UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

SOPHIE ROGERS, BRANDYN CHURCHILL
ASHLEY RAMKISHUN, SAMUEL SARFO
AMELIA SPENCER and KENDALL POOLE

Plaintiffs,

v.

VIRGINIA STATE REGISTRAR

Serve: Janet Rainey, State Registrar, or
authorized recipient of process
Virginia Department of Health
OIM - Division of Vital Records
2001 Maywill Street
Richmond, VA 23218

and

CLERK, ARLINGTON CIRCUIT COURT

Serve: Paul F. Ferguson, Clerk, or
authorized recipient of process
Arlington Circuit Court
1425 North Courthouse Road, #6700
Arlington, VA 22201

and

CLERK, ROCKBRIDGE CIRCUIT COURT

Serve: Michelle M. Trout, Clerk, or
authorized recipient of process
Rockbridge Circuit Court
20 South Randolph Street, #101
Lexington, VA 24450-2552

Defendants.

Case # 1:19-cv-_____

COMPLAINT

Preliminary and Jurisdictional Statement

1. In this lawsuit for declaratory and injunctive relief, plaintiffs ask this court to declare unconstitutional and enjoin defendants' enforcement of Va. Code Ann. §32.1-267(A), requiring that persons seeking a license to marry, under threat of prosecution for perjury, label themselves according to "race," using unscientific, highly controversial, misleading, useless, and tainted categories reflecting Virginia's historical repression of non-white persons.[1] Virginia is one of eight states that impose this requirement by statute. In Virginia, the requirement reflects a regulatory scheme embodied in the Virginia Racial Integrity Act of 1924, originally called "An Act to Preserve the Integrity of the White Race." The requirement to identify by "race" uses terms grounded in ignorance and bigotry, not in science. The statutory scheme is implemented by the clerks of the circuit courts of Virginia as they see fit, using inappropriate categories duly made available by the Virginia Department of Health and Human Resources, and other, more offensive, categories as well. Fifty-two years after the Supreme Court struck down laws preventing the marriage of white and non-white persons, the Commonwealth of Virginia continues to require its residents, including plaintiffs, affirmatively to label themselves, against their will, according to categories rooted in a malignant statutory scheme working to the detriment of non-white persons. This case arises under the First, Thirteenth and Fourteenth

[1]This lawsuit challenges solely the government's right to require people to place themselves into tainted and useless racial boxes as a condition of getting married. Privately and socially, people are free to refer to themselves as they see fit and to choose those with whom they identify. Nor does this lawsuit address what may be permissibly done to address the wrongs inflicted in the past on previously racialized groups. It is not necessary to racialize groups in order to confront the fact and consequences of their victimization. *See* n. 9 at 19, *infra.*

Amendments to the United States Constitution and 42 U.S.C. §1983. This court has jurisdiction under 28 U.S.C. §1331.

Parties

2. Plaintiff Sophie Rogers is an adult resident of Lexington, Virginia. Her ancestry is principally Irish, German and Polish and she has peach-pink skin. She is engaged to be married to plaintiff Brandyn Churchill in Fincastle, Virginia on October 19, 2019.

3. Plaintiff Brandyn Churchill is an adult resident of Lexington, Virginia. His ancestry is English, Scottish and German and he has peach-pink skin. He is engaged to be married to plaintiff Sophie Rogers in Fincastle, Virginia on October 19, 2019.

4. Plaintiff Ashley Ramkishun is a former adult resident of Arlington, Virginia. Her ancestry is Asian Indian and Guyanese and she has dark-brown skin. She is engaged to be married to plaintiff Samuel Sarfo, and would like to do so in Virginia where she lived for several years and where she met her fiancé – but not if she must label herself with a race in order to get a marriage license.

5. Plaintiff Samuel Sarfo is a former adult resident of Arlington, Virginia. His ancestry is Ashanti and Kwahu and he has dark brown skin. He is engaged to be married to plaintiff Ashley Ramkishun, and would like to do so in Virginia where he met his fiancee and where his father and siblings all live – but not if he must label himself with a race in order to get a marriage license.

6. Plaintiff Amelia Spencer, who formerly worked in an Alexandria law firm, is moving to New York City with her boyfriend, plaintiff Kendall Poole. Her ancestry is Irish, English, German, Scottish and Scandinavian and she has peach-pink skin. She plans to marry plaintiff Kendall Poole, and would like to do so in Virginia – but not if she must label herself with a race in order to get a marriage license.

7. Plaintiff Kendall Poole is moving to New York City with his girlfriend plaintiff Amelia Spencer. His ancestry is African and European he has medium brown skin. He plans to marry plaintiff Amelia Spencer and would like to do so in Virginia – but not if he must label himself with a race in order to get a marriage license.

8. Defendant State Registrar is charged by 12VAC5-550-70 to prepare and supply forms for recording vital records and statistics, issue detailed instructions regarding use of those forms, and maintain a system for the collection and preservation of vital records in Virginia, including those on marriages.

9. Defendant Clerk of the Arlington, Virginia Circuit Court is charged by Va. Code Ann. § 20-14 to issue licenses to persons wishing to marry. In discharge of this obligation he provides license applicants, including plaintiffs, with the approved application form, attached as Exhibit 1, setting forth the information required to obtain a license to marry. The form includes a provision for the statement of the applicant's "race." The Clerk also provides the following pre-selected categories from which a choice of race is to be made: American Indian/Alaska Native; African-American/Black; Asian; Caucasian; Hispanic/Latino; Pacific Islander; White; Other.

10. Defendant Clerk of the Rockbridge, Virginia Circuit Court is charged by Va. Code Ann. § 20-14 to issue licenses to persons wishing to marry. In discharge of this obligation he provides license applicants, including plaintiffs, with the approved application form setting forth the information required to obtain a license to marry. The form includes provision for a statement of the applicant's "race." The Clerk also provides a list of 230 (*sic*) pre-selected racial categories from which a choice of race is to be made, including such terms as "Mulatto," "Quadroon," "Octoroon," "Aryan" and "White American." Exhibit 2.

11. All defendants are sued in their official capacities for declaratory and injunctive relief alone.

Claim for Relief

12. Virginia's requirement that "race" be declared by a person seeking to get married in the state is not a recent or local invention, but one with roots in early European attempts at the classification of living things, and the relations of white and non-white Europeans and Americans going back almost 275 years. This complaint demonstrates how this requirement came into being, and how it functions and malfunctions with reference to the right to marry in Virginia. To this end, the following claim for relief is divided into the following sections:

I. Background and Historical Racial Classification (¶¶13-16)

II. Racialization in the United States (¶¶17-22)

III. Virginia's Separation of Races and Restrictions on Marriage (¶¶23-26)

IV. The Classification of Races in Virginia (¶¶27-30)

V. The Bureau of Vital Statistics and the Work of Walter Plecker (¶¶31-40)

I. Background: Historical Racial Classification

13. In 1758, Carl Linnaeus (1707-1778), a Swedish doctor and botanist recognized as the father of taxonomy, published his monumental and highly influential *Systema Naturae*, an effort to classify all living things by a genus name and a species name. Where humanity had traditionally been divided by geography, culture, religion and customs, Linnaeus divided *homo sapiens* into four major and distinct groups ("*taxa"*): *Americanus, Asiaticus, Africanus* and *Europeanus,* distinguished by skin color and by alleged traits decidedly skewed in favor of white Europeans: copper-colored *Homo Americanus* was regulated by customs, sooty *Homo Asiaticus* by opinions, black *Homo Africanus* by caprice, and fair *Homo Europeanus* by laws. Exhibit 3. These groups evolved into the "races" that remain with us today.

14. The first census of the United States, in 1790, substantially tracked Linnaeus' categorization, except as there were very few Asians in the country, that category was not used. The first census thus counted, separately, three groups of persons: free white persons; taxed American Indians and other free persons, including a small number of free blacks; and slaves, all black.

15. Subsequent census categories changed when it came to slaves and their descendants. The 1820 census combined slaves and free blacks into the single category: "Slaves and Free Colored Persons." Following emancipation, the census category for former slaves and their descendants became "Black, Mulatto." In 1890, this changed to "Black, Mulatto, Quadroon or Octoroon." In 1900, it changed to "Black (Negro or of Negro Descent)."

16. Whites remained whites until the term "Caucasian" came into use to denote the same people. "Caucasian" was the invention of Johann Friedrich Blumenbach (1752-1840), a German physician and naturalist often considered the father of physical anthropology. In 1775 he published *On the Natural Variety of Mankind* following a visit to the Caucasus Mountains. He labeled the people there "Caucasians," proposing that they represented the ideal form of humanity, which, in different parts of the earth, had degenerated into Linnaeus' other races. He also added a fifth race – a brown Malay race – that was ultimately also incorporated into the American racial lexicon.

II. Racialization[2] in the United States

17. The division of humankind into distinct, superior and inferior races proved necessary in order to validate the maintenance of slavery in a new nation claimed to be based on the principle that all men were created equal and possessed of unalienable rights to life, liberty, and the pursuit of happiness:

[2]In sociology, racialization is the process of imposing a discrete racial identity on given persons and dealing with them as such, typically malignantly. Hitler racialized Jews.

> [I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.
>
> Yet the men who framed this declaration were great men – high in literary acquirements – high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

Dred Scott v. Sandford, 60 U.S. 393, 410 (1857).

18. In 1790, Congress provided that only "free white persons" could be naturalized as Americans. Act of March 26, 1790, ch. 3, 1 Stat. 103. With one exception for Africans and African-Americans mandated by the Fourteenth and Fifteenth Amendments[3], this remained the law until the passage of the Immigration and Naturalization Act of 1952, 8 U.S.C. §1422.

19. The 1790 restriction of naturalization to "white persons" was charitably characterized as being "most uncertain, ambiguous, and difficult both of construction and application.... There have been a number of decisions in which the question has been treated, and

[3]The Act of July 14, 1870, ch. 254 §7, extended the right of naturalization to "aliens of African nativity and to persons of African descent." Few, if any, Africans undertook to emigrate to this country for about one century. As for African-Americans, following the end of Reconstruction their rights as citizens were grossly truncated by law for about 100 years.

the conclusions arrived at in them are as unsatisfactory as they are varying." *Ex Parte Shahid*, 205 F. 812, 813 (E.D.S.C. 1913) (Syrian not white, notwithstanding that "such a construction would exclude persons coming from the very cradle of the Jewish and Christian religions as professed by the nations of Europe whose descendants form the great bulk of citizens of the United States." *Id.* at 816).

20. In numerous lawsuits brought by persons of various ancestries seeking naturalization as Americans in the years before the requirement of being "white" was dropped, American courts, having nothing better to rely on, routinely referenced "common knowledge," what they called "scientific evidence," perceived "congressional intent," or legal precedent in reaching their decisions. This was not without its difficulties, witness the following holdings:

* Syrians are white. *In re Ellis*, 179 F. 1002, 1004 (D. Or. 1910) ("common knowledge," "congressional intent").
* Syrians are not white. *Ex parte Dow,* 211 F. 486, 490 (E.D.S.C. 1914) ("common knowledge").
* Asian Indians are white. *In re Mohan Singh*, 257 F. 209, 213 (S.D. Cal. 1919) ("scientific evidence").
* Asian Indians are not white. *In re Sadar Bhagwab Singh*, 246 F. 496, 500 (E.D. Pa. 1917) ("common knowledge," "congressional intent").
* Armenians are white. *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925) ("scientific evidence," "common knowledge," legal precedent).
* Afghans are not white. *In re Feroz Din,* 27 F.2d 568 (N.D. Cal. 1928) ("common knowledge").

* Mexicans are white. *In re Rodriguez,* 81 F. 337, 354 (W.D. Tex. 1897) (legal precedent).

* Arabians are white. *Ex parte Mohriez,* 54 F. Supp. 941, 942 (D. Mass. 1944) ("common knowledge," legal precedent).

* Arabians are not white. *In re Ahmed Hassan,* 48 F.Supp. 843, 846 (E.D. Mich. 1942) ("common knowledge," legal precedent).

21. The United States Supreme Court first grappled with the question of who was white in 1922 in *Ozawa v. United States*, producing, for all its efforts, a tautological definition: "The words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race. *** [T]he words 'white person' means a Caucasian...." *Ozawa*, 260 U.S. 178, 197-98 (1922) (member of "Japanese race" not Caucasian, and thus ineligible for citizenship).

22. The following year, in *United States vs. Thind*, the Court expressly noted that the word Caucasian "is at best a conventional term with an altogether fortuitous origin...." *Thind*, 261 U.S. 204, 211 (1923). More broadly, the Court expressly abandoned any effort to impose scientific integrity on the definition of races by federal law.

> The various authorities are in irreconcilable disagreements as to what constitutes a proper racial division. For instance, Blumenbach has 5 races; Keane following Linnaeus 4; Denniker 29. The explanation probably is that 'the innumerable varieties of mankind run into one another by insensible degrees,' and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible. *** What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood.

Id. at 212, 214-15.

III. Virginia's Separation of Races and Restrictions on Marriage

23. As late as 1966, the Commonwealth of Virginia did not agree with the United States Supreme Court that the races "run into each other by insensible degrees." Thus, in a decision affirmed by the Virginia Supreme Court in that year, *Loving v. Virginia,* 206 Va. 924 (1966), the Circuit Court of Caroline County found, rather, that "Almighty God created the races white, black, yellow, malay and red, and placed them on separate continents. *** The fact that he separated the races shows that he did not intend for them to mix." Quoted in *Loving v. Virginia,* 388 U.S. 1, 3 (1967) (reversing 206 Va. 924 (1966).

24. The slave trade having disrupted God's alleged plans for the permanent continental division of the races, Virginia sought to maintain Justice Taney's "indelible marks" separating domestic members of the "unhappy black race" from members of the white race, all for the public good:

> The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent – all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them should be prohibited by positive law and be subject to no evasion.

Kinney v. Commonwealth, 71 Va. 858, 869 (1878) (Black man convicted of lewdly cohabiting with his white wife, whom he had lawfully married in the District of Columbia).

25. Prior to the abolition of slavery, the Virginia General Assembly confirmed that "All marriages between a white person and a negro *** shall be absolutely void without any decree of divorce or other legal process." 31 Va. Code Ann. 109 § 1 (1849). Over one hundred years later, Virginia's Supreme Court, having examined abundant legal authority, agreed that laws banning marriage between blacks and whites were required in order to "preserve the racial

integrity of its citizens." *Naim v. Naim,* 87 S.E.2d 749, 755-56 (Va. 1955). By so "regulat[ing] the marriage relation," the state would not end up with "a mongrel breed of citizens." Virginia was free to "legislate to prevent the obliteration of racial pride," and did not have to "permit the corruption of blood even though it weaken or destroy the quality of its citizenship." *Id*. at 756.

26. To the end that no "mongrel breed of citizens" flourish within the commonwealth, the prohibition on marriage between whites and blacks was underscored in the 1924 Virginia Racial Integrity Act, confirming that it was "unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian." The exception was a bow to the descendants of Pocahontas and John Rolfe. March 20, 1924, ch. 371, 1924 Va. Acts 534.

IV. The Classification of Races in Virginia

27. Since white and black people could not intermarry, "a method of identification as white or colored [had to] be employed." *Morgan v. Virginia*, 328 U.S. 373, 382 (1946). The United States Supreme Court confirmed that this might be done "by definition," noting that: "[a]ny ascertainable Negro blood identifies a person as colored for purposes of separation in some states," while in other states, where no definition was available, "[c]ourt definition or further legislative enactments would be required to clarify the line between the races." In either case, "there may be changes by legislation in the definition." *Id*.

28. The Virginia Supreme Court shared this view:

> If the prevention of miscegenetic marriages is a proper governmental objective, and within the competency of the state to effect, which we hold it to be, then [the statute forbidding such marriages] is a valid enactment unless the classification made by the statute is arbitrary and without reasonable relation to the purpose intended to be effected. *** The only way by which the statute could be made effective was by classification of the races. If preservation of racial integrity is legal, then racial classification to effect that end is not presumed to be arbitrary.

Naim, 87 S.E.2d at 755.

29. Who was "white" was set forth in Virginia's Racial Integrity Act of 1924:

> For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons.

30. The definition of black persons proved complicated. As the United States Supreme Court noted in *Morgan*, 328 U.S. at 381 n.22, as of 1887, in Virginia those who had "one-fourth or more Negro blood" were to be considered colored. This was changed in 1911, when anyone with at least one-sixteenth such "blood" was so classified. 1911 Va. Acts 581 ch. 537. In 1930, the threshold for being held a "colored person" was lowered as far as possible: "Every person in whom there is any ascertainable Negro blood shall be deemed and taken to be a colored person...." 1930 Va. Acts 97 ch. 85 § 67 (codified as Va. Code Ann. §1-14). This provision remained law until being repealed in 2005. 2005 Va. Acts 839 cl. 10.

V. The Bureau of Vital Statistics and the Work of Walter Plecker

31. In 1912, the Virginia General Assembly established the Bureau of Vital Statistics. 1912 Va. Acts. 181. The Bureau was charged to obtain information, *inter alia*, on the color or

race of all decedents and newborns. *Id.* at §§14(8), 14(14), 7(4). In 1918, the General Assembly added marriage records to those maintained by the Bureau of Vital Statistics.

32. In 1919, the year after marriage records were added to the jurisdiction of the Bureau of Vital Statistics, the General Assembly enacted §5074 of the Virginia Code, requiring the court clerk issuing a marriage license to record "the race, whether white or colored," of the applicants. In 1950 this was changed to "white, colored or otherwise." Va. Code Ann. §20-16.

33. The initial Virginia registrar of vital statistics was Walter Plecker (1861-1947), who served in that position until the year before his death. Plecker, a promoter of eugenics and active member of the aggressively racist Anglo-Saxon Clubs of Virginia, saw from review of the data coming into his bureau that the state's law barring the marriage of whites and blacks was being disregarded. Throughout his tenure he obsessed about "the great amount of racial intermixing going on quietly and steadily, apparently unknown to the public generally and without producing any evidence of alarm from our people." Plecker, *Racial Integrity Act of 1924,* Annual Report of the State Dep't of Health *** for the Year Ending June 30, 1927 (Richmond: Dep't of Health 1928) at 156-57.

34. Plecker made it his mission to secure proper enforcement of Virginia's law banning the marriage of whites and non-whites. He championed the campaign, instituted by the Anglo-Saxon Clubs of America, to pass what was initially called "An Act to Preserve the Integrity of the White Race" until it was renamed "An Act to Preserve Racial Integrity."

35. Virginia's Racial Integrity Act was signed into law in March 1924. It provided:

> No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct. If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the

> license until satisfactory proof is produced that both applicants are "white persons" as provided for in this act. The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed.[4]

1924 Va. Acts 534 §4; Exhibit 5 at 1-2.

36. On announcing the passage of the Racial Integrity Act in the *Virginia Health Bulletin* in March, 1924, Plecker expressed particular concern with "10,000 to 20,000, possibly more, near white people who are known to possess an intermixture of colored blood."

> [T]he intermarriage of the white race with mixed stock must be made impossible. *** The Bureau of Vital Statistics, Clerks who issue marriage licenses, and the school authorities are the barriers placed by this law [the Racial Integrity Act] between the danger and the safety of the Commonwealth.

Exhibit 5 at 1, 2. Seeking to preclude the marriage of such persons with genuine whites, he pointed out that while his bureau was in possession of the marriage records for the State back to 1853, they were not indexed for the period before 1917, and that he sought to accomplish such indexing as "an invaluable source of reference for establishing color in many cases." *Id.* at 3.

37. Plecker's insistence on the proper designation of races on marriage licenses led him to challenge marriages and have their participants prosecuted. In September 1937, for example, having been advised by an "informant" of a wedding between one Mohler and one Branham, Plecker wrote to the Botetourt County Circuit Court clerk:

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[4]The "Pocahontas exception" (*see* ¶25) caused severe problems for Plecker, who warned of blacks passing themselves off as Indians and marrying whites: "Some of these mongrels, finding that they have been able to sneak in their birth certificates unchallenged as Indians, are now making a rush to register as white. *** One hundred and fifty thousand other mulattoes in Virginia are watching eagerly the attempt of their pseudo-Indian brethren, ready to follow in a rush when the first have made a break in the dike." Plecker to Local Registrars *et al.*, January [n.d.] 1943, attached hereto as Exhibit 4.

> This family of Mohlers *** belongs to the class of respectable white people.... These Branhams *** are unquestionably mixed bloods, negroid in every appearance, speech and behavior. *** [T]hese mixed breeds *** go around to other counties where they are not known and in their [marriage license] applications swear that they are white. These people are usually well known in their own counties and their clerks will not issue licenses for them to marry white people. *** We are sending a copy of this letter to the Commonwealth's Attorney.

Exhibit 6. Newborns were also subject to Plecker's scrutiny. In April 1924, for example, he wrote as follows to a new mother:

> We have a report on the birth of your child, July 30th, 1923, signed by Mary Gilden, midwife. She says that you are white and that the father of the child is white. We have a correction to this certificate from the City Health Department at Lynchburg in which they say that the father of this child is a negro. This is to give you warning that this is a mulatto child and you cannot pass it off as white. A new law passed by the last Legislature says that if a child has one drop of negro blood in it, it cannot be counted as white. You will have to do something about this matter and see that this child is not allowed to mix with white children. It cannot go to white schools and can never marry a white person in Virginia. It is an awful thing.

Exhibit 7.

38. Plecker's Bureau of Vital Statistics promulgated a statewide application form for marriage licenses expressly referencing the Racial Integrity Act, underlining that a white person was one "with no trace whatsoever of colored blood," calling for the proposed husband to swear that neither he nor his wife-to-be was a "habitual criminal, idiot, imbecile, hereditary epileptic or insane person," and requiring a sworn statement whether each party was "white, colored or mixed." Exhibit 8.

39. Comparing his work in 1943 to that done in Nazi Germany, Plecker avowed that "Hitler's genealogical study of the Jews is not more complete." Exhibit 9 at 3.[5]

40. When the Supreme Court finally threw out Virginia's anti-miscegenation laws in 1967, it characterized the state's statutory scheme regulating marriage, which "arose as an incident to slavery," as follows:

> The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924 . . . The central features of this Act, and current Virginia law, are the absolute prohibition of a 'white person' marrying other than another 'white person,' a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of 'racial composition' to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

Loving v. Virginia, 388 U.S. 1, 6-7 (1967).[6] The Court styled these laws, appropriately enough, "measures designed to maintain White Supremacy." *Id.* at 11.

VI. Conventional Racial Confusion

41. There have been no enduring boundaries between regions, and increasingly people have mixed geographic, and thus genetic, ancestry, resulting in racial fluidity and ambiguity. Mixed genetic ancestry is more prevalent in proportion to historic migration events – voluntary or forced – followed by procreation by persons of different ancestries.

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[5]Courtesy of Albert & Shirley Small Special Collections Library, University of Virginia Library. On American influence on Nazi racial laws, *see* Whitman, *Hitler's American Model* (Princeton Univ. Press 2017).

[6]The Lovings did not challenge the requirement to state their race, only the law forbidding them to marry.

42. The Supreme Court's observation in *Thind, supra,* that "'the innumerable varieties of mankind run into one another by insensible degrees,' and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible," is graphically demonstrated by the photographs of Brazilian photographer Angelica Dass depicting the hues and tints of human beings blending imperceptibly one into the other. Exhibit 10[7]; see also photographs on line by Googling <Humanae Project – Angelica Dass>.

43. Another graphic example of the disutility of conventional "racial" identification are the Biggs twins, born July 3, 2006 in Birmingham, England to a "white" mother and a "black" father. The two girls, fraternal twins, have similar features except that one has fair skin, brown hair and blue eyes, and the other has dark skin, black hair and brown eyes. Conventionally, these fraternal twins are of different races. See, Exhibit 11[8]; see also photos and documentation on line by Googling <Biggs Twins>.

44. The classifications "other," "mixed" or "multiracial" are meaningless and worse than useless for genetic, medical or other scientific purposes, as they purport to impart meaning and significance to a wildly diverse catch-all category of no integrity, uniformity, substance or consequence. Someone whose parents are Chinese and Italian is conventionally "multiracial," "mixed" or "other," as is someone whose parents are Nigerian and native Alaskan. Such a catch-all scheme of categorization is not science and cannot aid science. Members of the "multiracial," "mixed" or "other" groups no more share genotypes than they share any other trait whatsoever, be it genetic, socioeconomic, educational, cultural or other.

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[7]Used by permission of Angelica Dass.

[8]Used by permission of Robin Hammond and *National Geographic.*

45. In this country, since the demise of Jim Crow there exist no uniform standards purporting to establish racial identity. A mother and her child can be of different races. We are free to define ourselves as we wish. Thus, Tiger Woods is a self-described "Cablanasian" (combination of Caucasian, Black, Native American and Asian ancestry). The federal racial guidelines provided by OMB Directive No.15 that frame most non-scientific discourse on race, discussed at ¶¶53-58, *infra*, expressly proclaim that they are not scientifically based, and indeed they are not. None of this is science, and scientists cannot and do not rely on such categorizations – even less on the "mixed" or "other" "races" that also pass as acceptable categories for governmental purposes, including Virginia's marriage license application.

VII. The Scientific Study of Race

46. The study of ancestry is not the study of "race." The study of ancestry is a scientific enterprise addressing a person's entire genetic heritage: the genome. Like all serious science, it organizes verifiable knowledge, in this case about individual or population origins, similarities and dissimilarities. Studies of ancestry give rise to research data that is testable and replicable by other studies. The study of ancestry permits creation of a genetic record of our past demographic and evolutionary history, including migration and inter-marriage. This cannot be done using conventional racial categories. A child may escape its mother's "race" – but it cannot escape her genetic inheritance.

47. Medical genetic research into *homo sapiens* focuses on identifying mutations that can cause health problems, offer health benefits, or both. The identification of a group of persons likely to have that mutation, once identified, is made without reference to "race," a

construct that is irrelevant to the inquiry. It is made with reference to genetic ancestry, not racial identification, *e.g.,* Barack Obama's "white" mother having a "black" child. Genetic research focused on ancestry – not "race" – can identify and lead to treatment of conditions associated with specific population groups. The relevant question for genetic and medical researchers is not what "race" a subject or patient is, but where the subject's parents, grandparents, or great-grandparents, came from.

48. In sum, there is no scientific basis for conventional racial classification, and nearly all human geneticists recognize this fact. The maintenance of conventional racial categories is irrelevant to, not to say disruptive of, scientific, including medical, study of the human species, and cannot give rise to efficacious policies attempting to improve the human condition, particularly in our increasingly intermixed world.[9]

VIII. Virginia's Marriage License Application

49. Persons seeking to wed in Virginia must fill out an application for a marriage license, setting forth information required by law. Pursuant to Va. Code Ann. § 32.1-267(A), Virginia requires identification of race on marriage license applications.

[9]The science here at issue does not address, or adversely impact, efforts to extirpate ongoing racism or the consequences of past racialization. While it is imperative *to be aware of* "race" to extirpate racism, it is unnecessary to *continue to racialize groups* victimized by racism. *See, e.g., Shaarei Tefilla Congregation v. Cobb,* 481 U.S. 615 (1987); *St. Francis College v. Al-Kazraji*, 481 U.S. 604 (1987) (Jews and Arabs not races but protected by 42 U.S.C. §1981 prohibiting race discrimination because they had been racialized.) *See generally, What is **Your** Race?* by Kenneth Prewitt (Princeton Univ. Press 2013), former Director of the United States Census Bureau.

50. Connecticut, Delaware, Kentucky, Louisiana and Minnesota join Virginia in having an express statutorily mandated requirement that race be stated on marriage license applications. New Hampshire requires the clerk of court to fill in such information on the application. Alabama does not have an application form as such, but parties proposing to marry must fill out an Alabama Marriage Certificate that requires a statement of their race. The remaining 42 states and the District of Columbia do not include any such express statutory mandate. The Model (formerly Uniform) Marriage and Divorce Act, drafted in 1970 by the National Conference of Commissioners on Uniform State Laws, and approved by the American Bar Association in 1974, does not require a statement of a marriage applicants' race. See excerpt at Exhibit 12.

51. Pursuant to 12VBAC5-550-70, the Virginia State Registrar prepares, prints, and supplies all blanks and forms to be used in registering, recording, and preserving data of vital records and health statistics or in otherwise carrying out the purpose of the statutes governing vital statistics, including those relative to marriage. The Registrar also prepares and issues such detailed instructions concerning use of all forms as may be required to secure the uniform observance of the statutes and the maintenance of an adequate system for the collection, registration, and preservation of data of vital records throughout the Commonwealth.

52. By statute, all the data to be provided on a marriage license application, including the racial identification, is deemed material. An applicant swears to the responses and may be prosecuted for perjury, as a felony, for providing false information, and if convicted be adjudged "forever incapable of holding any office of honor, profit or trust under the Constitution of Virginia, or of serving as a juror." Va. Code Ann. §18.2-434.

IX Virginia's Current Racial Classifications: OMB Directive No. 15

53. The standard choices that appear on Virginia marriage license applications for "race" track federal categories established in 1977 by the federal Office of Management and Budget ("OMB") in Directive No. 15, *Race and Ethnic Standards for Federal Statistics and Administrative Reporting*. Directive No. 15, created following the passage of civil rights legislation in the 1960s "to provide for the collection and use of compatible, nonduplicated, exchangeable racial and ethnic data by Federal agencies," was broadly adopted by state and local governments and private enterprise in aid of civil rights enforcement. A copy of Directive No. 15 is attached hereto as Exhibit 13.

54. Directive No. 15 expanded the three races dating from 1790 to the four races recognized by Linnaeus plus, from among the entire world's populations, two "ethnic groups": Hispanic and non-Hispanic.

55. Directive No. 15 expressly recognized both its limited purposes and lack of scientific basis, reciting at the very beginning:

> This Directive provides standard classifications for record keeping, collection, and presentation of data on race and ethnicity in Federal program administrative reporting and statistical activities. These classifications should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program. They have been developed in response to needs expressed by both the executive branch and the Congress.

56. In response to criticism for OMB's failure adequately to reflect the realities of the American population, the National Academy of Sciences was charged to review Directive No. 15. Having solicited input from federal agencies, academia and social science research institutions, in 1996 the Academy released its report, *Spotlight on Heterogeneity: The Federal*

Standards for Racial and Ethnic Classification (1996); available on line at https://www.nap.edu/read/9060; excerpt attached as Exhibit 14. The report highlighted dramatic inconsistencies and insufficiencies in Directive No. 15's classificatory scheme, with significant adverse consequences for statistical accuracy and the policy and programmatic consequences that the OMB categories were to serve:

> [T]he current classification *** lacks a consistent logic. Some of the categories are racial, some are geographic, some are cultural. *** The categories now represent a combination of historical, legal, and sociological factors, but that is not explicitly acknowledged. Much of the difficulty in the creation of a consistent, rational classification system lies in the fluid nature of what race and ethnicity are. Race and ethnicity are inherently complex concepts, with multiple sources of definition. There is no scientific basis for the legitimacy of race or ethnicity as taxonomic categories.

Id. at 37.

57. In 1997, OMB published minor changes in its categories in its *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* (Oct. 30. 1997), available at https://www.whitehouse.gov/wp-content/uploads/2017/11/Revisions-to-the-Standards-for-the-Classification-of-Federal-Data-on-Race-and-Ethnicity-October30-1997.pdf. In its revision, OMB repeated its initial caution: "The categories represent a social-political construct designed for collecting data on the race and ethnicity of broad population groups in this country, and are not anthropologically or scientifically based." Exhibit 15 at 3.

58. Like virtually all states, for lack of an alternative classificatory mode, and regardless of the conceded problems with the federal classificatory scheme, Virginia adopted OMB's classifications for use in its own vital statistics regarding race and ethnicity. Thus, the Division of Multicultural Health of the Department of Health recognizes that: "There are five U.S. Census

recognized racial and ethnic minority populations in Virginia: African-American/Black; Hispanic/Latino; Asian-American, Native Hawaiian or Other Pacific Islander; American Indian and Alaskan Native; and People of two or more races." Exhibit 16.

X. Virginia's Current Racial Classifications: Process

59. There is no uniformity even among neighboring Virginia circuits as to the proper terminology to designate race on marriage license applications, although the circuits all track the OMB scheme. The Arlington Circuit Court Clerk, in whose office plaintiffs Spence, Poole, Ramkishun and Safro inquired about marriage licenses, has determined that the appropriate categories in Arlington are: American Indian/Alaskan Native; African American/Black; Asian; Caucasian; Hispanic/Latino; Pacific Islander; Other. *See* Exhibit 1. In Fairfax, an applicant finds no category for Alaskan Natives, Latinos, Pacific Islanders or Others, but finds express reference to both Asian Indians and Asians, and also Mixed. *See*, Exhibit 17. In Alexandria, there are Caucasians as well as Whites, no Latinos or Pacific Islanders, but there are Unknown as well as Mixed. *See*, Exhibit 18. Prince William and Stafford Counties largely track the Arlington categories except that they lack any for Alaska Native and Prince William lacks Other. Loudoun has Pacific Islanders as well as Asians, and Hispanics but no Latinos. The Clerk of the Rockbridge Circuit Court, where plaintiffs Rogers and Churchill sought to secure their marriage license, lists 230 approved races, including "Mulatto," "Quadroon," "Octoroon," "Aryan" and "White American." Exhibit 2.

60. Marriage license applications are obtained from, and when completed submitted to, a Virginia circuit court clerk. The circuit court clerk then submits a copy of each filled-out marriage license application to the State Registrar. Va. Code Ann. §20-16.

61. The Registrar's Office creates statistical tables based on the information provided, which are available to the public at <http://www.vdh.virginia.gov/HealthStats/stats.htm>. The most recent statistics posted on line as of this writing are for 2013. In that year, 40,948 white persons are reported to have been married, 9,702 "black," 4,255 "other," and 243 "unknown." Exhibit 19.

62. The Division provides only the number of Virginia marriages to the National Center for Health Statistics, not any racial data. On information and belief, no study has been conducted by the Virginia Department of Health regarding the racial data collected from Virginia marriage records. Nor has this racial data been the subject of data sharing requests directed to the Division by third parties.

63. On information and belief, neither the circuit clerks' offices nor the Commonwealth of Virginia has used any of the racial information presented on marriage license applications to offer any benefits or protections to any marriage applicant or any other person or group, or otherwise to serve any useful governmental function, to say nothing of a compelling one. The requirement of stating one's race on marriage applications is no more than a retrograde repetition of the provisions of the Racial Integrity Act, notwithstanding Virginia's repeal of its statutory definition of "colored person" in 2005.

VIII. Plaintiffs' Personal Circumstances

64. Plaintiffs have all sought marriage licenses in Arlington Circuit Court or Rockbridge Circuit Court. They have each been given racial categories to choose from if they wish to get a license to get married, pursuant to a statute that puts them at risk of committing a felony for making a choice deemed false.

65. According to the racial categories provided by the Rockbridge Circuit Court clerk's office in Exhibit 2, plaintiff Sophie Rogers may possibly be considered of the "American" race, the "Anglo-Saxon Race," the "Aryan" race, the "Irish" race, the "German" race, the "European" race, the "Mixed" race, the "Polish" race or the "White American" race.

66. According to the racial categories provided by the Rockbridge Circuit Court clerk's office in Exhibit 2, plaintiff Brandyn Churchill may possibly be considered of the "American" race, the "Anglo-Saxon Race," the "Aryan" race, the "English" race," the "European" race, the "German" race, the "Mixed" race, the "Scottish" race or the "White American" race.

67. According to the categories on the marriage application form provided by the Arlington Circuit Court clerk's office, Ms. Ramkishun may possibly be considered of the "Asian" race, the "Latino" race, the "mixed" race, or the "other" race.

68. According to the categories on the marriage application form provided by the Arlington Circuit Court clerk's office, Mr. Sarfo may be possibly considered of the "Black" race, the "mixed" race, or the "other" race.

69. According to the categories on the marriage application form provided by the Arlington Circuit Court clerk's office, Ms. Spencer may possibly be considered of the "Caucasian" race, the "mixed" race, or the "other" race.

70. According to the categories on the marriage application form provided by the Arlington Circuit Court clerk's office, Mr. Poole may be possibly considered of the "Black" race, the "mixed" race, or the "other" race.

71. Fifty-two years after the Supreme Court struck down laws preventing the marriage of white and non-white persons, the Commonwealth of Virginia continues to require plaintiffs, as a condition of exercising their right to marry, affirmatively to label themselves racially, against their will and under oath and at risk of prosecution for a felony for misstatement, according to capricious categories rooted in a malignant statutory scheme.

72. Plaintiffs deem the requirement of racial labeling to be scientifically baseless, misleading, highly controversial, a matter of opinion, practically useless, offensive to human dignity, an invasion of personal privacy compelling an unwanted public categorization of oneself, and reflective of a racist past epitomized by the monomania of Walter Plecker and his ilk. Plaintiffs refuse to acquiesce to this malignant inheritance, and also to differentiate themselves "racially" from humans selecting different racial labels – including, in some instances, from their intended spouses – as a condition of exercising their fundamental right to marry. Each plaintiff has therefore declined to respond to the racial inquiry appearing on the application for a Virginia marriage license.

73. Since plaintiffs refuse to designate their "race" on the mandatory marriage license application, their local circuit court has, in accordance with state law, denied them a license to marry. As a result, in order to marry, plaintiffs, like the Lovings 61 years ago, must acquiesce in an unjustified, offensive and unconstitutional intrusion into their private lives, or, regardless of their desire to be married in Virginia, look elsewhere to get married, as most states do not require

racial identification on a marriage license application. Each plaintiff has suffered injury-in-fact as a result, directly traceable to defendants' actions mandated by state law, that can be redressed by a favorable decision of this court.

Causes of Action

Count I: All Plaintiffs

Substantive Due Process

74. As set forth above, in the absence of any compelling state need, defendants compel plaintiffs, as a condition of exercising their fundamental right to marry, to label themselves against their will according to racial categories that are scientifically baseless, misleading, highly controversial, a matter of opinion, practically useless, offensive to human dignity, and reflective of a malign racist past, where if plaintiffs fail to do so "accurately," they face a statutory risk of conviction of a felony. By so burdening plaintiffs' fundamental right to marry with an irrational and malignant requirement, defendants deprive them, without substantive due process of law, of their right to liberty in violation of the Fourteenth Amendment of the United States Constitution.

Count II: All Plaintiffs

Unconstitutional Compelled Speech

75. As set forth above, in the absence of any compelling state need, defendants compel plaintiffs, in order to exercise their fundamental right to marry, affirmatively to label themselves against their will according to racial categories that are scientifically baseless, misleading, highly controversial, a matter of opinion, practically useless, and reflective of a malign racist past.

Defendants thereby violate plaintiffs' right to free speech protected by the First Amendment of the United States Constitution.

Count III: All Plaintiffs

Unconstitutional Invasion of Privacy

76. As set forth above, in the absence of any compelling state need, defendants compel plaintiffs, in order to exercise their fundamental right to marry, to label and thereby characterize themselves on a public record, against their will, where as plaintiffs would reserve to themselves the independent right to characterize their ancestry as they see fit, when they see fit, and where they see fit. Defendants thereby violate plaintiffs' right to personal privacy protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution and their penumbras.

Count IV Plaintiffs: Ramkishun, Sarfo and Poole

Badges and Incidents of Slavery

77. As set forth above, in the absence of any compelling state need, defendants compel plaintiffs Ramkishun, Sarfo and Poole, in order to exercise their fundamental right to marry, to label themselves according to malignant racial categories that reflect a history of racist doctrines and policies victimizing dark-skinned persons resident in Virginia following the abolition of slavery. Defendants thereby violate their right to freedom from the badges and incidents of slavery guaranteed by the Thirteenth Amendment of the United States Constitution.

* * *

Wherefore, plaintiffs request orders of this court:

* On their motion filed herewith, granting plaintiffs Sophie Rogers and Brandyn Churchill a temporary restraining order or preliminary injunction prohibiting defendants from denying them a marriage license if they fail to label themselves by race, so as to permit their wedding to take place as planned on October 19, 2019,
* Declaring Va. Code Ann. §32.1-267(A) unconstitutional to the extent that it requires persons seeking to obtain a license to marry to state their "race,"
* Enjoining defendants and all others acting in concert with them from enforcing the provisions of Va. Code Ann. §32.1-267(A) requiring a statement of the applicant's "race," and directing the processing of any otherwise proper marriage license application without such statement,
* Enjoining defendants and all other acting in concert with them to prepare and henceforth make available marriage license applications without inquiry into race,
* Granting plaintiffs their reasonable costs, including attorney's fees, and
* Granting them such other relief as is just.

Respectfully submitted,

SOPHIE ROGERS, *et al.,*

By counsel

Dated: September 5, 2019

Counsel for Plaintiffs:

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