UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case Nos. 14-14061-AA, 14-14066-AA

JAMES DOMER BRENNER, et al., *Plaintiffs-Appellees*,

v.

JOHN ARMSTRONG, et al., *Defendants-Appellants*.

SLOAN GRIMSLEY, et al., *Plaintiffs-Appellees*,

v.

JOHN ARMSTRONG, et al., *Defendants-Appellants*.

Appeals from the United States District Court for the Northern District of Florida

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

Sherrilyn Ifill
Director-Counsel
Janai Nelson
Christina A. Swarns
Ryan P. Haygood *
Rachel M. Kleinman
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
rhaygood@naacpldf.org

* *Counsel of Record*

Marshall W. Taylor
Interim General Counsel
Khyla D. Craine
NAACP
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5767

John Paul Schnapper-Casteras
NAACP Legal Defense & Educational Fund, Inc.
1444 I Street NW
Washington, DC 20005

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici curiae NAACP Legal Defense & Educational Fund and National Association for the Advancement of Colored People, pursuant to Eleventh Circuit Rule 26.1-1, certify that the following persons and entities have an interest in the outcome of this case and/or appeal:

de Aguirre, Carlos Martinez

Albu, Joyce

Allen, Dr. Douglas W.

Alliance Defending Freedom

Alvaré, Helen M.

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc., The

American College of Pediatricians

Anderson, Ryan T.

Andrade, Carlos

Araujo, Dr. Robert John

Armstrong, Dr. John H

Ausley & McMullen, P.A.

Babione, Byron

Basset, Dr. Ursula C.

Bazzell, Harold

Becket Fund for Religious Liberty, The

Beckwith, Dr. Francis J.

Benne, Dr. Robert D

Bledsoe, Schmidt & Wilkinson, P.A.

Bleich, Dr. J. David

Bondi, Pamela Jo

Boyle, David

Bradford, Dr. Kay

Bradley, Gerard V.

Brenner, James Domer

Busby, Dr. Dean

Carroll, Dr. Jason S.

Cere, Dr. Daniel

Christensen, Dr. Bryce

Church of Jesus Christ of Latter-day Saints, The

Clark & Sauer, LLC

Cohen & Grigsby, P.C.

Cohen, Lloyd

Collier, Bob

Concerned Women for America

Cooper, Leslie

Corral, Dr. Hernan

Crampton, Stephen M.

Del Hierro, Juan

Deneen, Dr. Patrick J.

Dent, Jr., George W.

Dewart, Deborah J.

DeWolf, David K.

DeMaggio, Bryan E.

Duncan, Dwight

Duncan, William C.

Dushku, Alexander

Emmanuel, Stephen C.

Erickson, Dr. Jenet J.

Esbeck, Carl H.

Esolen, Dr. Anthony M.

Esseks, James D.

Ethics & Religious Liberty Commission of the Southern Baptist Convention, The

Farr, Thomas F.

Fields, Dr. Stephen M.

Fieler, Dr. Ana Cecilia

Finnis, Dr. John M.

Fitschen, Steven W.

Fitzgerald, John

FitzGibbon, Scott T.

Foley, Dr. Michael P.

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Franck, Matthew J.

Gantt, Thomas, Jr.

Garcimartin, Dr. Carmen

Gates, Gary J.

George, Dr. Robert P.

George, Dr. Timothy

Gibbs, David C.

Girgis, Sherif

Goldberg, Arlene

Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Gunnarson, R. Shawn

Graessle, Jonathan W.

Grimsley, Sloan

Hafen, Bruce C.

Hall, Mark David

Hankin, Eric

Harmer, John L.

Hinkle, Hon. Robert L.

Hitchcock, Dr. James

Hollberg & Weaver, LLP

Howard University School of Law Civil Rights Clinic

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

Jacob, Bradley P.

Jacobson, Samuel

Jacobson Wright & Sussman, P.A.

Jeffrey, Dr. David Lyle

de Jesus, Ligia M.

Jeynes, Dr. William

Johnson, Dr. Byron R.

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Kirton McConkie

Knapp, Dr. Stan J.

Knippenberg, Joseph M.

Kohm, Lynne Marie

Lafferriere, Dr. Jorge Nicolas

Lee, Dr. Patrick

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Liberty, Life, and Law Foundation

Lighted Candle Society

Lindevaldsen, Rena M.

Lopez, Robert Oscar

Loukonen, Rachel Spring

Loupo, Robert

Lutheran Church—Missouri Synod, The

Marriage Law Foundation

Martins, Joseph J.

McDermott, Dr. Gerald R.

McHugh, Dr. Paul

Mihet, Horatio G.

Milstein, Richard

Moon, Jeffrey Hunter

Morse, Dr. Jennifer Roback

Moschella, Dr. Melissa

Moses, Michael F.

Myers, Lindsay

Myers, Richard S.

Nagel, Robert F.

National Association of Evangelicals

National Center for Life and Liberty

The National Legal Foundation

Newson, Sandra

Nicgorski, Walter

Nichols, Craig J.

North Carolina Values Coalition

Pacific Justice Institute

Pakaluk, Dr. Catherine R.

Pecknold, Dr. C. C.

Peterson, Dr. James C.

Picarello, Jr., Anthony R.

Podhurst Orseck, P.A.

Presser, Stephen B.

Price, Dr. Joseph

Rahe, Dr. Paul A.

Regnerus, Dr. Mark

Rhoads, Steven E.

Rosenthal, Stephen F.

Rossum, Ralph A.

Russ, Ozzie

Sauer, D. John

Save Foundation, Inc.

Schaerr, Gene C.

Schaff, Jon D.

Schlairet, Stephen

Schlueter, Dr. Nathan

Schramm, Dr. David

Schumm, Dr. Walter

Scott, Rick

Sevier, Chris

Shah, Timothy Samuel

Shatz, Benjamin G.

Sherlock, Dr. Richard

Sheppard, White, Kachergus and DeMaggio, P.A.

Sheppard, William J.

Smith Appellate Law Firm, The

Smith, Hannah C.

Smith, Michael F.

Smith, Steven D.

Smolin, David M.

Snider, Kevin T.

Somerville, Dr. Margaret

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Sutherland Institute

Tanenbaum, Adam S.

Tilley, Daniel B.

Tollefsen, Dr. Christopher

Trent, Edward H.

Ulvert, Christian

United States Conference of Catholic Bishops

Upham, Dr. David

Wardle, Lynn

Watson, Bradley C.S.

Watts, Gordon Wayne

Weaver, George M.

White, Elizabeth L.

Williams, Dr. Richard N.

Wimberly Lawson Wright Daves & Jones, PLLC

Winsor, Allen C.

Wolfe, Dr. Christopher

Wood, Dr. Peter W.

Neither *amici curiae* have a parent corporation nor issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Since its inception, LDF has worked to eradicate barriers to the full and equal enjoyment of social and political rights, including those arising in the context of partner or spousal relationships. *See, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964).

Founded in 1909, the National Association for the Advancement of Colored People (NAACP) is the country's largest and oldest civil rights organization, incorporated by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of

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

rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used legal prowess to champion equality and justice for all persons. *See generally*, *NAACP v. Alabama*, 357 U.S. 449 (1958); *Morgan v. Virginia*, 328 U.S. 373 (1946); and *Town of Huntington v. Huntington Branch NAACP*, 488 U.S. 15 (1988).

Consistent with their opposition to all forms of discrimination, LDF and NAACP have written or joined as *amicus curiae* in cases across the nation that affect the rights of gays and lesbians, including *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); and *Sevcik v. Sandoval*, 2014 WL 4977682 (9th Cir. 2014). *Amici* have a strong interest in the fair application of the Fourteenth Amendment to the United States Constitution, which provides critically important protections for all Americans, and submits that their experience and knowledge will assist the Court in these cases.

SUMMARY OF THE ARGUMENT

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

Today, a growing chorus of federal courts have applied Equal Protection principles and *Loving* in particular to conclude that bans on same-sex marriage – akin to bans on interracial marriage – are flatly unconstitutional. Four courts of appeals are in harmony on that front. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Sevcik v. Sandoval*, 2014 WL 4977682 (9th Cir. 2014). Only one court of appeals has reached a discordant result, over a vocal dissent

stressing *Loving*. *See DeBoer v. Synder*, No. 14-1341, slip op. at 43-64 (6th Cir. 2014) (Daughtrey, J., dissenting). The Supreme Court now faces several petitions for *certiorari* on essentially the same question at issue here. And while the precise tenor and timing of those appeals are uncertain, this much is clear: 35 states now recognize same-sex marriage, more than twice as many states as allowed inter-racial marriage at the time of *Loving* was decided. *Id.* at 61 (Daughtrey, J., dissenting).

The principles of law set forth in *Loving* continue to resonate for good reason. As federal courts throughout the nation have recognized since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the basic Fourteenth Amendment dictates addressed by *Loving* have broad and lasting importance which are not limited to race. *See Kitchen*, 755 F.3d 1193; *Bostic*, 760 F.3d 352; *Baskin*, 766 F.3d 648; *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014). Thus, contrary to Florida's claustrophobically narrow and ahistorical reading of *Loving*, although the nature of discrimination against lesbians and gay men differs fundamentally from the *de jure* racial segregation, *Loving* governs state actions that deny two

consenting adults – including those of the same sex – the right to marry.

Furthermore, the rationales advanced by Defendants-Appellants and their *amici* in support of the state law prohibiting marriage for same-sex couples bear a striking resemblance to those proffered by Virginia almost half a century ago in defense of the anti-miscegenation statutes at issue in *Loving*. There, as here, the proponents of a ban on marriage for certain couples herald tradition above all else. The origin and legal significance of that tradition seem not to matter; invoking the mantra of "tradition" alone appears to be sufficient for Florida. In *Loving*, as here, the defenders of the facially discriminatory state law also argued that permitting an individual to exercise the right to marry the person of his or her choice would break from history and tradition, and require a fundamental redefinition of the institution of marriage. Perhaps cognizant of the flimsiness of that theory, Florida advances two dubious fallback arguments. Namely, Florida contends that its marriage law should be upheld on generalized federalism grounds or that the law is not discriminatory because the same-sex marriage ban applies "equally" to women and men alike. But the Supreme Court

rejected just these sort of arguments in *Loving*, recognizing that the state there had engaged in just the sort of "discrimination which it was the object of the Fourteenth Amendment to eliminate." 388 U.S. at 11.

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

ARGUMENT

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

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

Although the Fourteenth Amendment was ratified in the wake of the Civil War after a long struggle to eradicate slavery, its reach is not limited to racial discrimination. Over time, the Supreme Court made

[2] *Amici curiae* adopt the argument of Plaintiffs-Appellees that, consistent with *Loving*, Florida's prohibition against marriage for same-sex couples violates the constitutional guarantee of due process. *See* Br. of Plaintiffs-Appellees at 9, 16.

clear that, while the Fourteenth Amendment's anti-discrimination principles were first articulated in cases involving racial discrimination, they are also applicable to governmental classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of certain groups.

The Court has held that the determination of whether the Fourteenth Amendment governs a particular governmental classification should involve consideration of such factors as whether the classification was predicated upon "social stereotypes," *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976), and/or whether it "create[s] or perpetuate[s] the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *United States v. Virginia* (*VMI*), 518 U.S. 515, 534 (1996). Relying on this analysis, the Court has held that the Fourteenth Amendment protects against governmental classifications which discriminate based not only on race, but also on such factors as national origin, sexual orientation, and sex. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual orientation); *VMI*, 518 U.S. 515 (1996) (sex); *Romer v. Evans*, 517 U.S. 620 (1996)

(sexual orientation); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex); *Oyama v. California*, 332 U.S. 633 (1948) (national origin). This interpretation of the Fourteenth Amendment's Equal Protection Clause has been a critical component of our nation's ongoing effort to eliminate entrenched discrimination. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470, 1547 (2004) ("[C]oncerns about group subordination are at the heart of the modern equal protection tradition . . . ."); *cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.").

It is well-settled that courts should apply a more rigorous standard of review to government classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of a certain group. *See, e.g.*, *Loving*, 388 U.S. at 9. A faithful application of these principles reveals that more searching judicial review applies to laws

which burden lesbians and gay men as a group. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014) (equal protection jurisprudence "refuses to tolerate the imposition of a second-class status on gays and lesbians"); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281-82, 1289 (N.D. Fla. 2014) (applying strict scrutiny). This is because, by virtually any measure, lesbians and gay men have been subjected to the kind of systemic discrimination that the Supreme Court has contemplated would trigger heightened Fourteenth Amendment protection. *See Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) ("It is easy to conclude that homosexuals have suffered a history of discrimination . . . . Ninety years of discrimination is entirely sufficient . . . ."), *aff'd on alternative grounds*, 133 S. Ct. 2675 (2013). Even the lone detractors of marriage equality now recognize that there is a shameful history of discrimination and antagonism against gays and lesbians. *See DeBoer*, slip op. at 41.

The state law at issue here plainly burden lesbians and gay men as a class, because they ban lesbian and gay couples from marrying and, thus, exclude them from "participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment

cannot countenance." *Bostic*, 760 F.3d at 384. Accordingly, equal protection principles govern the analysis of the constitutionality of laws that deny the right to be married to lesbian and gay couples who "aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *See Windsor*, 133 S. Ct. at 2689.

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

discriminated on the basis of race in violation of the Equal Protection Clause," but instead "went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." *Id.* at 383. Thus, *Loving* is plainly applicable to laws that seek to deny same-sex couples the right to marry. *Compare Baskin*, 766 F.3d at 666-67 (applying *Loving* to strike down a ban on same-sex marriage), *with DeBoer*, slip op. at 28-29 (endorsing a cramped reading of *Loving*).

The fact that Florida law involves recognition of marriages of lesbian and gay couples who were legally married in other jurisdictions does not alter the conclusion. The Lovings themselves were married in the District of Columbia before returning to Virginia, where they were convicted of violating Virginia's ban on marriage for interracial couples. *Loving*, 388 U.S. at 2-3. The Court in *Loving* struck down not only Virginia's statute imposing criminal punishment on interracial couples who married, but also Virginia's "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages," a scheme that prohibited marriage for interracial couples within Virginia and denied recognition to marriages of interracial couples solemnized

outside Virginia. *See id.* at 4, 12. *Loving* thus applies with equal force to laws, like Florida Code. Art. I, § 27 (and the Florida Constitution), that prohibit recognition of lawful marriages of same-sex couples celebrated outside the state – as it does to laws, like Florida Code §§ 741.212, 741.04(1), and the pertinent provision of the Florida Constitution, that prohibit celebration of those marriages within the state.

Loving did not link the right to marry to a couple's ability to procreate. Although the Lovings happened to have biological children, there is not a single reference to that fact in the Supreme Court's opinion, let alone a suggestion that the Court's decision rested in any part on the Lovings' intention or ability to procreate. Other decisions by the Supreme Court have made clear that the right to marriage is not dependent on the capacity for procreation but is, instead, an "expression[] of emotional support and public commitment." *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that incarcerated persons have the right to marry); *Windsor*, 133 S. Ct. at 2689 (same-sex couples seek the right to marry to "affirm their commitment to one another before their children, their family, their friends, and their community . . . and

so live with pride in themselves and their union"). Indeed, the so-called "responsible procreation" theory, which some states have recently conjured up as the latest supposed justification for exclusionary marriage laws, is "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656.

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

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

The state law here was explicitly fashioned to ensure that lesbian and gay couples would not be afforded the same status and benefits as

---

[3] Florida claims that the Supreme Court's summary dismissal, "for want of a substantial federal question," of a challenge to a decision of the Minnesota Supreme Court – finding that denying a marriage license to a gay couple did not violate the Fourteenth Amendment, *Baker v. Nelson*, 409 U.S. 810 (1972) – somehow compels the same result here. *See* Fla. Br., at 15. They are wrong. Courts have recognized that *Baker* is "no longer authoritative." *Baskin*, 766 F.3d at 660. *See also Windsor*, 699 F.3d at 178-79; *see, e.g.*, *Bostic*, 760 F.3d at 373 (collecting cases); *Kitchen*, 755 F.3d at 1207-08. Likewise, *Loving* struck down Virginia's anti-miscegenation notwithstanding the Court's previous denial of *certiorari* in a similar challenge to Alabama's anti-miscegenation statute, *Jackson v. State*, 72 So. 2d 114 (Ala. Ct. App. 1954), *cert. denied*, 348 U.S. 888 (1954).

heterosexual married couples. As the district court found, "[t]he undeniable truth is that the Florida ban on same-sex marriage stems entirely, or almost entirely, from moral disapproval of the practice." Order Denying the Motions to Dismiss, Granting a Preliminary Injunction, and Temporarily Staying the Injunction, 4:14cv138-RH at 23 (Aug. 21, 2014). This disapprobation creates and perpetuates a social hierarchy that disadvantages gay people based on their sexual orientation. Because, historically, enslaved people and, later, interracial couples were also denied the right to marry, that history is instructive as to how the denial of the right to marry operates to perpetuate and enforce a caste system, which is contrary to the core purpose of equal protection.

"The idea that the freedom to marry is a symbol of American freedom has roots in the institution of slavery," because the denial of the slaves' right to marry was a significant limitation on their freedom and a crucial feature of their dehumanization. Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105, 110-12 (2009); *see also id.* at 142-43 ("[P]rior to

Reconstruction no Southern state, with the arguable exception of Tennessee, granted full legal recognition to marriage between slaves." (footnote omitted)).

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

> show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.

60 U.S. 393, 409 (1857); *see also* Hon. A. Leon Higginbotham, Jr., *Shades of Freedom* 44 (1996) ("Interracial marriages represented a potentially grave threat to the fledgling institution of slavery."). Even after the adoption of the Fourteenth Amendment, anti-miscegenation statutes were upheld by the Supreme Court. This is

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

perhaps unsurprising, given that "when the Fourteenth Amendment was drawn up and ratified, the vast majority of its supporters did not envision it as a bar to antimiscegenation laws." Randall Kennedy, *Interracial Intimacies* 277 (2003). Indeed, racial restrictions on marriage were so prevalent as to constitute a near universal and defining feature of marriage: "*Every state* whose black population reached or exceeded 5 percent of the total eventually drafted and enacted anti-miscegenation laws." *Id.* at 219 (emphasis added) (citing Joseph Golden, *Patterns of Negro-White Intermarriage*, 19 Am. Soc. Rev. 144 (1954)). Ultimately, forty-two states maintained, at one point in time, criminal prohibitions against marriage for interracial couples. *See* David H. Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest 1780-1930* 336 (1987).

Although, in 1883, the Supreme Court held that anti-miscegenation statutes were not discriminatory because they "appl[y] the same punishment to both offenders, the white and the black," *Pace v. Alabama*, 106 U.S. 583, 585 (1883), the *Loving* Court rejected this cramped, formalistic reasoning and recognized that such laws target

individuals and deny them the right to marry strictly on the basis of their race. *See* 388 U.S. at 12. Given the crucial role that anti-miscegenation laws played in maintaining our nation's racial caste system, *Loving* is "one of the major landmarks of the civil rights movement." Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004); *cf.* John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15, 52 (2007) ("Legalizing interracial marriage was an essential step toward racial equality.").

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

miscegenation laws, this Court should reject Florida' prohibitions against same-sex marriage.

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

There is no serious dispute that the state law at issue singles out lesbians and gay men for denial of the right to marry the person of their choice because of their sexual orientation. That the law discriminates on the basis of sexual orientation is plain from the operation of those laws – it prohibits lesbian and gay couples, but not different-sex couples, from marrying. As *Loving* made clear, the Equal Protection Clause prohibits classifications that perpetuate a system of hierarchy based on certain characteristics, *see* Siegel, *supra*, at 1504 & n.125 (citing *Loving*, 388 U.S. at 7, 11) – here, sexual orientation.

Even assuming *arguendo* that these laws are ostensibly facially neutral, because they prohibit both men and women from marrying a person of the same sex,[5] this would not undermine the conclusion that

[5] This "equal application" argument – like the one set forth in *Pace*, where the Court reasoned that anti-miscegenation laws were not discriminatory because they punish both white and black offenders equally, 106 U.S. at 585 – derives from the flawed reasoning in *Plessy v.*

they violate the Equal Protection Clause. As previously noted, *Loving* explicitly rejected the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8.

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

---

Ferguson, which held that segregation was not discriminatory because it applied "equally" to individuals of all races, 163 U.S. 537, 551 (1896).

Sweatt v. Painter, 339 U.S. 629, 635 (1950); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

For the same reason that it was rejected in *Loving*, the contention that there is no sex discrimination in the instant cases because the state law here treats men and women equally must also be rejected in these appeals. *See* Joint Br. of Appellants 27 (hereinafter, "Fla. Br."). *Loving* found that Virginia's anti-miscegenation laws classified – and discriminated against – persons on the basis of race because the question of whether a marriage was legal turned on the races of the adults seeking to exercise their right to marry (*i.e.*, only same-race marriages were permitted). *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd*, 755 F.3d 1193. Florida's laws here similarly classify – and discriminate against – persons on the basis of sex because the question of whether a marriage is legal turns on the sex of the adults seeking to exercise their right to marry (*i.e.*, only different-sex marriages are permitted). Both circumstances violate the Equal Protection Clause.[6]

[6] To be clear, Florida's ban could not pass constitutional muster even under a more relaxed standard of review. *See e.g., Baskin*, 766 F.3d at 656 ("discrimination against same-sex couples is irrational").

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

Florida's primary argument against same-sex marriage is that history and tradition, notionally bolstered by abstract federalism concerns, give it the right to facially discriminate against gays and lesbians. Fla. Br. at 10-21. In order to reach this troubling conclusion, Florida invents suffocatingly narrow readings of almost four decades of case law. Indeed, Florida offers virtually no affirmative reason for why discriminating against gays and lesbians serves any legitimate government interests – beyond vague allusions to wanting to wait and see whether societal norms change, references to the benefits of referenda, and rejected rationales advanced by other states, see, e.g., Fla. Br. at 30-31. *Amici* endorse Plaintiffs-Appellees' arguments about why Florida's ban does not rationally further any legitimate government interest and effectuates inequality. *Amici* write separately to emphasize that versions of these very same arguments were advanced by proponents of anti-miscegenation statutes and expressly rejected by the Supreme Court in *Loving*. *See* 388 U.S. at 11.

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

Florida's appeal to history and tradition to justify their discriminatory restrictions on the right to marriage is nothing new. *See, e.g.*, Fla. Br., at 22, 29; *cf. Kitchen*, 755 F.3d at 1216 (rejecting this approach). In 1955, the Virginia Supreme Court rejected a challenge to its anti-miscegenation statutes on the grounds that the institution of marriage "may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens." *Naim v. Naim*, 87 S.E.2d 749, at 756 (Va. 1955). And, in *Loving* itself, the trial court reasoned that marriage for interracial couples was aberrant and contrary to a proper understanding of the nature of marriage:

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

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

> The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries . . . . They have stood – compatibly – with the Fourteenth Amendment,

> though expressly attacked thereunder – since that Amendment was adopted.

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

In *Loving*, however, the Supreme Court directly rejected the notion that long-held beliefs (including those held by the framers of the Fourteenth Amendment) about the incompatibility of interracial relationships and a traditional understanding of marriage should be controlling. *See* 388 U.S. at 9-10. Significantly, the Supreme Court declared anti-miscegenation statutes unconstitutional in spite of the fact that the majority of states ratifying the Fourteenth Amendment had such laws in place as recently as 1950. *Loving* Appellee's Brief, 1967 WL 113931, at *6.[7] The *Loving* Court held that, regardless of the

[7] Although it is true that a minority of states maintained anti-miscegenation laws when *Loving* was decided, it does not follow that, as Defendants-Appellants contend, Fla. Br. 10-13, striking down the state law at issue here would subvert the federalist, democratic process. *See Bostic*, 760 F.3d at 380; *Kitchen*, 755 F.3d at 1228. Contrary to the notion that invalidating Florida's prohibition against marriage for same-sex couples would overstep the role of the courts, equal protection law locates *in the judiciary* a special responsibility of prodding society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that, in turn, entrench social caste. *See United States v.*

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

Thus, Florida's audacious contention that *Loving* and its progeny "did not examine . . . the Nation's history or tradition, because they did

---

Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (discussing laws that restrict political processes or target discrete and insular minorities). While all branches of government have a role to play in ensuring the equal protection of the laws, the judicial branch is best situated to safeguard historically subordinated groups, including lesbians and gay men, whom majoritarian political processes are often unwilling or unable to protect against constitutional violations. *Nixon v. Condon*, 286 U.S. 73, 89 (1932) ("[Equal protection] lays a duty upon the court to level by its judgment these barriers . . . .").

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

not have to," Fla. Br. 25, is flatly incorrect. Furthermore, not every tradition is has importance of constitutional proportions. As the Seventh Circuit sagely explained in *Baskin*, there are "harmless" traditions, and "mindless" traditions" and also discriminatory traditions. 766 F.3d at 667. The duty of courts is to examine the strength of evidence and legal arguments: "[t]radition per se [] cannot be a lawful ground for discrimination-regardless of the age of the tradition." *Id.* at 666.

The Supreme Court in *Loving* was equally undeterred by the fact that anti-miscegenation statutes enjoyed widespread popular support throughout the vast majority of our nation's history, as demonstrated by the fact that nearly three in four Americans still opposed marriage for interracial couples one year after *Loving* was decided. *See* Gallup, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958* (July 25, 2013) [hereinafter "Gallup, 87% Approve"], *available at* http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx (citing survey results that 73% of Americans opposed

marriage for interracial couples in 1968).[9] Despite widespread disapproval of marriage for interracial couples, "[n]either the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 n.16 (Mass. 2003).[10]

Even beyond the context of *Loving*, the Court has refused to credit the maintenance of tradition as a rational justification that might satisfy the equal protection analysis under the Fourteenth Amendment. *See Lawrence*, 539 U.S. at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *see also Windsor*, 133 S. Ct. at 2689, 2689-93 ("The

---

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

[10] Though constitutional principles, not public opinion polls, govern these cases, today, 55% of Americans support marriage for same-sex couples, *see* Gallup, *Same-Sex Marriage Support Reaches New High at 55%* (May 21, 2014) [hereinafter Gallup, *Same-Sex Marriage* Support], *available at* http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx, a level of support that marriage for interracial couples did not achieve until the mid-1990s, *see* Gallup, 87% Approve, roughly thirty years *after Loving*.

limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion. . . . [This] reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.").

Notwithstanding the Court's repeated rejection of these arguments, Defendants-Appellants now contend that Florida's ban on marriage for same-sex couples is constitutional because marriage for same-sex couples is not a historical right, but a recent appearance. Fla. Br., at 22. This is essentially a call to tradition by another name. It is also wrong. Neither the widespread prevalence of anti-miscegenation statutes, nor the broad public support for such statutes, prevented the Court from vigorously enforcing the principles underlying the Fourteenth Amendment in *Loving*. Express prohibitions against marriage for same-sex couples have a more recent, but no less pernicious, history: "[S]ince 1990 anti-gay marriage statutes or constitutional amendments have been passed by 41 states," *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 327 (D. Conn. 2012),

although more than a dozen have now been repealed. *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *2 & n.6, *9 (W.D. Ky. Feb. 12, 2014). And while a majority of Americans now oppose such prohibitions, fully 42% continue to support excluding same-sex couples from lawful marriage. Gallup, *Same-Sex Marriage Support*, *supra*. Here, as in *Loving*, the equality principles of the Fourteenth Amendment, rather than the longstanding nature of restrictions on marriage, should guide the Court. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era."); *Bostic*, 760 F.3d at 380 ("'[A]ncient lineage of a legal concept does not give it immunity from attack.'" (quoting *Heller v. Doe*, 509 U.S. 312, 326 (1993)).

Despite wild theories that interracial marriage would somehow alter the definition of marriage itself, eliminating the prohibitions against miscegenation hardly doomed the institution of matrimony. This is because recognizing the right of consenting adults to marry one another has no negative effect on any individual marriage or on the institution of marriage as a whole. *See Goodridge*, 798 N.E.2d at 965 ("Recognizing the right of an individual to marry a person of the same

sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."). Indeed, recognizing interracial marriages actually helped bridge racial divides and strengthen the social fabric of our increasingly diverse nation.

B. *Loving* Rejected Claims that Anti-Miscegenation Statutes were Necessary to Protect Children.

Historically, opponents of interracial marriage relied on the "misplaced, but often sincerely held" belief that such unions would be harmful to children.[11] *See* François, *supra*, at 130-33. Indeed, the belief that interracial couples would produce damaged children was one of the rationales proffered by the Virginia Supreme Court in upholding anti-miscegenation statutes in a decision twelve years before *Loving*. *Naim*, 87 S.E.2d at 756 (endorsing "the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.").

[11] Nineteenth century courts upheld anti-miscegenation statutes on the basis of irrational beliefs about harm to children. *See, e.g.*, *State v. Jackson*, 80 Mo. 175, 179 (1883) (interracial couples "cannot possibly have any progeny"); *Lonas v. State*, 50 Tenn. 287, 299 (1871) (interracial couples are "unfit"); *Scott v. State*, 39 Ga. 321, 323 (1869) (biracial children are "unnatural," "sickly," "effeminate," and "inferior").

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

> [T]he state . . . has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'

State v. Brown, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown v. Board of Education*, 347 U.S. 483, 494 (1954)).

In defending its anti-miscegenation statutes before the Supreme Court in *Loving*, Virginia did not rely on the blatantly offensive rhetoric of the Virginia Supreme Court in *Naim*, but it nevertheless cited purportedly scientific sources for its contention that prohibitions against marriage for interracial couples were in the interest of children. These arguments took various forms, including: (1) pseudoscientific assertions that interracial children might be genetically disadvantaged, *Loving* Appellee's Brief, 1967 WL 113931, at *43 ("[W]here two [widely distinct] races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny . . . ." (internal quotation marks

omitted)); (2) cultural arguments that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing, *id.* at *44-45 ("[M]uch that is best in human existence is a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance." (internal quotation marks and citations omitted)); and (3) sociological claims that interracial marriages were more likely to divorce, *id.* at *45, *47-48 (quoting John LaFarge, *The Race Question and the Negro* (1943); Dr. Albert I. Gordon, *Intermarriage – Interfaith, Interracial, Interethnic* 334-35 (1964)).[12]

As LDF stressed at the time, these arguments amounted to an "amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense summoned up to support the theories of white supremacy and racial 'purity.'" Br. of *Amicus Curiae* NAACP Legal Defense & Educ. Fund, Inc., *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113929, at *9-10 (Feb. 20, 1967). Likewise, the Supreme Court rejected these theories as unfounded, post-hoc rationalizations for Virginia's discriminatory marriage laws. *Loving*, 388 U.S. at 11 ("There is

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

patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). With time, it has become patently apparent how offensive and preposterous these theories actually were.

Troublingly, these discredited arguments about the purported harm to children of interracial couples have been recycled in a number of cases across the country about same-sex marriage. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693 (noting that the federal Defense of Marriage Act was intended to express "moral disapproval of homosexuality"); *Bostic*, 760 F.3d at 383 (proponents of Virginia's exclusionary marriage law argued it "safeguard[ed] children by preventing same-sex couples from marrying and starting inferior families"). These arguments are as misplaced today as they were in 1967. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 994 n.20 (S.D. Ohio 2013) ("The overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples." (emphasis omitted)); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d

921, 963 (N.D. Cal. 2010) (citing American Psychiatric Association statement that marriage benefits children of same-sex couples).

Perhaps disheartened by the fact that court of appeals have uniformly rejected such anachronistic conjectures about harm to children – including the lone circuit to uphold marriage bans, *DeBoer*, slip op. at 20, 24 – even Florida cannot bring itself to wholeheartedly validate them. Nonetheless, Florida obliquely alludes to other bases for traditional marriage laws, Fla. Br. 30, and leans on various *amici* to argue that heterosexual-only marriage is somehow better for procreative interests, families, and/or children.[13] Most of these arguments have dwindling credibility or are logically "so fully of holes that [they] cannot be taken seriously." *Baskin*, 766 F.3d at 656. Whatever the pseudoscientific theory *du jour* may be, this Court need not deign to reconsider a rehash of these unsupported and irrational arguments here. *See Kitchen*, 755 F.3d at 1225-26.

[13] *See, e.g.*, Br. of *Amicus Curiae* Lighted Candle Society 2-4; Br. of *Amicus Curiae* Marriage Law Foundation 2; Br. of *Amicus Curiae* Florida Conference of Catholic Bishops 2, 6.

CONCLUSION

Loving v. Virginia dictates the conclusion that consenting adults should not be denied the right to marry solely because of their sexual orientation or sex. Logically and legally, the arguments against interracial marriage and the arguments against same-sex marriage bear striking similarities and fatal flaws. Ultimately, it is hard to imagine that their fate will not be the same. Today, anti-miscegenation laws -- and the repugnant theories that underpinned them -- have largely been relegated to the dustbin of history. We expect that someday soon, the similar, scattershot of arguments against marriage equality will meet a similar fate.

December 23, 2014

Respectfully submitted,

s/ Ryan P. Haygood

Sherrilyn Ifill
Director-Counsel
Janai Nelson
Christina A. Swarns
Ryan P. Haygood
Counsel of Record
Rachel M. Kleinman
NAACP Legal Defense &
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
rhaygood@naacpldf.org

John Paul Schnapper-Casteras
NAACP Legal Defense &
Educational Fund, Inc.
1444 I Street NW
Washington, DC 20005

Marshall W. Taylor
Interim General Counsel
Khyla D. Craine
NAACP
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5767
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Ryan P. Haygood

Ryan P. Haygood
Counsel of Record
NAACP Legal Defense &
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
rhaygood@naacpldf.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 6,826 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Century Schoolbook font, with footnotes in 12-point Century Schoolbook font.

s/ Ryan P. Haygood

Ryan P. Haygood
Counsel of Record
NAACP Legal Defense &
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
rhaygood@naacpldf.org

Counsel for Amici Curiae