IN THE
SUPREME COURT OF VIRGINIA

Record No. 150770

MICHAEL ALLEN LUTTRELL,
***Appellant*,**

v.

SAMANTHA MARY JO CUCCO,
***Appellee*.**

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A. NATURE OF THE CASE.

In an unprecedented decision, the Court of Appeals held as a matter of law that same-sex couples cannot "cohabitate" in a relationship analogous to marriage for purposes of terminating spousal support under Section 20-109(A) of the Code of Virginia, 1950. The court's erroneous conclusion has serious implications that extend far beyond this particular case or this particular statute. Even before taking into account broader constitutional concerns, the Court of Appeals' decision calls out for reversal as a matter of simple statutory interpretation. Code § 20-109(A) requires judges to terminate spousal support when the supported ex-spouse "habitually cohabit[s] with another person in a relationship analogous to a marriage for one year or more." Ignoring the plain text of the statute, which makes no reference to the sex of the cohabiting persons, the Court of Appeals concluded that the General Assembly when it enacted Code § 20-109(A) in 1997 was presumably aware of one Court of Appeals opinion, *Frey v. Frey*, 14 Va. App. 270, 416 S.E.2d 40 (1992), which interpreted a clause in a property settlement agreement ("PSA") defining the phrase "cohabitation, analogous to a marriage" to mean "a status in which a man and a woman live together." App'x at 117; *Luttrell v. Cucco*, No. 1768-14-4,

2015 Va. App. LEXIS 135, at *15-16 (Va. Ct. App. Apr. 21, 2015). The Court of Appeals held that the General Assembly must therefore have intended the phrase used in Code § 20-109(A) relating to cohabitation to have the same meaning. App'x at 117; *Luttrell*, 2015 Va. App. LEXIS 135, at *16. The PSA in *Frey*, however, did not simply contain the phrase "cohabitation, analogous to a marriage." The entire phrase was: cohabitation, analogous to a marriage, *with another man*." *Frey*, 14 Va. App. at 271, 416 S.E.2d at 41 (emphasis added). At the time the General Assembly enacted Code § 20-109(A), neither *Frey* nor any other decision by this Court or the Court of Appeals had held that same-sex couples could not cohabit in a relationship analogous to marriage.

Moreover, even assuming for the sake of argument that same-sex couples could not have cohabited in a relationship analogous to a marriage at a time when they were not legally permitted to marry in Virginia, there is no logical reason why same-sex couples' relationships cannot be "analogous to marriage" now that same-sex marriage is legal in Virginia and every other State. *See Obergefell v. Hodges,* 135 S. Ct. 2584, 2604-05 (2015) (holding that states must issue marriage licenses to same-sex couples and recognize legal same-sex marriages performed in other states); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied* 135 S.

Ct. 286 (Oct. 6, 2014) (holding that Va. Const. Art. I, §15-A and Va. Code Ann. §§ 20-45.2, 20-45.3, and other Virginia laws that bars same-sex marriage or prohibits Virginia from recognizing lawful same-sex marriages from other states violate the constitution). Now that same-sex couples have legally valid marriages in Virginia, virtually every statute pertaining to marriage has applications that are different from those envisioned by the General Assembly at the time of enactment.[1] Taking the Court of Appeals' conclusion to its logical end, each of those statutes would need to be reenacted or challenged in federal court in order to ensure full compliance with *Obergefell*.

The doctrine of constitutional avoidance provides yet another reason why the Court of Appeals' decision must be reversed. The Court of Appeals' erroneous holding unnecessarily brings Code § 20-109(A) into conflict with the rest of Virginia's current marriage laws, which must allow same-sex couples to marry and treat marriages of same-sex couples as equal to those of different-sex couples. If upheld, it is likely to impede Virginia's compliance with the marriage equality mandate of *Obergefell*,

[1] *See, e.g.* Va. Code Ann. § 18.2-362 (bigamy); Va. Code Ann. § 18.2-363 (crossing state lines to commit bigamy); Va. Code Ann. § 20-31.1 (child legitimacy); Va. Code Ann. § 20-40 (fleeing Commonwealth to enter prohibited marriage).

and create unnecessary confusion for government officials, courts, and private parties.

Finally, the nature of the parties' PSA does not affect the outcome of this case. Under this Court's precedents, when marital agreements expressly incorporate the terms of statutes, those agreements must be interpreted according to the law as it exists at the time the PSA is enforced, not the law as it existed at them time when the PSA was executed.

This Court should reverse the Court of Appeals' decision on all three Assignments of Error.

B. MATERIAL PROCEEDINGS BELOW.

This case arises from a request by Appellant Michael Allen Luttrell ("Michael") to terminate his spousal support obligation to Appellee Samantha Mary Cucco ("Samantha") under Code § 20-109(A), pursuant to the couple's Property, Custody, and Support Settlement Agreement ("PSA") and Final Divorce Decree. App'x at 5-31, 32-43.

On July 10, 2014, Michael filed a "Motion for Adjustment and of Contempt" in Fairfax County Circuit Court pursuant to the PSA and Final Divorce Decree requesting to terminate his spousal support obligation to Samantha. App'x at 64-67. The PSA and the Final Divorce Decree recognized that support could be terminated "as a result of action by the

Court taken pursuant to § 20-109 of 1950 Code of Virginia, as amended, relative to cohabitation." App'x at 14, 39.[2] Code § 20-109(A), in turn, states that the Court must terminate spousal support "upon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more . . . ."

The circuit court denied the motion on August 28, 2014, finding that Samantha "lives with another woman and accordingly cannot 'cohabit' within the meaning of § 20-109." App'x at 93. The circuit court also awarded Samantha attorney's fees pursuant to the PSA. App'x at 86-88, 93. Michael objected to the August 28, 2014 Order, App'x at 93, filed a Motion to Stay the Tolling of Rule 1:1 on September 10, 2014, App'x at 94-95, and filed a Motion to Reconsider on September 16, 2014, App'x at 96-104. He also timely filed a Notice of Appeal from the August 28, 2014 Order on September 22, 2014. App'x at 105-06. The circuit court denied Michael's Motion to Reconsider on September 29, 2014. App'x at 107. The Court of Appeals of Virginia affirmed the circuit court's ruling on April 21, 2015. App'x at 108-121; *Luttrell*, 2015 Va. App. LEXIS 135, at *22

[2] The parties' subsequent orders regarding child support did not amend or otherwise affect Michael's spousal support obligation. App'x at 44, 55-61, 77-79.

(finding that trial court did not err in denying Michael's motion to adjust spousal support or in awarding Samantha attorney's fees). Michael now appeals that decision.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by holding that the term "cohabiting with another person in a relationship analogous to a marriage," as used in Virginia Code § 20-109 does not include cohabitation of same-sex couples. App'x at 115-17; *Luttrell*, 2015 Va. App. LEXIS 135, at *12-16.
2. The Court of Appeals erred by holding that the term "cohabitation" as used in the parties' property settlement agreement and divorce decree does not include cohabitation of same-sex couples. App'x at 118; *Luttrell*, 2015 Va. App. LEXIS 135, at *16-17.
3. The Court of Appeals erred by affirming the award of attorney's fees to appellee. App'x at 118-21; *Luttrell*, 2015 Va. App. LEXIS 135, at *17-22.

STANDARDS OF REVIEW

This appeal deals with the construction of a statute (First Assignment of Error) and the construction of a PSA (Second and Third Assignments of Error), both of which are reviewed *de novo. Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007); *Stacy v. Stacy*, 53 Va. App. 38, 43, 669 S.E.2d 348, 350 (2008) (en banc).

STATEMENT OF FACTS

Michael and Samantha were married on January 6, 1992, in Richmond, Virginia. App'x at 1. They executed the PSA on October 15, 2008, App'x at 5-31, which was later incorporated into the Final Decree of Divorce entered by the Fairfax County Circuit Court on November 6, 2008, App'x at 32-43.

The Final Decree of Divorce ordered Michael to pay Samantha $2,450 each month as spousal support. App'x at 39. Support was to continue until November 1, 2016 or "until the death of either party, the remarriage of the wife, or as a result of action by the Court taken pursuant to § 20-109 of 1950 Code of Virginia, as amended, relative to cohabitation." *Id*.

In June 2013, Michael discovered that Samantha had been engaged to and cohabitating with a woman since at least November 24, 2012—a

fact that Samantha has not denied. App'x at 73-74, 93. On July 10, 2014, Michael petitioned the circuit court to terminate his spousal support obligation under Code § 20-109 as contemplated by the Final Decree of Divorce and the PSA. App'x at 64.

On February 13, 2014, the United States District Court for the Eastern District of Virginia held that "Va. Const. Art. I, § 15-A, Va. Code Ann. §§ 20-45.2, 20-45.3, and any other Virginia law that bars same-sex marriage or prohibits Virginia's recognition of lawful same-sex marriages from other jurisdictions [is] unconstitutional." *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014). The Fourth Circuit affirmed, *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014), and the U.S. Supreme Court denied *certiorari*, *Rainey v. Bostic*, 135 S. Ct. 286 (Oct. 6, 2014). On October 7, 2014, Governor Terry McAuliffe ordered that "all entities in the executive branch, including agencies, authorities, commissions, departments, and all institutions of higher education . . . take all necessary steps and appropriate legal measures to comply" with *Bostic.* Commonwealth of Va., Office of the Governor, Exec. Order No. 30 at 1 (Oct. 7, 2014), available at https://governor.virginia.gov/media/3341/eo-30-marriage-equalityada.pdf (last visited Dec. 10, 2015).

For over eight months, Virginia issued marriage licenses to same-sex couples and recognized the marriages of same-sex couples married in other states. Government agencies in Virginia quickly revised their practices to ensure that statutes are enforced consistently with the federal injunction in *Bostic*requiring recognition of the marriages of same-sex couples. The Virginia Department of Taxation announced that "same-sex marriages that are valid under the law of any state will now be recognized for Virginia income tax purposes." Va. Dep't of Taxation, Tax Bull. No. 14-7 (Oct. 7, 2014), available at http://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/14-7-0 (last visited Dec. 10, 2015). The Governor instructed social services agencies that married, same-sex couples may jointly adopt children. Press Release, Commonwealth of Va., Office of the Governor, *McAuliffe Admin. to Local Divisions of Social Services: Same-Sex Spouses can now Legally Adopt* (Oct. 10, 2014), available at https://governor.virginia.gov/newsroom/newsarticle?articleId=6827(last visited Dec. 10, 2015). The Registrar of Vital Records instructed hospitals that "when there are two female spouses in a legal marriage both spouses can be listed on their child's birth certificate when one of the spouses is the gestational mother." Letter from Janet Rainey, Dir. and State Registrar, Div. of Vital Records to Virginia Hospitals (Jan. 22, 2015), App'x at 126.

On June 26, 2015, the Supreme Court of the United States rendered its decision in *Obergefell*, holding that same-sex couples may not be deprived of the fundamental right to marry and invalidating state laws that exclude same-sex couples from civil marriage "on the same terms and conditions" as different-sex couples. 135 S. Ct. at 2604-05.

ARGUMENT

I. The Court of Appeals Erred by Holding that the Phrase "Cohabiting with Another Person in a Relationship Analogous to a Marriage," As Used in Virginia Code § 20-109(A), Does Not Include Cohabitation of Same-Sex Couples. (First Assignment of Error).

A. The Plain Terms of the Statute Make No Distinction Based on the Sex of the Persons Involved.

"[U]nder settled principles of statutory construction, we are bound by the plain meaning of the statutory language." *Ramsey v. Comm'r of Highways*, 770 S.E.2d 487, 489, 2015 Va. LEXIS 43, at *5 (Va. 2015) (quoting *Hale v. Bd. of Zoning Appeals*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009). Courts "must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity." *Payne v. Fairfax Cty. Sch. Bd.*, 288 Va. 432, 436, 764 S.E.2d 40, 43 (2014) (internal quotations omitted).

Virginia Code § 20-109(A), in relevant part, states as follows:

> Upon order of the court based upon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more commencing on or after July 1, 1997, the court shall terminate spousal support and maintenance . . . .

Va. Code Ann. § 20-109(A).

The plain language of this statute clearly allows courts to terminate spousal support when the payee spouse is cohabiting with another person of the same sex "in a relationship analogous to a marriage." The term "cohabit" means "to live together as *or as if* a married couple," or "to live together or in company." Merriam-Webster Dictionary, www.meriam-webster.com (last visited Dec. 10, 2015) (emphasis added).[3] This definition does not indicate that only different-sex couples are capable of living "in the manner of" a married couple, or that a same-sex couple is incapable of such an arrangement.

The statute's use of the term "analogous" further indicates that the character of the relationship—and its functional similarity to marriage—is

[3] This definition has undergone minimal changes since Code § 20-109(A) was enacted in 1997. *See* Merriam-Webster Dictionary 440 (3rd Ed. 1993) (defining "cohabit" as "to live together as or as if husband and wife, or "to live together or in company").

the determinative factor, not the gender of its participants. "Analogous" is commonly understood to mean "susceptible of comparison either in general or in some specific detail" or "having a similar function but differing in structure and origin." Webster's Third New Int'l Dictionary 76 (1981). Cohabiting with another person in a "relationship analogous to a marriage" can thus include two people living together in a relationship that is functionally "similar" to a marriage, but not identical to one in structure and origin. Absent statutory language to the contrary, there is no reason to import the limitation "with a person of the opposite sex" to the phrase "cohabiting in a relationship analogous to marriage."[4]

Accordingly, in states with statutes similar to Code § 20-109(A), courts have interpreted the word "cohabit" to apply to two persons who live together, regardless of sex. For example, in *Garcia v. Garcia*, 2002 UT App. 381, ¶ 5, 60 P.3d 1174, 1176 (Utah Ct. App. 2002), the court considered a statute providing that "alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." Reversing the trial court's holding that a

[4] The "[r]ules of statutory construction prohibit adding language to or deleting language from a statute." *Office of the AG v. State Corp. Comm'n*, 288 Va. 183, 192, 762 S.E.2d 774, 779 (2014) (quoting *Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012).

"'same sex' relationship cannot, as a matter of law, amount to 'cohabitation,'" the court noted that "[t]he plain language of the statute requires only that the alimony payee cohabit 'with another person,' and contains no requirement that the other person be a member of the opposite sex." 2002 UT App. at ¶ 6, 60 P.3d at 1176. *See also In re Marriage of Weisbruch*, 304 Ill. App. 3d 99, 107, 710 N.E.2d 439, 442, 445 (Ill. App. Ct. 1999) (holding that statute terminating spousal maintenance "if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis" applied to cohabitation with person of the same sex).

Similarly, in an opinion interpreting the then-pending constitutional amendment prohibiting recognition of any marriage or similar relationship between same-sex couples, the Attorney General found that the word "cohabit," as used in Virginia's domestic violence statute, applied to any two people sharing a household, regardless of sex. 2006 Op. Va. Atty. Gen. No. 06-003 at 9-12 (Sep. 14, 2006). Therefore, "passage of the amendment . . . would not prevent prosecution of an individual in a same-sex or other unmarried relationship for assault and battery of the other individual pursuant to § 18.2-57.2." *Id.* at 11-12.

Even the Court of Appeals' own precedents have held that for the purposes of interpreting a property settlement agreement, the phrase "cohabit . . . analogous to marriage" encompasses cohabitation by same-sex couples. *See Stroud v. Stroud*, 49 Va. App. 359, 378-79, 641 S.E.2d 142, 151 (2007) (interpreting the phrase "cohabitation with any person to whom [the wife] is not related by blood or marriage in a situation analogous to marriage" as applicable to same-sex cohabitation).[5] If the plain text of the property settlement agreement in *Stroud* includes cohabitation by a same-sex couple, then the plain text of virtually identical language in Code § 20-109(A) compels the same conclusion.

[5] In *Brennan v. Albertson*, No. 2042-11-4, 2012 Va. App. LEXIS 240, at *12-15 (Va. Ct. App. July 24, 2012), the Court of Appeals upheld the circuit court's order terminating spousal support pursuant to Code § 20-109(A), holding that there was clear and convincing evidence that the female supported spouse lived with another woman in a non-romantic, but financially interdependent, relationship and was thus "habitually cohabiting with another person in a relationship analogous to marriage." *Id.* at *12. The assignments of error in *Brennan*, however, did not address whether a same-sex couple could cohabitate in a relationship analogous to marriage under Code § 20-109(A), and the court declined to address that issue *sua sponte*. *Id*. at *16.

B. At the Time the Statute was Enacted, the General Assembly Understood the Term "Cohabit" to Mean Living With a Person of Either Sex.

1. Judicially Determined Meaning

The Court of Appeals ignored the plain text of Code § 20-109(A) because it believed that the General Assembly that enacted that statute should be presumed to have adopted the constrained definition of "cohabitation, analogous to a marriage" in *Frey*. App'x at 117; *Luttrell*, 2015 Va. App. LEXIS 135, at *15-16 (citing *Frey*, 14 Va. App. at 275, 416 S.E.2d at 43). This was an erroneous conclusion.

In *Frey*, the Court of Appeals interpreted a PSA in which spousal support terminated upon the wife's "cohabitation, analogous to a marriage, *with another man*."[6] *Frey*, 14 Va. App. at 271, 416 S.E.2d at 41 (emphasis added). Because the PSA in *Frey* referred specifically to the wife's cohabitation with a man, the holding in that case has no bearing on whether the phrase "habitually cohabiting with another person in a relationship analogous to marriage," as used in a broadly applicable statue,

[6] Similarly, when this Court discussed the meaning of the term "cohabit" in *Schweider v. Schweider*, 243 Va. 245, 248, 415 S.E.2d 135, 137 (1992), it was interpreting a PSA that terminated spousal support based on "the wife's permanent cohabitation *with a male*."

is limited to different-sex cohabitation.[7] Nor does *Frey* provide any evidence that the General Assembly understood the terms used in Code § 20-109(A) so narrowly. If anything, the existence of precedent interpreting "cohabitation with a man" to mean only cohabitation with a man suggests that the General Assembly purposely chose the language "cohabit[] with another *person*" to ensure that it would apply to cohabitation with *any* other person.

In short, the language interpreted in *Frey* was explicitly limited to a woman's cohabitation with a man. The statutory language in Code § 20-109(A) is gender neutral. The Court of Appeals erred by relying on *Frey* to restrict the plain meaning of Code § 20-109(A).

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[7] Virginia courts interpret clauses like the one at issue in *Frey* under the rules of contractual construction. *See Southerland v. Estate of Southerland*, 249 Va. 584, 588, 457 S.E.2d 375, 378 (1995) ("Property settlement agreements are contracts and are subject to the same rules of construction that apply to the interpretation of contracts generally."). Such decisions provide guidance to parties deciding which language to include or exclude from a PSA, but are ultimately limited in their applicability by the court's obligation to discern "the intention of the parties as expressed by them in the words they have used, and . . . [to] say that the parties intended what the written instrument plainly declares." *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). If it was the parties' intention to terminate the wife's spousal support upon her cohabitation in a relationship analogous to marriage *with another man*, as was the case in *Frey*, there would be no reason for the court to consider whether such language would apply to same-sex cohabitation. A broadly applicable statute like Code § 20-109(A), by contrast, provokes that inquiry.

2. Legislative History

"A statute is ambiguous if the text can be understood in more than one way or refers to two or more things simultaneously or when the language is difficult to comprehend, is of doubtful import, or lacks clearness or definiteness." *Covel v. Town of Vienna*, 280 Va. 151, 158, 694 S.E.2d 609, 614 (2010) (quoting *Boynton v. Kilgore*, 271 Va. 220, 227 n.8, 623 S.E.2d 922, 926 n.8 (2006) (internal quotation marks omitted)). As discussed above, the plain meaning of the words used in Code § 20-109(A) is not ambiguous. If this Court disagrees, however, it may consider the legislative history of the statutory language to resolve the ambiguity. *Eberhardt v. Fairfax Cty. Emps. Ret. Sys. Bd. of Trs.*, 283 Va. 190, 196, 721 S.E.2d 524, 527 (2012). The Court "properly may resort to the statutory history and to the enactment process to ascertain legislative intent." *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988); *American Airlines, Inc. v. Battle*, 181 Va. 1, 8, 23 S.E.2d 796, 800 (1943).

Prior to 1997, Code § 20-109 only permitted courts to terminate spousal support upon the death or remarriage of the supported spouse, or a contractual agreement providing otherwise. 1994 Va. Acts ch. 518. The 1997 amendment to Code § 20-109 indicates the General Assembly

considered limiting the scope of the new cohabitation provision to different-sex cohabitation, but ultimately enacted gender-neutral language that, by its plain meaning, includes same-sex cohabitation. As first introduced in the House of Delegates, the 1997 amendment read: "Upon the death, cohabitation with a person of the opposite sex, or remarriage of the spouse receiving support, spousal support shall terminate . . . ." H.B. 1341, 1997 Va. Gen. Assemb., Reg. Sess. (Jan. 22, 1996, Reprinted Dec. 23, 1996). The amendment proceeded to the House Courts of Justice Committee, which proposed the following substitute amendment:

> Unless otherwise provided by stipulation or contract, spousal support and maintenance shall terminate (i) upon the death or remarriage of the spouse receiving support; or (ii) upon order of the court based on clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person for a year or more and that termination of such support would not constitute a manifest injustice based on the relative economic circumstances of the parties. For purposes of this section, "cohabiting with another person" means dwelling together with another adult in a committed, intimate, personal relationship that includes the assumption of joint financial responsibilities. Nothing in this section shall be construed to make conduct lawful that is made unlawful by other statutes.

H.B. 1341, 1997 Va. Gen. Assemb., Reg. Sess. (Dec. 26, 1996) (emphasis added). The House unanimously passed the substitute amendment. H.B. 1341, 1997 Va. Gen. Assemb., Reg. Sess. (Jan. 14, 1997). When the amendment reached the Senate, however, the Senate Committee for

Courts of Justice proposed another substitute amendment, which divided Code § 20-109 into subsections. H.B. 1341, 1997 Va. Gen. Assemb., Reg. Sess. (Feb. 10, 1997). The proposed subsection (A) deleted the House Committee for Courts of Justice's proposed definition of "cohabiting with another person" and modified the cohabitation provision to read: "habitually cohabiting with another person in a relationship analogous to a marriage." *Id*. It also deleted the disclaimer that nothing in the statute could be construed to make unlawful conduct lawful.[8] The Senate Committee for Courts of Justice's proposed amendment was ultimately enacted. 1997 Va. Acts ch. 241.

The legislative history of Code § 20-109(A) illustrates that the General Assembly considered and rejected language that specifically exempted same-sex couples from "cohabitating" by replacing "cohabitation with another person of the opposite sex" with "cohabiting with another person." *Compare* H.B. 1341, 1997 Va. Gen. Assemb., Reg. Sess. (Jan. 22, 1996, *reprinted on* Dec. 23, 1996) *with* H.B. 1341, 1997 Va. Gen. Assemb., Reg. Sess. (Dec. 26, 1996) *and* 1997 Va. Acts ch. 241. By

[8] This provision likely addressed Virginia's prohibition of fornication, Va. Code Ann. § 18.2-344, lewd and lascivious cohabitation, Va. Code Ann. § 18.2-345 (repealed by 2013 Va. Acts. ch. 621), and sodomy, 1993 Va. Acts ch. 450.

including the phrase "cohabiting with another person" the legislators used gender neutral language that clarifies the statute's applicability to same-sex cohabitation.

C. The Court of Appeals' Interpretation of the Word "Cohabit" Defeats the Purpose of the Statute.

The purpose of spousal support is to ensure that a person who was previously dependent upon his or her spouse for support during the marriage can maintain a similar standard of living after a divorce. *Lapidus v. Lapidus*, 226 Va. 575, 580, 311 S.E.2d 786, 789 (1984).[9] Prior to 1997, § 20-109 only permitted termination of a spousal support award when the payee spouse died or remarried. *See* 1994 Va. Acts ch. 518. The purpose of Code § 20-109(A) is to terminate that responsibility when the spouse receiving support is no longer dependent on the former spouse because he is sharing a financially interdependent household with another person to whom he is not married. For purposes of this statutory function, it is

[9] *See also* Fam. Law Section of the Va. State Bar, Rpt. to the Governor and the Gen. Assemb. of Va. on Rehab. Alimony and the Reservation of Spousal Support in Divorce Proceedings at 7, House Doc. No. 55, 1997 Va. Gen. Assemb., Reg. Sess. (1997), available at http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD551997/$file/HD55_1997.pdf (last visited Dec. 10, 2015) (discussing Virginia's public policy toward spousal support).

immaterial whether the spouse is now living with a person of the same sex or different sex.

Interpreting this statute as only applicable to opposite-sex cohabitation leads to absurd results. If an ex-wife receiving spousal support joins the household of a man who pays for all the household expenses and ensures the ex-wife's continued financial wellbeing, the court must terminate any support she receives from her former spouse. If, however, she enters into exactly the same personal and financial relationship with a woman, her ex-husband must continue paying her support, even though it is no longer needed. Essentially, a woman receiving spousal support realizes a windfall if she moves in with a woman instead of with a man. The General Assembly could not have intended such a result.

D. The Court of Appeals' Holding Undermines the Commonwealth's Interest in the Uniformity and Stability of Its Marriage Laws.

The Court of Appeals' erroneous holding has serious implications that extend far beyond this particular case or this particular statute. As noted above, government agencies in Virginia have already revised their practices to ensure that statutes are enforced consistently with the federal injunction requiring recognition of the marriages of same-sex couples and

the mandates in *Obergefell*. *See, e.g.* Va. Dep't of Taxation, Tax Bull. No. 14-7 (Oct. 7, 2014), available at http://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/14-7-0 (last visited Dec. 10, 2015) (announcing that "same-sex marriages that are valid under the law of any state will now be recognized for Virginia income tax purposes"); Press Release, Commonwealth of Va., Office of the Governor, *McAuliffe Admin. to Local Divisions of Social Services: Same-Sex Spouses can now Legally Adopt* (Dec. 10, 2014), available at https://governor.virginia.gov/newsroom/newsarticle?articleId=6827 (last visited Dec. 10, 2015) (instructing social services agencies that married, same-sex couples may jointly adopt children); Letter from Janet Rainey, Dir. and State Registrar, Div. of Vital Records to Virginia Hospitals (Jan. 22, 2015), App'x at 126 (instructing hospitals that "when there are two female spouses in a legal marriage both spouses can be listed on their child's birth certificate when one of the spouses is the gestational mother").

In taking these actions, government agencies correctly interpreted Virginia tax laws (Va. Code Ann. § 58.1-324), adoption laws (Va. Code Ann. § 63.2-1225), and parentage laws (Va. Code Ann. §§ 20-158 (A)(2), 32.1-257(D)) to apply to married same-sex couples, even though the General Assembly did not contemplate such an application at the time the

statutes were enacted. The Court of Appeals' holding in this case accordingly has the potential to introduce chaos into this careful state response to the *Bostic* and *Obergefell* decisions. This Court should reverse the Court of Appeals' decision to prevent the disorder that would ensue.

As the government actions described above illustrate, all Virginia statutes containing words such as "marriage," "spouse," "husband," or "wife," must be understood in light of the legal and factual reality that some married couples in Virginia are of the same sex, and that a married couple is not always a husband and wife, but may be a husband and a husband or a wife and a wife. This is true even though the General Assembly did not foresee these applications of the statutes at the time they were enacted. Indeed, as discussed below, any other interpretation would raise grave constitutional concerns.

E. The Doctrine of Constitutional Avoidance Requires an Interpretation of "Cohabitation" That Includes Living with a Person of the Same Sex.

This Court has repeatedly recognized that "courts have a duty when construing a statute to avoid any conflict with the Constitution." *Commonwealth v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009) (citing cases). Along with the plain language and the statutory purpose,

this duty compels the Court to interpret "cohabitation" to mean living with a person of either sex. Even if it were true that the General Assembly did not originally intend for the term "relationship analogous to marriage" to include same-sex couples when it amended the statute in 1997, the statute would still have to be applied equally to same-sex couples today in order to comply with the Supreme Court of the United States' decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Following *Obergefell*, any statute referring to marriage, or husbands, or wives must be applied in a gender-neutral manner to include same-sex couples—regardless of the original intent of the legislators. A recent case from a federal court in Utah is instructive. *Roe v. Patton*, No. 2:15-CV-00253-DB, 2015 U.S. Dist. LEXIS 96207, at *2-3 (D. Utah July 22, 2015). The plaintiffs in *Roe* were a same-sex couple challenging Utah's refusal to recognize both spouses as parents of their daughter who was conceived with the assistance of donor sperm. *Id.* Utah's assisted-conception statute provides that a "husband" who consents to his wife conceiving a child with donated sperm would automatically be the legal parent of the child. *Id.* at *2, *5-6. Utah officials, however, refused to apply the assisted conception statute to same-sex couples because the statutory text referred to a "husband," not a "wife." *Id.* at *3.

In ruling in favor of the plaintiffs, the U.S. District Court acknowledged that "[t]he assisted-reproduction statutes were enacted in 2008, a time when Utah had a state constitutional amendment limiting marriage to a man and a woman." *Id.* Consistent with the understanding that the only legal marriages in Utah would consist of a man and a woman, the assisted-reproduction statues refer to the spouse of the birth mother as "man" and "husband." 2015 U.S. Dist. LEXIS 96207, at *6. But, the court continued:

> Now that the U.S. Supreme Court has established that States must allow same-sex couples to marry "on the same terms and conditions as opposite-sex couples," *Obergefell v. Hodges,* No. 14–556, 2015 WL 2473451, at *19 (U.S. June 26, 2015), the question becomes whether the statues as written comport with the Equal Protection and Due Process Clauses of the Fourteenth Amendment. May Defendants extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples?

U.S. Dist. LEXIS 96207, at *6. The district court ultimately concluded that the differential treatment was likely unconstitutional under any standard of scrutiny and entered a preliminary injunction prohibiting the State defendants from applying the statute unequally to different-sex and same-sex spouses. *Id.* at *6-7.

The same analysis applies here. Even if the General Assembly in 1997 intended to exclude same-sex couples from the term "relationship analogous to marriage," the "question becomes whether the statues as

written to comport with the Equal Protection and Due Process Clauses of the Fourteenth Amendment." As in *Roe*, applying different rules to different-sex couples and same-sex couples for purposes of whether their cohabiting relationship is analogous to marriage under Code § 20-109(A) violates equal protection under any standard of review.

Obergefell requires that same-sex couples have access not merely to "marriage" in the abstract, but also to "civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605. In explaining why same-sex couples cannot be excluded from marriage, *Obergefell* emphasized that same-sex couples have an equal claim to various state benefits and obligations that are tied to marital status.

> "[W]hile the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

Id. at 2601. The Court emphatically declared that "[t]here is no difference between same- and opposite-sex couples with respect to this principle." *Id.*

Significantly, the list of benefits and obligations include duties imposed after divorce, such as "child custody, support, and visitation rules." *Id.*

One of the "responsibilities" of marriage in Virginia is the obligation to pay spousal support pursuant to Virginia Code § 20-107.1 if the marriage results in divorce and the terms of that statute are satisfied; and one of the "benefits" of marriage is the right to receive those payments. As this Court explained in *Newport v. Newport*, 219 Va. 48, 245 S.E.2d 134 (1978):

> [T]he duty of a husband to support his wife is a moral as well as a legal obligation; it is a marital duty, in the performance of which the public as well as the parties are interested; it is a duty which is an incident to the marriage state and arises from the relation of the marriage.

In 1975, the General Assembly amended the relevant statute to make spousal support equally available to either spouse regardless of gender. *Brooker v. Brooker*, 218 Va. 12, 13 n.2, 235 S.E.2d 309, 310 n.2 (1977). The United States Supreme Court and this Court have subsequently recognized that spousal support and similar obligations must be applied equally to male and female spouses in order to comply with the Fourteenth Amendment. *See Orr v. Orr*, 440 U.S. 268, 279-80 (1979); *Schilling v. Bedford Cty. Mem'l Hosp., Inc.*, 225 Va. 539, 543, 303 S.E.2d 905, 908 (1983).

Under the Court of Appeals holding, however, same-sex couples and different-sex couples are treated unequally with respect to this important "incident of marriage." *Newport*, 219 Va. at 56, 245 S.E.2d at 139. This differential treatment is harmful even in a case such as this one, in which the original marriage involved a different-sex couple and the unequal treatment redounds to the benefit of a person in a same-sex relationship. *Cf. Orr*, 440 U.S. at 281; *Schilling*, 225 Va. at 543-44, 303 S.E.2d at 908. It denies the "equal dignity" of same-sex couples' intimate relationships by perpetuating the stigma that the relationships of same-sex couples are less capable of long-term permanence and stability than the relationships of different sex-couples. Declaring that same-sex couples cannot live together in a relationship analogous to marriage "has the effect of teaching that gays and lesbians are unequal in important respects" and denies them "equal dignity in the eyes of the law." *Obergefell,* 135 S. Ct. at 2602, 2608. *See Orr*, 440 U.S. at 281, 283 (invalidating gender-based alimony statute even though plaintiff was a man because sex classifications "carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection").

Moreover, even if it did not conflict with *Obergefell*, the Court of Appeals' decision unnecessarily injects a gender-based classification into

Code § 20-109(A) that would independently trigger heightened scrutiny under the Fourteenth Amendment. *See Orr*, 440 U.S. at 279, 281; *Schilling*, 225 Va. at 543, 303 S.E.2d at 907. It is difficult to say how a gender distinction in this case could survive heightened scrutiny—or even rational-basis review. Before *Obergefell* it may have been rational to apply the statute only to cohabiting couples who had the legal ability to marry but chose not to do so in order to preserve spousal support from a previous marriage. After *Bostic* and *Obergefell*, however, same-sex couples now have the same option to marry that different-sex couples do. It makes no sense to allow same-sex couples to artificially maintain spousal support by cohabiting instead of marrying while prohibiting similarly situated different-sex couples from doing the same.

The doctrine of constitutional avoidance is yet another reason why the Court of Appeals' erroneous holding must be reversed.

II. The Court of Appeals Erred by Holding the Term "Cohabitation," As Used in the Parties' Property Settlement Agreement and Divorce Decree, Does Not Include Cohabitation of Same-Sex Couples. (Second Assignment of Error).

As the Court of Appeals noted, "the parties' PSA permits the termination of spousal support only upon an '*action by the Court taken pursuant to [Code] § 20-109 . . . relative to cohabitation*.'" In other words,

the parties agreed that Code § 20-109 would govern in any proceeding where husband alleged cohabitation as a basis to terminate wife's spousal support award." App'x at 118; *Luttrell*, 2015 Va. App. LEXIS 135, at *17 (emphasis in original) (citation omitted).

As explained above, the phrase "cohabitation in a relationship analogous to a marriage"—both in 1997 and now—includes cohabiting same-sex couples. But even if same-sex couples could not have cohabited in relationships analogous to marriage before *Bostic* and *Obergefell*, they can now, and the PSA must be interpreted based on the current state of the law—not the state of the law that existed at the time the PSA was executed.

This Court has previously held that when a law changes, marital agreements incorporating that law in a forward-looking manner will change with it. In *Meredith v. Meredith*, the parties' divorce decree incorporated a Stipulation and Agreement dated in 1970, which required the husband to pay child support until their child "shall reach his majority." 216 Va. 636, 636-37, 222 S.E.2d 511, 511 (1976). Child support could only be changed "by further order of the Court." 216 Va. at 636, 222 S.E.2d at 511. In 1972, the General Assembly lowered the age of majority from 21 to 18. 1972 Va. Acts chs. 824, 825. The father then petitioned the court to terminate his

child support obligation as of the child's eighteenth birthday in 1975. 216 Va. at 637, 222 S.E.2d at 511. This Court concluded that "from the wording of the agreement . . . the parties intended not to extend Meredith's duty of child support beyond the period within which . . . he would have been liable under Virginia law for such support" and held that Meredith's child support obligation should terminate when his child reached 18 years of age. 216 Va. at 638, 222 S.E.2d at 512.

Likewise, in *Mack v. Mack*, this Court interpreted a PSA requiring a father to pay his former wife child support for their two "minor children." 217 Va. 534, 534-35, 229 S.E.2d 895, 895 (1976). The parties signed the PSA in 1960 and it became part of their final divorce decree in 1961. *Id*. When the General Assembly lowered the age of majority to 18 in 1972, the father promptly petitioned the court to terminate his child support obligation on the younger child's eighteenth birthday. 217 Va. at 535, 229 S.E.2d at 896. This Court found the PSA did not fix a specific date or time when the father's obligation to pay child support would terminate, and concluded that "[e]ven though the law existing when the contract was executed in June, 1960, specified 21 years to be the age of majority, the terms of the agreement fail[ed] to demonstrate the parties relied on such fact." 217 Va. at 537, 229 S.E.2d at 897; *cf. Paul v. Paul*, 214 Va. 651, 653, 203 S.E.2d

123,125 (1974). Consequently, this Court held that "because minority is a legal status subject to change by the legislature rather than a vested right . . . the parties intended that [the father's] duty to support his "minor" children terminated on the day when, in the absence of any agreement, his legal liability for such support under Virginia law ended—and that was . . . this child's 18th birthday." *Id*.

In sum, just as the marital agreements in *Meredith* and *Mack* incorporated changes to Virginia's age of majority statute by making the father's child support obligation contingent on the supported child remaining under the legal age of majority, the PSA at issue here incorporates changes to Code § 20-109 by making Michael's obligation to pay spousal support contingent upon future action taken by the court pursuant to Code §20-109, as amended, with regard to cohabitation. App'x at 39. Under this Court's precedents in *Meredith* and *Mack*, when marital agreements make support contingent on a legal obligation under a statute, those agreements must be interpreted according to the law as it exists at the time the PSA is enforced, not the law as it existed at them time the PSA was executed. *Meredith*, 216 Va. at 638, 222 S.E.2d at 512; *Mack*, 217 Va. at 537, 229 S.E.2d at 897. Even if same-sex relationships could not have been "analogous to marriage" when Michael and Samantha executed their

PSA in 2008, they must now be interpreted as such pursuant to the mandate in *Obergefell*. As Michael and Samantha's PSA incorporates future changes to Code § 20-109(A), it must be interpreted according to the law as it exists now. This Court should accordingly reverse the Court of Appeals' holding that Code § 20-109(A), as incorporated into the parties' PSA, precludes the trial court from considering whether Samantha's cohabitation with another woman amounts to a "relationship analogous to marriage" under that statute.

III. The Court of Appeals Erred by Affirming the Award of Attorney's Fees to Appellee (Third Assignment of Error).

Because the Court of Appeals erroneously held that Code § 20-109(A) excludes same-sex cohabitation, its affirmance of the circuit court's award of attorney's fees was also erroneous and should be reversed. The PSA contains the following provision:

> The parties agree that any reasonable expenses incurred by a party in the successful enforcement of any of the provisions of this Agreement, or in taking action as a result of the breach of this Agreement by the other party, whether through litigation or other action necessary to compel compliance herewith, or to cure such breach, shall be borne by the defaulting party. Any such expenses incurred by a party in the successful defense to any such action shall be borne by the party seeking to enforce compliance.

App'x at 22, ¶17. The circuit court concluded that Michael's petition to terminate his spousal support obligation to Samantha pursuant to her habitual cohabitation with another person in a relationship analogous to a marriage constituted an attempt to enforce the above provision of the PSA. App'x at 86-88, 93. The Court of Appeals affirmed the circuit court's award of attorney's fees to Samantha, concluding that although the PSA required Michael to obtain a court order to terminate spousal support pursuant to Code § 20-109, his motion to obtain that court order constituted an attempt to enforce the provision of the PSA permitting termination of spousal support payments "'upon an action by the Court taken pursuant to [Code] § 20-109 . . . relative to cohabitation.'" *Luttrell*, 2015 Va. App. LEXIS 135, at *22 (quoting PSA, App'x at 14).

The circuit court and the Court of Appeals erred by concluding that Code § 20-109(A) excludes same-sex cohabitation in a relationship analogous to marriage. This Court should reverse the judgments of the Court of Appeals and the circuit court as to the First and Second Assignments of Error, and accordingly reverse the award of attorney's fees to Samantha.

CONCLUSION

For the reasons stated herein, this Court should reverse the Court of Appeals' decision and remand this case to the circuit court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify compliance with Va. Sup. Ct. R. 5:26 as follows:

1. On December 14, 2015, ten printed copies of this Opening Brief of Appellant, and three copies of the Appendix, were filed by hand-delivery with the Clerk of the Court.
2. An electronic version of this Opening Brief of Appellant and the Appendix, in Portable Document Format (PDF), were filed with the Clerk of the Court on December 14, 2015, in the manner prescribed by the VACES Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES).
3. On December 14, 2015, a printed copy of this Opening Brief of Appellant was sent via U.S. Mail to counsel of record for Appellee:

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4. On December 14, 2015, an electronic version of this Opening Brief of Appellant, in PDF format, was transmitted to counsel of record for the Appellee via electronic mail to lkleiza@curranmoher.com.

5. The portion of this Opening Brief of Appellant that pertains to Virginia Supreme Court Rule 5:26(b) contains 7,556 words and is less than 50 pages.

/s/ Gail M. Deady