

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

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, ET AL.

Plaintiffs-Appellees,

JOANNE HARRIS, ET AL.

Intervenors,

v.

GEORGE E. SCHAEFER, III

Defendant-Appellant,

JANET M. RAINEY, ET AL.

Defendants,

MICHÈLE MCQUIGG

Intervenor-Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia (No. 2:13-cv-00395)

**AMICI CURIAE BRIEF OF THE NATIONAL WOMEN'S LAW CENTER,
EQUAL RIGHTS ADVOCATES, LEGAL MOMENTUM, NATIONAL
ASSOCIATION OF WOMEN LAWYERS, NATIONAL PARTNERSHIP
FOR WOMEN & FAMILIES, SOUTHWEST WOMEN'S LAW CENTER,
WOMEN'S LAW PROJECT, AND PROFESSORS OF LAW ASSOCIATED
WITH THE WILLIAMS INSTITUTE IN SUPPORT OF PLAINTIFFS-
APPELLEES AND INTERVENORS**

[All Parties Have Consented to Filing. FRAP 29(a)]

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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I. INTEREST OF AMICI CURIAE¹

Amici Curiae are the National Women’s Law Center, Equal Rights Advocates, Legal Momentum, National Association of Women Lawyers, National Partnership for Women & Families, Southwest Women’s Law Center, Women’s Law Project, and professors of law associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. Amici have substantial expertise related to equal protection, including discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise bears directly on the issues before the Court. Descriptions of individual Amici are set out in the Appendix.

II. SUMMARY OF ARGUMENT

Under the federal Constitution’s equal protection guarantees, laws that classify on the basis of sex are subject to heightened judicial scrutiny and cannot stand absent an “exceedingly persuasive justification,” and a showing that such laws substantially further important governmental interests. *United States v. Virginia*, 518 U.S. 515, 533 (1996) [hereinafter “*VMP*”]. In

¹No counsel for any party authored this brief in whole or in part, nor did a party or party’s counsel contribute money intended to fund preparation or submission of this brief, nor did a person other than Amici, its members or counsel contribute money intended to fund preparation or submission of the brief.

particular, the government may not enforce laws that make sex classifications based on gender stereotypes or gendered expectations, including those regarding roles that women and men perform within the family, whether as caregivers, breadwinners, heads of households, or parents. Courts have recognized that sex classifications warrant heightened scrutiny because legal imposition of archaic and overbroad gender stereotypes arbitrarily harms women and men by limiting individuals' abilities to make decisions fundamental to their lives and their identities.

Laws that discriminate based on sexual orientation share with laws that discriminate based on sex a frequent basis in overbroad gender stereotypes about the preferences and capacities of men and women.² Lesbian, gay, and bisexual persons long have been harmed by legal enforcement of the expectation that an individual's most intimate relationship will be and should be with a person of a different sex. Such presumptions underlie many laws that discriminate based on sexual

² Amici note that laws that discriminate based on gender identity, including transgender status, are also premised on overbroad gender stereotypes and should be subject to heightened scrutiny. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding discrimination against a transgender individual based on gender-nonconformity constitutes sex discrimination and collecting cases in accord); *Hart v. Lew*, No. 1:12-cv-03482, 2013 WL 5330581, at *18 (D. Md. Sept. 23, 2013) (denying motion to dismiss because animus based on "gender transition" could constitute discrimination because of sex).

orientation, including Virginia's challenged laws, and cause gay, lesbian, and bisexual persons to experience both serious practical and dignitary harms of constitutional magnitude. These laws communicate to them and to the world that there is something wrong with a core part of their identity, that they do not measure up to what a man or a woman supposedly should be, and that their most important relationships are "less worthy," *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) [hereinafter "*Windsor*"], than the relationships and marriages of different-sex couples.

Just as the Constitution requires close scrutiny of laws that enforce the roles that men and women perform within marriage on the basis of gender stereotypes, the Constitution demands close scrutiny of laws based on gender stereotypes that restrict an individual's liberty to decide whom he or she marries and with whom he or she forms a family. Accordingly, this Court should hold that laws that discriminate based on sexual orientation warrant heightened judicial scrutiny and that the laws challenged here cannot withstand such scrutiny.

III. ARGUMENT

Over the last four decades, application of heightened scrutiny to laws that discriminate based on sex has served as an important bulwark in protecting individuals' liberty to participate in family life, education, and

work, free from legally-imposed gender roles. Gay, lesbian, and bisexual persons, however, are still subject to laws that burden their liberty to enter into relationships, including marriage, with the person to whom they may feel closest—a person of the same sex. Those laws deny gay, lesbian, and bisexual persons full citizenship in profound ways.

Rather than serving any important governmental interest, laws that discriminate against same-sex couples reflect the gender-role expectation that women will form intimate relationships with men, and that men will form such relationships with women, as well as the stereotype that same-sex spouses are inferior parents because they cannot fulfill particular gender roles. The decisions whether and with whom to enter into intimate relationships, including marriage, and whether and with whom to raise children, are central to individual liberty under the Constitution. The government has no authority to restrict those choices based on gender-based stereotypes or expectations, just as it has no authority to dictate the roles that men and women fill within marriage on such bases. The Supreme Court repeatedly has held that the government may not justify sex discrimination by an asserted interest in perpetuating traditional gender roles in people's family and work lives. Nor is sexual orientation discrimination justified by a rigid and exclusionary gender role expectation that an individual will only

partner with someone of a different sex.

“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). Under the Equal Protection Clause, laws that deny rights or opportunities based on sexual orientation should be subject to heightened scrutiny. In *Windsor*, the Supreme Court noted that this question is “still being debated and considered in the courts.” 133 S. Ct. at 2683. In affirming the judgment of the Second Circuit in that case, the Supreme Court let stand the Second Circuit’s holding that the federal Constitution requires heightened scrutiny of laws that discriminate based on sexual orientation. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) [hereinafter “*Windsor v. United States*”]. The Ninth Circuit has held the same, *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014), as have the highest courts of California, Connecticut, Iowa, and New Mexico under their state constitutions. See *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013).

Post-*Windsor*, every district court to consider bans on marriage between same-sex couples (or on recognition of out-of-state marriages

between same-sex couples) has held these laws violate the Fourteenth Amendment. Many such courts have found these prohibitions are subject to heightened scrutiny and fail, or are likely to fail, this test. *See, e.g., Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 979, 991 (S.D. Ohio 2013) (holding Ohio’s marriage recognition bans were subject to heightened scrutiny and failed even rational basis review); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (ruling Utah’s marriage bans were subject to heightened scrutiny as gender-based classifications and failed even rational basis review); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *12-14, *21, *28 (W.D. Tex. Feb. 26, 2014) (holding Texas’s marriage bans were likely subject to heightened scrutiny and did not satisfy rational basis review at preliminary injunction stage). In this case, too, the district court noted that it “would be inclined to find” Virginia’s marriage laws are subject to heightened scrutiny because they classify on the basis of sexual orientation, but concluded that it need not reach the issue because the laws lack even a rational basis. *Bostic v. Rainey*, No. 2:13-CV395, 2014 WL 561978, at *22 n.16 (E.D. Va. Feb. 13, 2014).

Were this Court to apply the same standard of review applicable to sex discrimination, laws denying rights based on sexual orientation would be invalid unless the government could show an “exceedingly persuasive

justification” for them, including a showing “at least that the [challenged] classification[s] serve important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives” without “rely[ing] on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *VMI*, 518 U.S. at 533 (internal quotation marks and citations omitted; first alteration in original). The laws challenged here cannot withstand such scrutiny.³

A. The Supreme Court Adopted Heightened Scrutiny for Laws That Discriminate Based on Sex Because Such Laws Are Typically Based on Gender Stereotypes.

Again and again, the Supreme Court has recognized that laws that discriminate on the basis of sex typically rely on gender-based expectations about the roles or conduct that is supposedly natural, moral, or traditional for women and men, and that legal enforcement of these stereotypes is incompatible with equal opportunity. A repeated refrain runs through

³ While discrimination on the basis of sexual orientation should be subject to at least heightened scrutiny, Amici also note that these laws lack any rational basis, as the district court found. *Bostic*, 2014 WL 561978, at *22. Moreover, were this Court to employ strict scrutiny for laws that discriminate based on sexual orientation—the standard of review for laws that classify on the basis of race and national origin, *e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005)—the challenged measures would fail, for they are not narrowly tailored to further a compelling state interest.

modern case law addressing measures that deny rights or opportunities based on sex: Such laws warrant “skeptical scrutiny,” *VMI*, 518 U.S. at 531, because “of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (internal quotation marks omitted).

In *Frontiero v. Richardson*, for example, a plurality of the Supreme Court recognized that “our Nation has had a long and unfortunate history of sex discrimination” in which the Supreme Court itself played a role. 411 U.S. 677, 684 (1973) (plurality). The Court noted now-infamous language from an 1873 opinion stating that “[m]an is, or should be, women’s protector and defender”; that women’s “natural and proper timidity and delicacy” render them “unfit[] for many of the occupations of civil life”; and that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.” *Id.* at 684-85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) (rejecting constitutional challenge to Illinois’s refusal to admit a woman to the bar). The *Frontiero* plurality acknowledged, “As a result of notions such as these,

our statute books gradually became laden with gross, stereotyped distinctions between the sexes.” 411 U.S. at 685.

Frontiero struck down a military benefits scheme premised on the gender-based expectation that women were financially dependent on their husbands. It directly rejected assumptions that the Supreme Court had relied on not only in 1873 but for many decades thereafter—assumptions that fundamental differences between women and men, rooted in women’s traditional family roles, justified laws limiting opportunities for women and reinforcing gender stereotypes. *See, e.g., Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding state law that made jury duty registration optional for women because “woman [was] still regarded as the center of home and family life”); *cf. Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (upholding legislation limiting women’s work hours because “healthy mothers are essential to vigorous offspring, [and so] the physical well-being of woman becomes an object of public interest”).

In *Weinberger v. Wiesenfeld*, the Supreme Court further illuminated how laws based on gender stereotypes arbitrarily harm those who do not conform to those stereotypes. 420 U.S. 636 (1975) [hereinafter “*Wiesenfeld*”]. *Wiesenfeld* held unconstitutional a Social Security Act provision that required payment of benefits to a deceased worker’s *widow*

and minor children, but not to a deceased worker's *widower*. *Id.* at 637-39. First, the Court explained that the challenged measure's reliance on the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children" devalued the employment of women, "depriv[ing] women of protection for their families which men receive as a result of their employment." *Id.* at 645. Second, the challenged provision "was intended to permit women to elect not to work and to devote themselves to the care of children." *Id.* at 648. The measure thereby failed to contemplate fathers such as Stephen Wiesenfeld, a widower who wished to care for his child at home. The Court emphasized that gender does not prescribe or limit parental roles, stating, "It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. . . ." *Id.* at 652; *see also Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) [hereinafter "*Goldfarb*"] (holding unconstitutional differential treatment of widows and widowers based on "'archaic and overbroad' generalizations") (citations omitted).

As these and other cases illustrate, laws that discriminate on the basis of sex are typically premised on gender stereotypes—including stereotypes of the family as necessarily constituted by a woman assuming the role of homemaker and caretaker and a man assuming the role of breadwinner and

protector.⁴ In their failure to recognize that many men and women either do not wish to or are unable to conform to these roles, such laws arbitrarily limit individuals' ability to make fundamental decisions about their lives. When the law enforces "assumptions about the proper roles of men and women," it closes opportunity, depriving individuals of their essential liberty to depart from gender-based expectations. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) [hereinafter "*Hogan*"]. Accordingly, "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-25.

These decisions make clear that "archaic and overbroad generalizations" cannot justify "statutes employing gender as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Such "loose-fitting characterizations" are "incapable of supporting . . . statutory schemes . . . premised upon their accuracy." *Id.*

⁴ See also, e.g., *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional federal statute providing for support only in event of father's unemployment based on stereotype that father is principal provider "while the mother is the 'center of home and family life'"); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations solely on husbands because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (striking down statute assigning different ages of majority to girls and boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

at 199. Moreover, as this Circuit has held in rejecting a state’s imposition of gender-stereotyped family roles, laws that classify on the basis of sex often violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility” and ignore the fact that “sex characteristics frequently bear[] no relation to ability or perform or contribute to society.” *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (internal citations and quotations omitted). By requiring an “exceedingly persuasive” showing of a close relationship between a sex classification and a statutory scheme’s objective, and by demanding that the objective be important (rather than merely legitimate), the Equal Protection Clause rejects the “artificial constraints on an individual’s opportunity” imposed by laws resting on imprecise gender stereotypes.⁵ *VMI*, 518 U.S. at 533.

B. Laws That Discriminate Based on Sexual Orientation Should Be Subject to Heightened Scrutiny Because of Their Frequent Basis in Gender Stereotypes.

Just as laws that classify based on sex often improperly rest on gender stereotypes or expectations that do not hold true for all men and women, so too do laws that discriminate based on sexual orientation. Central among

⁵ The challenged Virginia laws not only improperly rest on gender stereotypes, but also classify on the basis of sex in defining who may enter into marriage. They must be subject to heightened scrutiny for this reason as well. *See, e.g., Kitchen*, 961 F. Supp. 2d at 1206.

those gender-based expectations are the overbroad presumptions that a woman will be attracted to and form an intimate relationship and family with a man, not with a woman, and that a man will be attracted to and form an intimate relationship and family with a woman, not with a man. Courts have rejected gender stereotypes as a proper basis for lawmaking with regard to sex. Courts similarly should view these stereotypes and expectations with skepticism when reviewing the constitutionality of laws that discriminate based on sexual orientation.

1. Laws That Discriminate Based on Sexual Orientation Are Rooted in Gender Stereotypes.

Laws that classify based on sexual orientation typically share with laws that discriminate based on sex a foundation in gender stereotypes or gender-based expectations. Many laws discriminating based on sexual orientation are founded on assumptions that men and women form (or should form) romantic, familial, or sexual relationships with each other, rather than with persons of the same sex. These assumptions have been at the root of laws prohibiting same-sex intimate conduct, as well as laws regarding family structure that discriminate on the basis of sexual orientation, such as the Virginia marriage laws challenged here. Perhaps less apparent, but equally true, is that such gender-based expectations underlie other forms of discrimination against gay, lesbian, and bisexual

people, too.

The notion that stigma and discrimination against gay, lesbian, and bisexual persons are premised on gender-role assumptions is a matter of common experience in our society. “There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so.” Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994). “Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one’s sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other.” *Id.*; see also *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.”). Individuals who depart from gender-based expectations are often targeted with antigay animus and slurs, regardless of their actual sexual orientation. Gay, lesbian, and bisexual people regularly experience social disapproval and discrimination that is targeted at their nonconformity with gender-based

expectations—because they are not acting as “real men” or “real women” supposedly do.

Although the linkage between antigay stigma and gender-based expectations is apparent in ordinary life, courts have only recently begun to recognize its legal implications. For example, in considering whether gay, lesbian, and bisexual people could find recourse in federal statutes prohibiting discrimination based on sex, courts initially focused on the absence of express mention of sexual orientation in such laws. *See, e.g., Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143-44 (4th Cir. 1996) (collecting older precedents to support conclusion that Title VII does not afford a cause of action for discrimination based on sexual orientation). More recently, however, courts have begun to understand that much of the discrimination that gay, lesbian, and bisexual people experience in the workplace or in school takes the form of hostility toward nonconformance with gender stereotypes—which the Supreme Court recognized twenty-five years ago in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), constitutes discrimination based on sex. *See, e.g., Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (holding that harassment of a gay man targeting his gender-nonconforming behavior and appearance could constitute sex harassment); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061,

1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (concluding that gay man stated a claim for sex discrimination based on evidence that he was mocked by male co-workers because of his nonconformance with “gender-based stereotypes”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment of male employee for failing to act “as a man should act,” including being derided for not having sex with female colleague, constituted actionable sex discrimination based on nonconformity with gender stereotypes); *Terveer v. Billington*, No. 12-1290-CKK, 2014 WL 1280301, at *11 (D.D.C. Mar. 31, 2014) (holding that gay man who alleged he was discriminated against because of his nonconformance with gender stereotypes stated a claim of sex discrimination); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (holding allegation that manager harassed employee because he took his male spouse’s surname stated claim based on sex stereotyping); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (explaining that plaintiff’s allegations of harassment in the form of antigay epithets could proceed to trial under Title IX’s prohibition of sex discrimination based on plaintiff’s alleged failure to conform to gender stereotypes); *Theno v. Tonganoxie Unified Sch. Dist No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (holding that claim that male student who was

subjected to antigay slurs, physical abuse, and rumors about his masturbation habits because of his “perceived lack of masculinity” and because he “did not act as a man should act” could proceed to trial on theory of gender stereotyping under Title IX).

Courts in the Fourth Circuit, too, have recognized that discrimination based on sexual orientation can be rooted in hostility toward nonconformance with gender expectations, and, as such, be actionable as sex discrimination. For example, in finding that a male plaintiff stated a Title VII sex discrimination claim when he alleged he was “routinely subjected to verbal epithets” such as being called a “faggot,” “bitch,” and a “homo” and was told that he “looked just like a woman” and did not “meet [the employer’s] standards of a man,” a court in the Eastern District of Virginia acknowledged that “it is often difficult to draw the distinction between discrimination on the basis of gender stereotyping and discrimination on the basis of sexual orientation” and that “[f]urther muddling the analysis is the fact that, as a result of the well-documented relationship between perceptions of sexual orientation and gender norms, gender-loaded language can easily be used to refer to perceived sexual orientation and vice versa.” *Henderson v. Labor Finders of Virginia, Inc.*, 3:12-CV-600, 2013 WL 1352158, at *2-6 (E.D. Va. Apr. 2, 2013) (first brackets in original).

Similarly, in *E.E.O.C. v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 603-04 (4th Cir. 2011) (Gregory, J.), it was uncontested that a man who was subjected to antigay epithets and vulgar and lewd comments by coworkers, including graphic descriptions of oral sex that featured them “groping themselves and propositioning [the plaintiff],” was harassed because of sex.

Federal agencies also have recently emphasized that discrimination experienced by gay, lesbian, and bisexual people is often discrimination based on nonconformity with gender-based expectations—and thus sex discrimination. For example, the Civil Rights Division of the United States Department of Justice recently issued guidance explaining that federal employment, housing, education, and other statutes that prohibit discrimination based on sex “protect[] all people (including LGBTI people) from . . . discrimination based on a person’s failure to conform to stereotypes associated with [a] person’s real or perceived gender.” U.S. Dep’t of Justice, Civil Rights Div., *Protecting the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals* (Feb. 11, 2013), *available at* <http://www.justice.gov/crt/publications/lgbtibrochure.pdf>. The United States Department of Education’s Office for Civil Rights has explained that harassment of students “on the basis of their LGBT status,” is prohibited by Title IX, 20 U.S.C. § 1681 *et seq.*, when such harassment is

based on “sex-stereotyping.” U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying at 7-8 (Oct. 26, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. The Department of Housing and Urban Development has similarly construed the sex discrimination prohibition in the Fair Housing Act, 42 U.S.C. 3601 *et seq.* See Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662-01 (Feb. 3, 2012) (to be codified at 24 C.F.R. Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982) (“[T]he Fair Housing Act’s prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes.”).

In addition, the U.S. Equal Employment Opportunity Commission has explained that Title VII’s “broad prohibition of discrimination ‘on the basis of . . . sex’ will offer coverage to gay individuals in certain circumstances,” including where an employee is discriminated against “based on the perception that he does not conform to gender stereotypes of masculinity.” *Couch v. Chu*, Appeal No. 0120131136, 2013 WL 4499198, at *7-8 (E.E.O.C. Aug. 13, 2013) (“[S]ince *Price Waterhouse*, every court of appeals has recognized that disparate treatment for failing to conform to

gender-based expectations is sex discrimination and has also concluded that this principle applies with equal force in cases involving plaintiffs who are gay, bisexual, heterosexual, or transgender.”); *see also Veretto v. U.S. Postal Service*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (E.E.O.C. Jul. 1, 2011) (holding that discrimination based on stereotype that a man should not marry another man can constitute discrimination based on sex); *Castello v. U.S. Postal Service*, Appeal No. 0120111795, 2011 WL 6960810, at *2-3 (E.E.O.C. Dec. 20, 2011) (concluding that discrimination based on stereotype that women should only have sexual relationships with men can constitute discrimination based on sex); *Culp v. Dep’t of Homeland Security*, Appeal No. 0720130012, 2013 WL 2146756, at *3-4 (E.E.O.C. May 7, 2013) (concluding allegation of sexual orientation discrimination was a claim of sex discrimination because supervisor was motivated by gender stereotypes that women should only have relationships with men).

Just as courts and agencies have recognized in the context of *statutory* antidiscrimination protections that *Price Waterhouse’s* anti-stereotyping principle can serve as a basis for protecting gay, lesbian, and bisexual people from discrimination, so must courts consider the implications of the anti-stereotyping principle underlying *constitutional* protections against sex discrimination for laws that discriminate based on sexual orientation. Laws

that discriminate based on sexual orientation are, at core, based on “fixed notions” about the roles, preferences, and capacities of women and men of the sort that have been repeatedly rejected in sex discrimination cases under the Equal Protection Clause. *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725). Such discrimination improperly seeks to impose gender-based expectations on how men and women structure their lives.

2. Government Action That Discriminates Based on Sexual Orientation Warrants Heightened Scrutiny.

Gay, lesbian, and bisexual people long have had important life opportunities foreclosed by state action seeking to enforce gender-based expectations in connection with the most intimate of human relationships. As with measures seeking to enforce outdated gender stereotypes on the basis of sex, courts should require at least “an exceedingly persuasive justification,” *id.*, for classifications based on sexual orientation. Heightened scrutiny for such laws follows straightforwardly from precedents identifying relevant factors in considering whether a particular classification warrants close judicial scrutiny, rather than simple deference to majoritarian lawmaking. *See generally United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting considerations that “may call for . . . more searching judicial inquiry”); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (reciting “traditional indicia of suspectness”); *Windsor v. United*

States, 699 F.3d at 180-85 (explaining why lesbian, gay, and bisexual persons meet the definition of a quasi-suspect class). That is so because measures discriminating on the basis of sexual orientation typically bear little or no relation to the actual abilities, capacities, or preferences of the persons that such measures constrain or burden.

Heightened scrutiny is particularly appropriate in this context because laws that impose gender-role expectations in contravention of the actual preferences of individuals offend the central liberty interest on which the Supreme Court focused in *Lawrence* and *Windsor*. In *Lawrence*, the Supreme Court reaffirmed that “‘matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,’” and that “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” 539 U.S. at 573 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)). The Court in *Lawrence* was emphatic that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do,” *id.* at 574, and in *Windsor*, the Court expressly noted that state marriage laws permitting same-sex couples to marry “reflect[] . . . evolving understanding of the meaning of equality,” 133 S. Ct.

at 2692-93. The Constitution's liberty and equality principles are mutually-reinforcing and are incompatible with a presumption of constitutionality for the legally enforced expectation that individuals should enter into intimate relationships only with someone of a different sex.

An essential component of the Constitution's due process and equal protection guarantees is that the government cannot exclude individuals from important social statuses, institutions, relationships, or legal protections because of a characteristic that is irrelevant to participation in such statuses, institutions, relationships, or protections. *E.g., Frontiero*, 411 U.S. at 686. The courts therefore must look with skepticism upon laws that restrict access to marriage based on overbroad gender stereotypes unrelated to the actual capacity of persons to engage in mutual care and protection, to share economic risks, and to raise children together—capacities that do not turn on sexual orientation. Because legal enforcement of overbroad gender stereotypes arbitrarily constrains and determines individuals' most fundamental and personal choices about their own lives, the Constitution requires vigorous interrogation of any such government action.

C. Laws Excluding Same-Sex Couples From Marriage Cannot Survive Heightened Scrutiny.

Laws related to marriage were once a leading example of sex-based rules enforcing separate gender roles for men and women and depriving

persons of equal opportunities. As the harm arising from laws requiring adherence to gender stereotypes has been recognized, sex-based marriage rules have been almost completely dismantled, with one glaring exception: many states continue to exclude same-sex couples from marriage. The Equal Protection Clause promises gay, lesbian, and bisexual persons, as it promises all persons, “full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society.” *VMI*, 518 U.S. at 532.

Subjecting laws, including marriage laws, that discriminate based on sexual orientation to heightened scrutiny is appropriate so that each person may have equal opportunity to aspire to and to experience a relationship with the person with whom he or she most wishes to build a life.

1. Heightened Scrutiny Has Been Key to Dismantling Sex-Specific Marriage Laws That Once Enforced Gender Stereotypes.

Historically, “the husband and wife [were] one person in law: . . . the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband.”¹ William Blackstone, *Commentaries on the Laws of England* 442 (3d ed. 1768); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11 (2000). For example, wives could not contract or dispose of their assets without their husbands’ cooperation. Even after the Married Women’s

Property Acts and similar laws gave married women increased control over their property in the nineteenth century, many state and federal statutes continued to rely on the notion that marriage imposed separate (and unequal) roles on men and women. *See generally* Deborah A. Widiss, *Changing the Marriage Equation*, 89 Wash. U. L. Rev. 721, 735-39 (2012). Indeed, courts routinely invalidated efforts by spouses to “alter the ‘essential’ elements of marriage” through contractual arrangements seeking to modify its “gender-determined aspects.” Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 Law & Sexuality 9, 15 & n.24 (1991).

An extensive legal framework continued to set out gender-specific rules relating to marriage well into the second half of the twentieth century. In 1971, for example, an appendix to the appellant’s brief submitted by then-attorney Ruth Bader Ginsburg in *Reed v. Reed* listed numerous areas of state law that disadvantaged married women, including: mandatory disqualification of married women from administering estates of the intestate; qualifications on married women’s right to engage in independent business; limitations on the capacity of married women to become sureties; differential marriageable ages; and domiciles of married women following that of their husbands. Brief for Appellant at 69-88 (App.), *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (collecting state laws in each area). Federal

law also persisted in attaching different legal consequences to marriage for men and women. For example, across a variety of federal programs, benefits were provided to wives on the assumption that they were financially dependent on their husbands, but denied to husbands altogether or unless they could prove financial dependence on their wives. *See, e.g., Goldfarb*, 430 U.S. at 201; *Wiesenfeld*, 420 U.S. at 643-44.

In the intervening years, courts applying heightened scrutiny have played a key role in dismantling the legal machinery enforcing separate gender roles within marriage, based on the principle that such legally enforced roles do not properly reflect individuals' "ability to perform or contribute to society" and thus violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also, e.g., Kirchberg v. Feenstra*, 450 U.S. 455, 458-60 (1981) (invalidating Louisiana statute giving the husband as "head and master" the right to sell marital property without his wife's consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147-48 (1980) (rejecting stereotypes regarding wives' financial dependency in the context of differential workers' compensation benefits); *Westcott*, 443 U.S. at 89 (finding unconstitutional a statute's limitation of social security benefits to

unemployed fathers, rather than to both fathers and mothers); *Orr*, 440 U.S. at 281-82 (rejecting stereotypes regarding wives' financial dependency in the context of alimony); *Goldfarb*, 430 U.S. at 206-07 (rejecting “role-typing society has long imposed”) (citation omitted). As a result, men and women entering into marriage today have the liberty under law to determine for themselves the responsibilities each will shoulder regardless of whether these roles conform to traditional arrangements.

2. Like Other Marriage Laws Enforcing Gender-Based Expectations, Laws Excluding Same-Sex Couples From Marriage Cannot Survive Constitutional Scrutiny.

Although the law no longer expressly imposes separate roles on married men and women, marriage laws that discriminate based on sexual orientation continue to rest on gender stereotypes about the preferences, relationship roles, and capacities of men and women that do not reflect the realities of the lives of many individuals. For example, Appellant Schaefer argues in his opening brief, and the Virginia legislature resolved in banning marriage between same-sex couples, that permitting such marriages would “ignor[e] the historic, religious, natural, and societal idea of marriage being between one man and one woman.” Opening Brief of Appellant George E. Schaefer at 37, *Bostic*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Mar. 28, 2014) [hereinafter “Schaefer Br.”]; Appellant McQuigg’s Opening Brief at

94, 96 (Addendum 2), *id.* [hereinafter “McQuigg Br.”] (collecting House resolutions). Such justifications reflect the gender-stereotyped notion that it is “moral” or “natural” for women and men to play different roles within marriage and require skeptical examination under the Equal Protection Clause.

Appellants also argue that procreation is the primary reason for marriage and that “genderless marriage” will not “steer[] marriage into procreation.” McQuigg Br. at 44; Schaefer Br. at 38-39. Same-sex couples, of course, may become parents through adoption, assisted reproduction, or surrogacy, or may be raising biological children from prior different-sex relationships. *See* Brief of Amicus Curiae Gary J. Gates at 12-17, *Bostic*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Apr. 18, 2014). Moreover, as the Supreme Court has recognized, marriage has many other core purposes such as emotional support, public commitment, and personal dedication as well as tangible benefits such as social security and property rights—purposes that have nothing to do with the capacity to bear offspring.⁶ *See Turner v. Safley*,

⁶ Schaefer’s brief implies that permitting marriage between same-sex couples would promote “marriage fraud” in that two same-sex individuals could marry solely “so that they could own property as tenants by the entirety, file joint tax returns, qualify for health benefits, and obtain better insurance rates.” Schaeffer Br. at 39. Only procreation, the brief suggests, can substantiate that marriage is “real.” But our Constitution would never sanction banning marriage between different-sex couples who do not

482 U.S. 78, 95-96 (1987) (holding prison inmates must be allowed to marry, even if marriages are never consummated). Cases holding that married couples have a right to use contraception, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and that women cannot be required to notify their spouses to obtain an abortion, *Casey*, 505 U.S. at 898, further illustrate that marriage and procreation are not coextensive. *See generally id.* at 849 (“[T]he Constitution places a limit on a State’s right to interfere with a person’s most basic decisions about family and parenthood . . . as well as bodily integrity.”). Indeed, a description of marriage as based primarily on procreation is one that most married couples would fail to recognize.

Relatedly, the contention that permitting same-sex couples to marry could harm child welfare because children need to be raised by a mother and a father and that children require “gender differentiated parenting,” *McQuigg Br.* at 40, also rests on pervasive gender stereotypes. Courts repeatedly have struck down laws that are based on the assumption that mothers and fathers play categorically and predictably different roles as

procreate or an assumption that their relationships were “fraudulent” if childless. Any justification of Virginia’s marriage ban as necessary to prevent marriage fraud demeans all couples who would marry on the basis of love alone and imposes dignitary harms of the sort resoundingly rejected by *Windsor*. 133 S. Ct. at 2694-96; *cf. Lawrence*, 558 at 573-75.

parents, rejecting “any universal difference between maternal and paternal relations at every phase of a child’s development.” *E.g.*, *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *see also Wiesenfeld*, 420 U.S. at 652 (“It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.”); *Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972) (finding unconstitutional a state’s presumption that single fathers were unfit to raise their children where single mothers were presumed fit); *Knussman*, 272 F.3d at 634-35 (finding irrebutable presumption that a mother is primary caregiver violated the Equal Protection Clause). Gender-based generalizations about how mothers and how fathers typically parent are an insufficient basis for discriminatory laws even when these generalizations are “not entirely without empirical support.” *Wiesenfeld*, 420 U.S. at 645. Here, empirical evidence does not support the notion that different-sex couples are better parents than same-sex couples; indeed, research supports the conclusion that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted,” and this finding “is accepted beyond serious debate in the field of developmental psychology.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010).

Indeed, preventing same-sex couples from marrying in Virginia inflicts serious harms on same-sex couples and their children. Those harms include not only denial of substantial tangible benefits and responsibilities, but also serious dignitary harms of constitutional dimension. *Windsor*, 133 S. Ct. at 2694-95 (explaining how the refusal of the federal government to recognize the marriages of same-sex couples “demeans” the members of such couples and “humiliates” their children). *Windsor* instructs that, in evaluating for constitutional purposes the harms that discriminatory marriage laws inflict, dignitary harms are of great moment.

One of the most serious ways in which laws that exclude same-sex couples from marriage demean gay, lesbian, and bisexual persons is by enforcing gender-based expectations in the roles that men and women play in families. State enforcement of such stereotypes and expectations—through exclusionary marriage laws and other discriminatory government actions—communicates to gay, lesbian, and bisexual persons, their children, and their communities that there is something wrong with a core part of their identity and being. Such government actions communicate that gay, lesbian, and bisexual persons do not measure up to what a man or a woman should be and that their most important relationships are “less worthy,” *Windsor*,

133 S. Ct. at 2696, than the relationships and marriages of different-sex couples. Such discrimination cannot survive heightened scrutiny.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court apply heightened scrutiny to invalidate Virginia's laws prohibiting same-sex couples from marrying and denying recognition to legal marriages between same-sex couples obtained in other jurisdictions and affirm the judgment of the District Court.

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Respectfully submitted,

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APPENDIX

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or Amicus Curiae in a range of cases before the Supreme Court and Federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of the Constitution's guarantees of equal protection of the laws. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by the Constitution.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is a national nonprofit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and

girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant gender discrimination cases in both state and federal courts, and by engaging in other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment, which often have been justified by or based on stereotypes and biased assumptions about the roles that women (and men) can or should play in the public and private sphere, including within the institution of marriage. ERA is concerned that if laws such as Virginia's, and others like them, are allowed to stand, millions of gay, lesbian, and bisexual persons in the United States will be deprived of the fundamental liberty to choose whether and whom they will marry—a deprivation that offends the core principle of equal treatment under the law.

Legal Momentum

Legal Momentum, formerly NOW Legal Defense and Education Fund, is the nation's oldest women's legal rights organization. Legal Momentum has appeared before courts in many cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in *Nguyen v. INS*, 533 U.S. 53 (2001), and *Miller v. Albright*, 523

U.S. 420 (1998), and as Amicus Curiae in *United States v. Virginia (VMJ)*, 518 U.S. 515 (1996), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Legal Momentum views discrimination on the basis of sexual orientation as a form of sex discrimination, and strongly supports the rights of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

National Association of Women Lawyers

The National Association of Women Lawyers (“NAWL”) is the oldest women’s bar association in the United States. Founded in 1899, the association promotes not only the interests of women in the profession but also women and families everywhere. That has included taking a stand opposing gender stereotypes in a wide range of areas, including Title IX and Title VII. NAWL is proud to have been a signatory to the civil rights amicus brief in the 2003 case of *Goodridge v. Department of Public Health*, where the Massachusetts Supreme Judicial Court found that denial of marriage licenses to same sex couples violated state constitutional guarantees of liberty and equality. Now, over a decade later, NAWL is proud to join in this brief and stand, once again, for marriage equality.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential, including by eliminating gender bias, discrimination, and harassment. These cases could help prevent discrimination in matters involving the most intimate and personal choices that people make during

their lifetime. Personal intimate choices that individuals make for themselves are central to the liberty protected by the Fourteenth Amendment.

Women's Law Project

Founded in 1974, the Women's Law Project ("WLP") is a nonprofit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to Amici Curiae in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised, and *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent

adoption in families headed by same-sex couples. Together with Legal Momentum, WLP represented women in non-traditional employment as Amici Curiae in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual orientation discrimination. WLP also joined as Amici Curiae in *United States v. Windsor*, 133 S.Ct. 2675 (2013), in which the Supreme Court struck down the Defense of Marriage Act's definition of marriage for being in violation of the Fifth Amendment of the Constitution. Because harmful gender stereotypes often underlie bigotry against lesbian and gay people, it is appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.

Williams Institute Scholars of Sexual Orientation and Gender Law

The Amici professors of law are associated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. These Amici have substantial expertise in constitutional law and equal protection jurisprudence, including with respect to discrimination based on sex, sexual orientation, and gender stereotypes. Their expertise thus bears

directly on the constitutional issues before the Court in these cases. These Amici are listed below. Institutional affiliations are listed for identification purposes only.

- Sharon Dolovich

Professor of Law, UCLA School of Law;
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Associate Dean for Graduate Programs and Professor of Law,
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- Nancy Polikoff

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,907 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 this 18th day of April, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving true and correct copy at the addresses listed below:

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I further certify that on this 18th day of April, 2014, I caused eight (8) copies of the foregoing Brief of the National Women's Law Center, Equal Rights Advocates, Legal Momentum, National Association of Women Lawyers, National Partnership for Women & Families, Southwest Women's Law Center, Women's Law Project, and Professors of Law Associated with the Williams Institute as *Amici Curiae* to be delivered via overnight mail to the Clerk of the United States Court of Appeals for the Fourth Circuit.

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