to a prohibition on laws that discriminated on account of race, preferring the universal guarantee of equal protection, which secured equal rights to all persons, to a race-specific guarantee of equality that proscribed racial discrimination and nothing else. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46, 50, 83 (1914). Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the framers consistently rejected limiting the Fourteenth Amendment's equality guarantee to racial discrimination. *See J.E.B.*, 511 U.S. at 151 (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms.");

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xvii (1866). As the extensive testimony taken by the Joint Committee showed, the freed slaves and their Unionist allies had as much chance of having their equal rights respected as "a rabbit would in a den of lions." *Id.*, pt II, 17. Accordingly, the committee charged with drafting the Fourteenth Amendment wrote the Equal Protection Clause to eliminate state laws and practices that violated the fundamental rights of particular classes of people, based on more than just race.

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 260-261 n.* (1998) ("[S]ection 1 pointedly spoke not of race but of more general liberty and equality.").

The Fourteenth Amendment's sweeping guarantee of equal protection meant, first and foremost, equality under the law and equality of rights for all persons. Under the plain text, this sweeping guarantee unambiguously applies to the plaintiffs in this case and to all gay men and lesbians who wish to exercise the right to marry the person of their choice.

II. THE ORIGINAL MEANING OF THE EQUAL PROTECTION CLAUSE CONFIRMS THAT ITS GUARANTEE OF EQUAL RIGHTS AND EQUALITY UNDER THE LAW APPLIES BROADLY TO ALL PERSONS

The original meaning of the Equal Protection Clause confirms what the text makes clear: that equality of rights and equality under the law apply broadly to any and all persons within the United States. The Fourteenth Amendment's framers' own explanations during congressional debates, press coverage of the proposal and ratification process, and the Supreme Court's earliest decisions interpreting the Clause all affirm this basic understanding.

Introducing the Amendment in the Senate, Jacob Howard explained that the Equal Protection Clause "establishes equality before the law, and . . . gives to the humblest, the poorest, and most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). The guarantee of equal protection, he went on, "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." *Id.* *See also id.* at 2961 (noting that the Equal Protection Clause aimed to "uproot and destroy . . . partial State legislation"); *id.* at app. 219 (explaining that the Clause was necessary because Southern states had "an appetite so diseased as seeks . . . to deny to all classes of its citizens the protection of equal laws").

Senator Howard's reading of the Fourteenth Amendment—never controverted during the debates and widely reported "in major newspapers across the country," *McDonald*, 130 S. Ct. at 3074 (Thomas, J., concurring)—demonstrated that "[t]he Equal Protection Clause was

intended to work nothing less than the abolition of all caste-based and invidious class-based legislation," *Plyler v. Doe*, 457 U.S. 202, 213 (1982), ensuring "the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623. Indeed, Howard's speech was so closely followed that "public discussion of the Fourteenth Amendment commonly referred to the proposal as the 'Howard Amendment.'" Kurt T. Lash, *The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges or Immunities Clause,* 101 GEO. L.J. 1275, 1299-1300 (2013).

In the House, the framers, too, emphasized that equality of rights and equality under the law were the touchstone of the equal protection guarantee. Thaddeus Stevens observed that "[w]hatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all," Cong. Globe, 39th Cong., 1st Sess. 2459 (1866), while future President James Garfield explained that the Clause "h[e]ld over every American citizen, without regard to color, the protecting shield of the law." *Id.* at 2462. The plain meaning of equal protection, framer after framer explained, was that the "law which operates upon one man shall

operate *equally* upon all," *id.* at 2459 (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction." *Id.* at 2502.

Newspaper coverage of the debates over ratification of the Fourteenth Amendment confirms this same basic understanding of the equal protection guarantee. In an article entitled "The Constitutional Amendment," published shortly after Congress sent the Fourteenth Amendment to the states for ratification, the *Cincinnati Commercial* explained that the Fourteenth Amendment wrote into the Constitution "the great Democratic principle of equality before the law," invalidating all "legislation hostile to any class." *Cincinnati Commercial*, June 21, 1866, at 4. "With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens . . . ." *Id.* Press coverage emphasized that the Amendment "put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic," *Chicago Tribune*, Aug. 2, 1866, p.2, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation . . . ." *Cincinnati Commercial*, Aug. 20, 1866, p.2. *See* Charles Fairman, *Does the*

Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5, 72-75 (1949) (discussing press coverage).

In short, it was commonly understood at the time the Fourteenth Amendment was ratified that the Equal Protection Clause "was intended to promote equality in the States, and to take from the States the power to make class legislation and to create inequality among their people." Cong. Globe, 42nd Cong., 2nd Sess. 847 (1872).

Consistent with this history and the clear and unequivocal constitutional text, the Supreme Court quickly confirmed the broad reach of the Equal Protection Clause's guarantee of equality under the law and equality of rights. In 1880, the Court explained that "[t]he Fourteenth Amendment makes no attempt to enumerate the rights it [is] designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). *See also Barbier v. Connolly*, 113 U.S. 27, 31 (1885) ("The fourteenth amendment . . . undoubtedly intended . . . that equal

protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness . . . ."); *Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (Field, J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . .").[3]

Supreme Court precedent today firmly establishes that the Equal Protection Clause requires "neutrality where the rights of persons are at stake," forbidding states from "singling out a certain class of citizens

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[3] In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court turned its back on these principles, upholding enforced racial segregation on the theory that laws requiring the separation of African Americans and white persons in public places "do not . . . imply the inferiority of either race to the other . . . ." *Id.* at 544. Justice Harlan, alone faithful to the Fourteenth Amendment's text and history, demonstrated that enforced racial segregation violated the Fourteenth Amendment's guarantee of equality under the law and equality of rights: "[I]n the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . ." *Id.* at 559 (Harlan, J., dissenting).

for disfavored legal status or general hardships . . . ." *Romer*, 517 U.S. at 623, 633. The constitutional guarantee of equal protection "withdraws from Government the power to degrade or demean," preventing states from acting to "disparage and injure" gay and lesbians couples, deny their equal dignity, and treat their loving relationships as "less respected than others." *Windsor*, 113 S. Ct. at 2695, 2696; *Smithkline Beecham Corp. v. Abbott Labs.*, Nos. 11-17357, 17373, slip op. at 25 (9th Cir. Jan. 21, 2014) (explaining that *Windsor* requires courts "to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second class status"). Under the Equal Protection Clause, states may not deny to gay men or lesbians rights basic to "ordinary civic life in a free society," *Romer*, 517 U.S. at 631, "to make them unequal to everyone else." *Id.* at 635.

III. THE EQUAL PROTECTION CLAUSE GUARANTEES ALL PERSONS AN EQUAL RIGHT TO MARRY THE PERSON OF THEIR CHOICE

The framers of the Fourteenth Amendment recognized the right to marry as a basic civil right of all persons, "one of the vital personal rights essential to the orderly pursuit of happiness . . . ." *Loving*, 388 U.S. at 12. The equality of rights secured by the Fourteenth

Amendment's Equal Protection Clause thus unquestionably includes the equal right to marry the person of one's choice, "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J*, 519 U.S. 102, 116 (1996).

The Reconstruction framers further recognized the right to marry the person of one's choosing as a crucial component of freedom and liberty—a right that had long been denied under the institution of slavery. Slaves did not have the right to marry, and slaves in loving relationships outside the protection of the law were time and again separated when one slave was sold to a distant part of the South. *See* HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925, at 318 (1976). As Sen. Jacob Howard explained, a slave "had not the right to become a husband or father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend." Cong. Globe, 39th Cong., 1st Sess. 504 (1866).

In the Fourteenth Amendment, the framers thus sought to guarantee to the newly freed slaves the right to marry that they had long been denied. "The attributes of a freeman according to the

universal understanding of the American people," Sen. Jacob Howard observed, included "the right of having a family, a wife, children, home." *Id.* The framers insisted that the "poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land." *Id.* at 343. Even opponents of the Fourteenth Amendment recognized that "marriage according to one's choice is a civil right." *Id.* at 318. *See also* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION & FAMILY VALUES 39 (1997) ("Speaker after speaker pronounced marriage rights fundamental and resolved that freedom in the United States would entail the right to marry."); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 670 (2009) ("The common law . . . had long recognized a right of marriage, and it would be astonishing if that right were not also described in 1868 as having been fundamental."); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. REV. 1297, 1338 (1998) (noting framers' judgment that the freedom promised by abolition "was ultimately

worthless without the right to marry, to raise a family, and to maintain a home").[4]

Indeed, few rights were more precious to the newly freed slaves than the right to marry. With the abolition of slavery, "ex-slaves themselves pressed for ceremonies and legal registrations that at once celebrated the new security of black family life and brought their most intimate ties into conformity with the standards of freedom." II FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, at 660 (I. Berlin et al. eds. 1982). "[M]ass wedding ceremonies involving as many as seventy couples at a time became a common sight in the postwar South." LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 240 (1979).

The newly freed slaves rejoiced to finally, at long last, have the right to marry the person of their choice protected and secured by law. As one African American soldier put it, "I praise God for this day! I have long been praying for it. The Marriage Covenant is at the

[4] In the debates during the 39th Congress, only one member of the House, Rep. Moulton, denied that the right to marry was a protected right, "[b]ut he knew that he was in the minority. . . . Reconstruction's advocates were intent on creating . . . constitutional protection for familial rights . . . ." Hasday, 45 U.C.L.A. L. REV. at 1350.

foundation of all our rights. In slavery we could not have legalised marriage: now we have it." II FREEDOM: A DOCUMENTARY HISTORY at 672 (emphasis omitted). On January 1, 1866, African Americans called the first anniversary of the Emancipation Proclamation "a day of gratitude for the freedom of matrimony. Formerly, there was no security for our domestic happiness. . . . But now we can marry and live together till we die . . . ." Hasday, 45 U.C.L.A. L. REV. at 1338 n.146. In short, the right to marry "by the authority and protection of Law," confirmed that the newly freed slaves, finally, were "beginning to be regarded and treated as human beings." JAMES MCPHERSON, THE NEGROES' CIVIL WAR 604 (1991).

In writing into the Fourteenth Amendment a requirement of equality under the law and equality of basic rights for all persons—which included the right to marry—the Amendment's framers ensured that discriminatory state laws would not stand in the way of Americans exercising their right to marry the person of their own choosing. Laws that discriminate and deny to members of certain groups the right to marry the person of their choice thus contravene the original meaning of the Fourteenth Amendment.

The Supreme Court has many times vindicated this principle. Most famously, in *Loving v. Virginia*, the Court invalidated the laws of Virginia and fifteen other states that outlawed interracial marriage. Observing that marriage is "one of the 'basic civil rights of man,'" *Loving*, 388 U.S. at 12 (quoting *Skinner*, 316 U.S. at 541), the Court held the denial of the "fundamental freedom" to marry "solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.*[5] "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual . . . ." *Id.*

To use another example, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court held that a Wisconsin statute that denied the right to marry to parents who had failed to satisfy pre-existing child support obligations violated the Equal Protection Clause, emphasizing

[5] *Loving* rested on two independent grounds: that Virginia's marriage law violated the Equal Protection Clause by discriminating on the basis of race and also that it violated the substantive aspects of the Due Process Clause by denying the right to marry the person of one's choosing. In this brief, which focuses on the textual and historical reasons for invalidating state marriage laws that treat same-sex couples differently than opposite-sex couples, we rely on *Loving* simply to show that the right to marry the person of one's choosing must be provided equally to all. Our focus is on marriage equality, not the similarities or differences—such as they may be—between distinctions based on race and sexual orientation, respectively.

that the "right to marry is of fundamental importance for all individuals." *Id.* at 384. *Zablocki* explained that *Loving*'s holding did not depend on "the context of racial discrimination," but rather that "the laws arbitrarily deprived the couple of a fundamental liberty . . . , the freedom to marry." *Id.* at 383-84. Applying strict scrutiny, the Court invalidated the statute's discriminatory denial of the right to marry to parents who had failed to pay child support, finding it imposed "a serious intrusion into . . . freedom of choice in an area in which we have held such freedom to be fundamental." *Id.* at 387. Because the Equal Protection Clause secured an equal right to marry to all persons, the government could not pursue its legitimate interest in ensuring payment of child support obligations by "unnecessarily imping[ing] on the right to marry." *Id.* at 388. *See also M.L.B.*, 519 U.S. at 117 ("Choices about marriage . . . are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

Both the Fourteenth Amendment's text and history and Supreme Court precedent thus establish that the Equal Protection Clause commands the equality of rights, including the right to marry. Laws that deny the fundamental right to marry to certain classes of people are subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest. *See Zablocki*, 434 U.S. at 388; *see also Skinner*, 316 U.S. at 541 (applying strict scrutiny under the Equal Protection Clause to legislation involving "one of the basic civil rights of man . . . lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws"). *See generally* Plaintiffs-Appellees Br. at 33-40 (arguing that heightened scrutiny applies in this case). [6]

[6] In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court did not apply strict scrutiny, applying instead reasonableness review because the challenge arose in the prison context. Even under this deferential standard of review, however, the Court nonetheless found that the state had no legitimate basis for denying prisoners the right to marry the person of their own choosing. Certainly, if the right to marry is so fundamental that there is no reasonable basis for denying the right to incarcerated prisoners, there is no basis under any standard of scrutiny—but especially under strict scrutiny—for denying that right to committed, loving, same-sex couples. *See* Plaintiffs-Appellees Br. at 40-59 (demonstrating that Virginia's marriage prohibition cannot survive rational basis review, much less heightened scrutiny).

IV. VIRGINIA'S MARRIAGE PROHIBITION INFRINGES THE EQUAL RIGHT TO MARRY AND THUS VIOLATES THE GUARANTEE OF THE EQUAL PROTECTION CLAUSE THAT ALL PERSONS SHALL HAVE EQUALITY UNDER THE LAW

Virginia's marriage prohibition violates basic, well-settled equal protection principles. By forbidding loving, committed same-sex couples from participating in the "the most important relation in life," and the "foundation of the family in our society," *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888), *quoted in Zablocki*, 434 U.S. at 386, Virginia law contravenes the Equal Protection Clause's central guarantee of equality under the law and equal rights reflected in both the text and history of the Fourteenth Amendment. Virginia's marriage prohibition establishes a class-based badge of inferiority that "disparage and injure" the personal dignity and liberty of gay men and lesbians and their families, treating their loving relationships as "less respected than others." *Windsor*, 133 S. Ct. at 2696.

Denying gay men and lesbians the right to marry the person of their choosing is inconsistent with the text of the Equal Protection Clause, which secures equality of rights to all persons, regardless of sexual orientation, *see Windsor*, *supra*; *Romer*, *supra*, and the Clause's

history, which demonstrates that the right to marry the person of one's choosing is a basic and fundamental right, guaranteed to all persons under the Fourteenth Amendment. Virginia's marriage prohibition is forbidden class legislation, a "status-based enactment" that denies same-sex couples the right to marry in order to "to make them unequal to everyone else." *Romer*, 517 U.S. at 635. Under Virginia law, men and women who love and choose to marry someone of the same sex do not stand equal before the law and do not receive its equal protection.

No constitutionally legitimate rationale—let alone any compelling state interest—justifies the state's refusal to accord gay men and lesbians the right to marry the person of their choosing. As in *Windsor*, 133 S. Ct. at 2696, "no legitimate purpose overcomes the purpose and effect to disparage and to injure," same-sex couples in committed, loving relationships, "whose moral and sexual choices the Constitution protects." *Id.* at 2694. Far from furthering any legitimate state goals connected to marriage, Virginia's discriminatory law disserves them, "humiliat[ing] . . . thousands of children now being raised by same sex couples" and "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family . . . ." *Id.*

Contrary to the arguments suggested by supporters of Virginia's marriage prohibition, the text and first principles the framers wrote into the Fourteenth Amendment control this Court's constitutional analysis, not purported "traditional" understandings of marriage. "No tradition can supersede the Constitution." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting). *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history or tradition could save a law prohibiting miscegenation from constitutional attack.'") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Bd. of County Comm'rs, Waubunsee County, Kan. v. Umbehr*, 518 U.S. 668, 681 (1996) (rejecting a "special exception" to the First Amendment's protection of political speech based on a "'long and unbroken tradition'" of "allocation of government contracts on the basis of political bias") (citation omitted); *Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack . . . ."); *Rutan*, 497 U.S. at 92 (Stevens, J., concurring) ("The tradition that is

relevant in these cases is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution.").[7] If a so-called tradition or history of discrimination were sufficient to justify perpetuating the discriminatory practice, our public schools, drinking fountains, and swimming pools would still be segregated by race.

These principles apply with special force to the Equal Protection Clause, which changed the Constitution from one that sanctioned inequality to one that prohibited it. The very point of the Clause was to stop dead in its tracks the state "tradition" of denying to African Americans—and other disfavored groups—equal rights under the law. As far as the Equal Protection Clause is concerned, discriminatory traditions are no part of our nation's constitutional traditions. *Cf. Umbehr*, 518 U.S. at 681 (explaining that a tradition of political bias in

[7] This is true even of traditions existing at the time of the ratification of the Fourteenth Amendment. *See Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (rejecting the idea that "the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"); *Rutan*, 497 U.S. at 82 n.2 (Stevens, J., concurring) (rejecting the argument that "mere longevity can immunize from constitutional review state conduct that would otherwise violate the First Amendment").

contracting is "not . . . the stuff out of which the Court's principles are to be formed") (citation and quotation marks omitted).

Intentionally drafting the Equal Protection Clause in broad, universal terms, the framers of the Fourteenth Amendment deliberately targeted the entire range of unequal laws, including a host of longstanding, discriminatory state practices. At the time of its ratification, discrimination against the newly freed slaves, as well as other persons, "had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected." *Strauder*, 100 U.S. at 306. Carving out of the text of the Fourteenth Amendment an exception for traditional forms of discrimination would have strangled the Equal Protection Clause in its crib, subverting its central meaning. *See Illinois State Employees Council 34 v. Lewis*, 473 F.2d 561, 568 n.14 (7th Cir. 1972) (Stevens, J.) ("[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would . . . have been doomed to failure."). Thus, "tradition" cannot save a state law or policy that contravenes the Equal Protection Clause's

command of equality under the law and equality of rights for all persons.

The Supreme Court's cases vindicating the equal right of all persons to marry have long recognized this basic point. For many years in this country, states prohibited marriages between persons of different races, but *Loving* held that such a "traditional" concept of marriage violated the Fourteenth Amendment because "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving*, 388 U.S. at 12. *See also Casey*, 505 U.S. at 980 n.1 (Scalia, J., dissenting) (denying that "adherence to tradition would require us to uphold laws against interracial marriage" because such a "tradition" is "contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value.") (emphasis in original). As the district court properly concluded, "tradition alone cannot justify denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage." *Bostic v. Rainey*, Civil No. 13-395, slip op. at 26 (E.D. Va. Feb., 14, 2014).

It is thus of no constitutional relevance that the marriages into which Plaintiffs wish to enter have long been denied legal recognition. As the Supreme Court confirmed in *Loving*, history is a valid source of inquiry for identifying basic and fundamental constitutional rights and protections, but historical "tradition" cannot be used in an Equal Protection Clause analysis to justify a law or practice that denies any group the equal protection of the laws. Denial of the equal right to marry—like other fundamental constitutional protections—"'cannot be justified on the basis of 'history.' . . . Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional.'" *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 478 (Conn. 2008) (quoting *Hernandez v. Robles,* 855 N.E.2d 1, 33 (N.Y. 2006) (Kaye, C.J., dissenting)). *See also Varnum v. Brien*, 763 N.W.2d 862, 898-899 (Iowa 2009) (concluding that "some underlying reason other than the preservation of tradition must be identified" because "[w]hen a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective,

which objective is to maintain the classification."); *Goodridge v. Dep't of Public Health,* 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring) ("[T]he mantra of tradition . . . can[not] justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.").

As the text and history of the Fourteenth Amendment show, the Equal Protection Clause guarantees to all persons—regardless of race, sexual orientation, or other group characteristics—equality of rights, including the fundamental right to marry the person of their choosing. Virginia's marriage prohibition conflicts with this fundamental constitutional principle, and the lower court was correct to have invalidated it.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,901 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amici curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

Executed this 18th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on April 18, 2014.

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