IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

VIET ANH VO, Plaintiff, v. REBEKAH E. GEE, Secretary of the Department of Health; DEVIN GEORGE, State Registrar, MICHAEL THIBODEAUX, Iberia Parish Clerk; DIANE MEAUX BROUSSARD, Vermilion Parish Clerk; LOUIS J. PERRET, Lafayette Parish Clerk, Defendants.	Civil Action No. 2:16-CV-15639-ILRL-MBN

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for liberty and equality.

INTRODUCTION

The Fourteenth Amendment's guarantee of substantive liberty, together with its guarantee of equal protection for all persons, protects fundamental rights central to individual dignity and autonomy for all persons—regardless of where they were born—ensuring that the government cannot take fundamental rights away from any group of persons. Louisiana's Act 436, which imposes certain requirements on foreign-born residents of Louisiana who are seeking to marry that do not apply to (or can be waived for) U.S.-born residents of Louisiana, violates these fundamental principles. By discriminatorily imposing these burdensome requirements on foreign-born residents, the law denies individuals born outside of the United States—both citizens and noncitizens alike—the fundamental right to marry, a right that the United States Supreme Court has described as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Louisiana's discriminatory marriage laws "impose stigma and injury of the kind prohibited by our basic charter." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Mr. Vo seeks "not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. [He] ask[s] for equal dignity in the eyes of the law. The Constitution grants [him] that right." *Id.* at 2608.

Ratified 150 years ago, in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights, adding to our nation's charter sweeping guarantees of liberty and equality. The Fourteenth Amendment guarantees fundamental rights and outlaws discrimination against all persons, preventing legislative majorities from oppressing disfavored individuals. The Fourteenth Amendment's universal sweep protects all persons, "no matter what his color, no matter beneath what sky he may have been born, . . . no matter how poor, no matter how friendless, no matter how ignorant . . . ." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). The constitutional right to marry may not be denied to foreign-born residents of Louisiana simply because they were never issued birth certificates or passports in the country of their birth. Those born overseas have the same right to marry as those born in the United States.

Act 436's purposeful discrimination "serves to disrespect and subordinate" immigrants in Louisiana and to prevent them from enjoying the full promise of liberty by "lock[ing] them out of a central institution of the Nation's society." *Obergefell*, 135 S. Ct. at 2604, 2602. Louisiana insists that the requirement of a birth certificate is necessary to prevent "marriage fraud," but this is a sham. As Mr. Vo's preliminary injunction motion explains, "the 'fraudulent marriages' that the Act seeks to address – those to obtain an immigration benefit . . . – already are addressed by the federal immigration laws," and Act 436 is "vastly overinclusive, preventing far more people from obtaining marriage licenses than those seeking to commit fraud." Pl.'s Mem. (D.E. 34-1) 17. As the Supreme Court has explained, a law cannot stand where "there [i]s no significant . . . problem that the new law help[s] to cure," *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016), and there is a "total disconnect," *Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (en banc), *cert. denied*, 580 U.S. ___ (2017), between the law's purported purpose and its means

of achieving that purpose. Here, there is such a "disconnect" between the law's anti-fraud purpose and its unyielding requirement of a birth certificate and a passport, especially as applied to U.S. citizens like Viet Vo. Even under rational basis review, a court need not accept "nonsensical explanations for regulation." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013). But that is all Louisiana has offered as justification for its decision to take the right to marry away from state residents who, like Mr. Vo, were born outside the United States and lack a birth certificate or passport. The state has failed to explain why Mr. Vo and others like him cannot use other official documentation—such as a social security card or driver's license—in exercising the right to marry.

There is no doubt that Louisiana has wide latitude to regulate the institution of marriage. But where constitutional limits apply, state prerogatives necessarily end. As the Supreme Court's cases make clear, even when states act within an indisputably state sphere, they cannot write inequality into law or deny minorities core aspects of liberty. *See United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons"). There is no "marriage exception" to the Fourteenth Amendment's guarantee of equality under the law. On the contrary, as the Supreme Court has stated, the right to marry is "fundamental under the Constitution," *Obergefell*, 135 S. Ct. at 2599, and is "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Act 436's discriminatory denial of the right to marry cannot be squared with the Fourteenth Amendment's text and history, which ensure the full scope of liberty and equality under the law to foreign-born residents of Louisiana. Act 436 should be preliminary enjoined.

ARGUMENT

I. THE FOURTEENTH AMENDMENT ENSURES THE FULL PROMISE OF LIBERTY AND EQUAL DIGNITY FOR ALL.

Drafted in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg. Central to that task was the protection of the full range of personal, individual rights essential to liberty.

To achieve these ends, the Framers of Section 1 of the Fourteenth Amendment chose sweeping language specifically intended to protect the full panoply of fundamental rights for all:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. These guarantees "are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other." *Obergefell*, 135 S. Ct. at 2603. History shows that the Framers of the Fourteenth Amendment wrote Section 1's overlapping guarantees to ensure the full promise of liberty and broadly secure equal rights for all persons—whether born in this land or elsewhere—and to give the courts a vital role in ensuring that states respect basic constitutional principles of equal liberty, dignity, and autonomy.

The original meaning of Section 1's overlapping guarantees was to "forever disable" the states "from passing laws trenching upon those fundamental rights and privileges which pertain to

citizens of the United States, and to all persons who may happen to be within their jurisdiction." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). "The great object of the first section of th[e] amendment," Senator Jacob Howard explained, is "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* The Fourteenth Amendment wrote into the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty." *Id.* at 1255. In this way, Section 1 gives to "the humblest, the poorest, the most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766; *see* Jack M. Balkin, *Living Originalism* 198 (2011) (explaining that the overlapping guarantees of Section 1 "together . . . were designed to serve the structural goals of equal citizenship and equality before the law"). In its design, the Fourteenth Amendment ensured that states would respect the rights of all, "no matter what his color, no matter beneath what sky he may have been born, . . . no matter how poor, no matter how friendless, no matter how ignorant . . . ." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866); *see Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.").

Erasing the stain of slavery—the ultimate violation of personal liberty—from the Constitution, the Amendment's Framers affirmed that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property." Cong. Globe, 39th Cong., 1st Sess. 1832, 1833. Among these personal rights was the right to marry. *Id.* at 504 (explaining that the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a

family, a wife, children, home"); *id.* at 343 ("[T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land[.]"); Speech of Gov. Oliver Morton at Anderson, Madison Cnty., Indiana (Sept. 22, 1866), *in* Cincinnati Commercial, Nov. 23, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 35 (1866) ("We say that the colored man has the same right to enjoy his life and property, to have his family protected, that any other man has."). For good reason, the Supreme Court has long held that "marriage is fundamental under the Constitution," *Obergefell*, 135 S. Ct. at 2599, because of the "abiding connection between marriage and liberty," and the fact that "[c]hoices about marriage shape an individual's destiny." *Id.*; *see Loving*, 388 U.S. at 12; *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987).

The Fourteenth Amendment not only protects substantive fundamental rights, it also guarantees to all persons residing in the United States—whether born in the United States or in a foreign country—the equal protection of the laws, forbidding a state from enacting a law, such as Act 436, that discriminatorily denies the right to marry to certain groups or classes. The Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," secures the same rights and same protection under the law for all men and women, of any race, whether young or old, native or foreign born, citizen or alien, gay or heterosexual. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."); Cong.

Globe, 39th Cong., 1st Sess. 1294 (1866) ("Who will say that Ohio can pass a law enacting that no man of the German race . . . shall ever own any property in Ohio, or shall ever make a contract in Ohio, or ever inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law, and exclude a German citizen . . . because he is of the German nationality or race, then may every other State do so."). As history shows, the original meaning of the equal protection guarantee "establishes equality before the law," *id.* at 2766, "abolishes all class legislation in the States[,] and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* The meaning of equal protection, as the debates over the Fourteenth Amendment show, was that the "law which operated upon one man shall operate *equally* upon all," *id.* at 2459 (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction." *Id.* at 2502; *see Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,456) (Field, C.J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . .").

Importantly, the Fourteenth Amendment's broad language was no accident. When the 39th Congress drafted the Fourteenth Amendment, it chose universal language specifically designed to secure equal rights for *all*. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 260-61 n.* (1998). Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, *see* Benjamin B. Kendrick, *The Journal of the Joint Committee of*

Fifteen on Reconstruction, 39th Congress, 1865-1867, at 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152 (Kennedy, J., concurring), was intended to secure equal rights for all.

The Fourteenth Amendment's Framers crafted this broad guarantee of equality for all persons to bring the Constitution back into line with these fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our nation's founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong. Globe, 39th Cong., 1st Sess. 2961 (1866), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life,

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

Indeed, from the very beginning, the Fourteenth Amendment's guarantee of equality was particularly important to ensure that states respected the equal rights of immigrants. Congressman John Bingham, one of those responsible for drafting the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers, within this land . . . have equal protection in every State in this Union in the rights of life and liberty and property[.]" *Id.* at 1090. Indeed, in 1870, two years after the Fourteenth Amendment's ratification, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the Enforcement Act of 1870. This Act secured to "all persons within the jurisdiction of the United States" the "same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien." Enforcement Act of 1870, 16 Stat. 140, 144 (1870); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are."); *id.* at 3871 (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws"). As this history shows, the Fourteenth Amendment's guarantee of equality "extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory." *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

In short, the Fourteenth Amendment established as constitutional mandates the protection of substantive fundamental rights, including the right to marry, and equality under the law, forbidding the people of a state from denying any group of persons their fundamental rights. Under the Amendment's plain text and original meaning, this sweeping, universal guarantee of liberty and equality applies to Viet Vo and to all other foreign-born residents of Louisiana who wish to exercise the right to marry, one of the "attributes of a freeman according to the universal understanding of the American people[.]" Cong. Globe, 39th Cong., 1st Sess. 504 (1866).

II. ACT 436 CANNOT BE SQUARED WITH THE FOURTEENTH AMENDMENT'S UNIVERSAL GUARANTEE OF LIBERTY AND EQUALITY.

Act 436 violates the fundamental principles of liberty and equality inscribed in the Fourteenth Amendment. It denies individuals born outside of the United States—both citizens and noncitizens alike—the fundamental right to marry, arbitrarily requiring individuals to provide a certified birth certificate as a precondition to exercising the fundamental right to marry, and permitting only individuals born in the United States or one of its territories to seek a waiver of the birth certificate requirement. Likewise, Act 436 requires foreign-born residents to present a valid passport, but makes no similar demand of those born in the United States. The Act thus facially discriminates against foreign-born residents, effectively imposing an unwarranted marriage ban on those who, like Viet Vo, were never issued a birth certificate in their country of origin. Under our Constitution, the denial of a fundamental right to any group of persons "because of their ancestry" is "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *see Hernandez v. Texas*, 347 U.S. 475, 479 (1954) ("The exclusion of otherwise eligible persons from jury service solely

because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.").

Under any standard of review, Act 436 is constitutionally infirm. In enacting Act 436, the Louisiana legislature insisted that its discriminatory restrictions on the right to marry were necessary to combat immigration-related marriage fraud, but this is a sham. As Mr. Vo's preliminary injunction motion explains, "the 'fraudulent marriages' that the Act seeks to address – those to obtain an immigration benefit . . . – already are addressed by the federal immigration laws," and Act 436 is "vastly overinclusive, preventing far more people from obtaining marriage licenses than those seeking to commit fraud." Pl.'s Mem. (D.E. 34-1) 17. As the Supreme Court has explained, a law cannot stand where "there [i]s no significant . . . problem that the new law help[s] to cure," *Whole Women's Health*, 136 S. Ct. at 2311, and there is a "total disconnect," *Veasey*, 830 F.3d at 262, between the law's purported purpose and its means of achieving that purpose. Here, there is such a "disconnect" between the law's purported purpose and its unyielding requirement that those born outside the United States must provide a birth certificate and a passport. An individual who lacks a birth certificate or passport—particularly where, as here, he was not issued a birth certificate at birth—may not be denied his fundamental right to marry, which has an "abiding connection [to] . . . liberty," "shape[s] an individual's destiny," and "supports a two-person union unlike any other in its importance to the committed individuals." *Obergefell*, 135 S. Ct. at 2599.

There is no legitimate basis for denying Viet Vo and other foreign-born residents of Louisiana the right to marry when they can present other official documentation confirming their identities, and when U.S.-born state residents are permitted to waive the birth certificate requirement and do not have to comply with the passport requirement at all. The state has wholly

failed to explain why the ample other means of ensuring the identity of a marriage applicant do not satisfy whatever legitimate interests it may possess. By targeting foreign-born residents of Louisiana—including those such as Viet Vo who are, in fact, U.S. citizens—Act 436 "serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry." *Id.* at 2604. Act 436 denies individuals like Viet Vo the "equal dignity in the eyes of the laws," *id.* at 2608, that the Fourteenth Amendment guarantees to all regardless of their ancestry. It should be preliminarily enjoined.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with L.R. 5.4, I hereby certify that on February 8, 2017, copies of the foregoing have been served on all parties, or their attorneys, via the court's CM/ECF system or by mail.

Dated: February 8, 2017

/s/ Ellie T. Schilling
Ellie T. Schilling