IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

CASIE JO MCGEE and SARA ELIZABETH ADKINS; JUSTIN MURDOCK and WILLIAM GLAVARIS; and NANCY ELIZABETH MICHAEL and JANE LOUISE FENTON, Individually and as next friends of A.S.M., minor child,

Plaintiffs,

v. **Civil Action No. 3:13-24068**

KAREN S. COLE, in her official capacity as CABELL COUNTY CLERK; and VERA J. MCCORMICK, in her official capacity as KANAWHA COUNTY CLERK,

Defendants.

and

STATE OF WEST VIRGINIA,
Defendant-Intervenor.

STATE OF WEST VIRGINIA'S MEMORANDUM SUPPORTING ITS CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this State and throughout the country, citizens and elected officials have been and will continue to be engaged in the important and fundamental policy debate over the definition of marriage. As the Supreme Court recently explained in *United States v. Windsor* the long-held view "throughout the history of civilization" is that marriage is between a man and a woman. 133 S. Ct. 2675, 2689 (2013). And for some, there is "a new perspective" that "same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other." *Id.* In West Virginia, that debate has been resolved nearly unanimously by the Legislature—at least for now—in favor of the traditional definition of marriage.

Plaintiffs now seek this Court's intervention in that debate, but not every question of policy is a constitutional one. Indeed, "extending constitutional protection to an asserted right or liberty interest" often "place[s] the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). It is not for this Court to determine whether West Virginia's marriage laws are sound or unsound policy. The issue here is whether those laws violate the Constitution. They do not.

This Court should grant the State summary judgment and deny Plaintiffs summary judgment. As a threshold matter, even if the Constitution compels States to permit same-sex marriage, the State is entitled to judgment because Plaintiffs have failed to sue the state officials responsible for implementing the challenged laws. In addition, this case is controlled by the Supreme Court's long-standing decision in *Baker v. Nelson*, 409 U.S. 810 (1972), the binding nature of which was recently reaffirmed by the Supreme Court's stay order in *Kitchen v. Herbert*. Finally, whether sound policy or not, the challenged laws easily survive rational basis

review under the Constitution's Equal Protection and Due Process Clauses of the U.S. Constitution.

BACKGROUND

I. Marriage in West Virginia

The act of marriage in West Virginia is a two-step statutory process, in which it "must be solemnized under a marriage license issued by a clerk of the county commission." W. Va. Code § 48-2-101. In the first step, a couple submits an application to a county clerk, who issues a marriage license, *id.* § 48-2-102, without which any marriage would be "void," *id*. § 48-2-101. The license permits a state-authorized celebrant to perform the second step: solemnization. *Id.* § 48-2-201. The celebrant performs the marriage ceremony, keeps a record of the ceremony, endorses the license, and forwards the license to the county clerk. *Id*. §§ 48-2-202, 48-2-405. If a state-authorized celebrant does not solemnize the authorized marriage within sixty days, "the license is null and void." *Id*. § 48-2-202(c).

Among the statutes at issue in this case are West Virginia Code §§ 48-2-104 and 48-2-401, through which the Legislature imposed limits at *both steps* that restrict marriages in West Virginia to those between one man and one woman. As discussed more fully below, Section 104 limits the issuance of marriage licenses to different-sex couples, and Section 401 permits only the solemnization of man-woman marriages.

A. Section 104 Requires the State Registrar To Create Marriage License Applications Limited to Man-Woman Marriages

In Section 104, the Legislature set forth requirements for the official state marriage application, including two that specifically contemplate man-woman marriages. Foremost, the application must "contain a statement of the full names of both the female and the male parties." *Id*. § 48-2-104; *see also id.* § 48-2-105 ("Both female and male parties to a contemplated

marriage are required to sign the application for a marriage license, under oath."). The Legislature also required that all marriage applications include the following statement of its view of what "marriage is": "Marriage is designed to be a loving and lifelong union between a woman and a man." *Id.* (internal quotations omitted).

The Legislature thereby made the State Registrar (an official in the Department of Health and Human Resources (DHHR)) critical to carrying out its intent that West Virginia marriage licenses issue only to male-female couples. Under the law, the State Registrar supervises the licensing and recording of each new marriage by promulgating uniform state-wide forms, including the State's marriage application. *See* W. Va. Code §§ 16-5-5, 16-5-34, 16-5-35; W. Va. Code R. §§ 64-32-2.1.a, 64-32-2.2.a.12 (setting forth State Registrar's exclusive authority over state vital records forms); Exh. 1 (Application for Marriage License); Exh. 2 (Application for Certified Marriage Certificate); Exh. 3 (State Registrar's website). County clerks are responsible for accepting applications, issuing licenses, recording solemnized marriages, and "forward[ing] to the State Registrar a report of all marriage records made by him or her . . . on a form prescribed or furnished by the State Registrar." W. Va. Code § 16-5-35(a); *see also id.* §§ 48-2-102, 48-2-105 to 48-2-107. But the clerks have no authority to create their own marriage forms or change the marriage forms created by the State Registrar, W. Va. Code § 16-5-34(b); W. Va. Code R. §§ 64-32-2.1.a, 64-32-2.2.a.12; Exh. 1–2, and would be guilty of a misdemeanor if they did so because it would be contrary to state law, *see* W. Va. Code §§ 48-2-501, 48-2-502.

B. Section 401 Only Permits the Solemnization of Different-Sex Marriage

In Section 401, the Legislature formally limited the solemnization of marriages in West Virginia to different-sex marriages. Under this statute, state-authorized celebrants, including judges and authorized religious representatives, are permitted to solemnize only different-sex marriages. The Legislature specifically defined the "[c]elebration or solemnization of a

marriage" as "the performance of the formal act or ceremony by which a man and woman contract marriage and assume the status of husband and wife." *Id*. § 48-2-401.

For religious marriage celebrants, at least, it appears that the Secretary of State is responsible for enforcing this restriction on solemnization. Under state law, the Secretary of State is exclusively charged with reviewing and approving "religious representative[s] to celebrate the rites of marriage," and with maintaining "a central registry of persons authorized to celebrate marriages in this state." *Id*. § 48-2-402; *see* Exh. 4–5. No religious representative may solemnize a marriage in West Virginia without an authorizing "order" from the Secretary of State. *Id.*; *see also id*. § 48-2-401 ("A religious representative who has complied with the provisions of section 2-402 . . . is authorized to celebrate the rites of marriage in any county of this state.").

II. Statutory History

The West Virginia statutes challenged in this case, like many similar laws and constitutional provisions in other States, are part of a greater debate over marriage that has been occurring throughout the United States and around the world. Here, West Virginia's Legislature has engaged in a thorough deliberative process and has concluded three times in recent years—with near-unanimity—that West Virginia should retain its traditional definition of marriage. As more than a thousand of attached pages of legislative history show, these deliberations lack any evidence suggesting widespread improper motives; rather, they are fully consistent with the conceivable state interests of expanding gay rights incrementally and promoting the care of unintentionally conceived children. *See* Exh. 17–19, 22–24, 29–31.

A. Marriage in West Virginia Has Always Been Understood To Involve One Man and One Woman

As the Supreme Court recently recognized, "marriage between a man and woman no doubt ha[s] been thought of by most people as essential to the very definition of that term and to its role and function *throughout the history of civilization*." *Windsor v. United States*, 113 S. Ct. 2675, 2689 (2013) (emphasis added). No country in the world permitted same-sex marriage until the Netherlands in 2000, and no State in this country permitted same-sex marriage until Massachusetts in 2003. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003); *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting).

West Virginia is no exception. The traditional definition of marriage existed when West Virginia was part of the colony, and later the Commonwealth, of Virginia. *E.g.*, 10 William Waller Henning, Statutes At Large 361–62 (1822), reprinting "An act what shall be a lawful marriage" (Va. 1780) (Exh. 6) (authorizing ministers of all faiths to "join together [residents] as man and wife" in accord with the universal colonial practice); Va. Code ch. 106 (1819) (Exh. 7) (codifying marriage and describing it as between "man and wife"); Va. Code §§31-108-2, 31-196-1(1860) (Exh. 8) (referring to "the husband" and "the wife" of the marriage); 1861 Va. Acts c. 20, § 1, p. 43 (Exh. 9) (directing clerks to record in the marriage registry "the age of the proposed husband" and "the age of the proposed wife.").

The definition remained when West Virginia became an independent state. *E.g.*, W. Va. Code §§ 69-1 *et seq*. (1878) (Exh. 10) (using terms such as "man and wife" and "the man['s] wife and children" in state divorce law); W. Va. Code §§ 70-1 *et seq*. (1878) (Exh. 11) (providing as dower that a "widow" receives certain real estate from "her husband"); W. Va. Code §§ 103-1 *et seq*. (1879) (Exh. 12) (using the terms "husband," "married woman," and "cohabit" to define "illegitimate children"); W. Va. Code §§ 121-1 *et seq*. (1879) (Exh. 13)

(referring to "the female" of every marriage, the "husband" of every marriage, and the male "head of every family" in the context of state marriage licenses and other vital records); W. Va. Code §§ 122-1 *et seq*. (1879) (Exh. 14) (describing the "rights of married women" in relation to their male husbands).

And the definition has endured throughout the twentieth century and continues today. *E.g.*, W. Va. Code §§ 48-1-1 *et seq*. (1999) (Exh. 15) (describing the parties to marriage as "both the male and the female," providing a standard ceremony for uniting a man and a woman, referring to the man as the "husband" and the woman as the "wife," and considering "man and wife" to be the married state); W. Va Code §§ 48-2-1 *et seq*. (1999) (Exh. 16) (using the terms "the wife" and "the husband" as the exclusive marriage partners in divorces and annulments); Doc. 40-1 at 4 & n.1 (showing that today there remain "almost 700 references" to the "terms 'wife,' 'husband,' 'spouse,' 'married,' 'marriage,' 'marital,' 'matrimony,' 'widow,' or 'widower'" to this day "in West Virginia law"). By the time same-sex marriage began to be proposed at the end of the twentieth century, West Virginia legislators universally agreed that the traditional definition of marriage was the law. *E.g.*, Karin Fischer, *Harrison used to defending his stands*, Charleston Daily Mail, Feb. 22, 1999, at 1A (hereinafter Daily Mail (Feb. 22, 1999)).

B. Prelude to the Challenged Marriage Laws

Nevertheless, the Legislature began for several reasons to consider a new law expressly prohibiting same-sex marriage. *First*, it would clarify the text of the State's domestic relations code, which was due for updating and reform. *Second*, it would ensure that the State would decide for itself through its democratic process whether to permit same-sex marriage. *Third*, it would protect against unforeseen consequences.

1. Clarification of the State's domestic relations code

At the end of the last century, West Virginia's domestic relations code was due for a major overhaul. The Legislature saw a need for "a 'general recodification' of domestic-relations laws [to] clarify rules on annulment, divorce and other matters." *House poised to ban same-sex marriages*, Charleston Gazette, Feb. 17, 1999, at 8A). One proposal would have "clean[ed] up very old language and clarifie[d] particular passages of the state's marriage law." Stacy Ruckle, *House may ban same-sex marriages*, Charleston Daily Mail, Mar. 31, 1997, at 2A (hereinafter Daily Mail (Mar. 31, 1997)).

As part of that effort, Legislators sought to include laws reaffirming their commitment to the traditional understanding of marriage. As the Chairman of the House Judiciary Committee, Rick Staton, explained at the time: "[P]rohibiting West Virginia from recognizing same-sex marriages from other states will be part of [this] larger reform being performed on state marriage law." Daily Mail (Feb. 22, 1999); *see Marriage ban added to bill*, Charleston Daily Mail, Mar. 10, 1998, at 5B (hereinafter Daily Mail (Mar. 10, 1998)) (noting that the marriage definition provision was included in a bill that otherwise addressed, for example, the content of marriage licenses, removing a three-day waiting period for marriage licenses, and removing the requirement to have a blood test for syphilis before marrying). Lawmakers did not see themselves as breaking new ground. Indeed, House Judiciary "[C]ommittee members didn't view inclusion of [laws declining to permit same-sex marriage] as being a major change in state policy. Current state law refers to marriage as a union between a man and woman." Daily Mail (Mar. 31, 1997).

2. Preservation of the State's democratic process

Legislators also sought to ensure that the State and her people retained the ability to decide this important issue for themselves. In the mid-1990s, other States, such as Hawaii and

Vermont, appeared to be on the verge of changing their traditional definitions of marriage in response to judicial orders. *See Windsor*, 133 S. Ct. at 2682; *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). West Virginia legislators became concerned that without legislative action, this State would recognize out-of-state same-sex marriages "by default." Daily Mail (Feb. 22, 1999). West Virginia's Governor, Cecil Underwood, explained: "It's an issue that needs to be addressed before it becomes a problem." Jennifer Bundy, *W.Va. Gov. Faults Same-Sex Marriage*, AP Online, Jan. 12, 2000 (hereinafter AP Online (Jan. 12, 2000)). And one sponsor of proposed legislation said: "We as a legislature are forced to react." Daily Mail (Feb. 22, 1999); Daily Mail (Mar. 10, 1998) ("Sponsors say the goal is to stave off potential changes in states such as Hawaii, where the issue is expected to soon be addressed."). Another sponsor agreed: "Let's not let another state force this on us." Daily Mail (Feb. 22, 1999); *see also* Jeff VanMatre, *Same-sex marriage can still be discussed*, Readers' forum, Charleston Gazette, Mar. 19, 1998 ("West Virginia is not blazing new territory by preserving the sanctity of marriage. . . . Let's preserve traditional family values in West Virginia and prevent Hawaii from legalizing same-sex marriage in our state").

The legislative efforts were also a direct reaction to the role the courts had played in other States. West Virginia's elected legislators did not want courts resolving the debate instead of democratically accountable officials. As the Governor's spokesman explained, the 2000 marriage bill was "'an opportunity for the legislative and executive branches to develop a law rather than have the judiciary develop the law.'" Jennifer Bundy, *W.Va. Votes To Ban Same-Sex Marriage*, AP Online, Mar. 11, 2000 (hereinafter AP Online (Mar. 11, 2000)).

3. Protection against unforeseen consequences

Finally, some citizens supported the traditional definition of marriage out of pragmatic concerns about the unforeseeable consequences of abruptly changing a major social institution.

In 1997, at a public hearing by the House Judiciary Committee, one member of the public questioned whether same-sex marriage would lead to changes to the State's educational curriculum, expand state liabilities through benefits programs, or reduce the scope of First Amendment protection for those who opposed same-sex marriage. *See Religious Groups Praise Domestic Relations Bill*, Charleston Daily Mail, Mar. 21, 1997, at 5B. The citizen concluded: "The legal implications would be very costly, chaotic and create much confusion." *Id.*

C. The Legislature Codified the State's Traditional Definition of Marriage in 2000 with Near-Unanimous Bipartisan Support

For all these reasons, West Virginia began considering a law to clarify that the State did not permit same-sex marriage, like dozens of other States.[1] Between 1997 and 2000, the Legislature considered numerous bills incorporating a non-recognition provision alongside the State's traditional definition of marriage and other domestic relations laws. *E.g.*, S. 146, 75th Leg. (2000) (Exh. 17–19); H.B. 4089, 75th Leg. (2000) (Exh. 20); S. 17, 74th Leg. (1999); S. 375, 74th Leg. (1999); H. B. 2036, 74th Leg. (1999); S. 50, 74th Leg. (1998); H.B. 2179, 74th Leg. (1998); H.B. 2865, 74th Leg. (1998); H.B. 4469, 74th Leg. (1998); S. 302, 73rd Leg. (1997); H.B. 2179, 73rd Leg. (1997); H.B. 2865, 73rd Leg. (1997).

But in 2000, with Vermont about to enact civil unions under a judicial mandate, the Legislature decided that the provision could not wait for the State's larger domestic relations

[1] Of the forty-odd states that enacted such laws, thirty-three have laws or constitutional provisions that remain in effect today. Ala. Const. art. I, § 36.03; Alaska Const. art. I, § 25; Ariz. Const. art. XXX, § 1; Ark. Const. amend. 83, §§ 1-3; Colo. Const. art. II, § 31; Fla. Const. art. I § 27; Ga. Const. art. I, § 4; Idaho Const. art. III, § 28; Kan. Const. art. XV, § 16; Ky. Const. § 233a; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss. Const. art. XIV, § 263a; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. II, § 35; Or. Const. art. XV, § 5a; S.C. Const. art. XVII, § 15; S.D. Const. art. XXI, § 9; Tenn. Const. art. XI, § 18; Tex. Const. art. I, § 32; Utah Const. art. I, § 29; Va. Const. art. I, § 15-A; Wis. Const. art. XIII, §13; Ind. Code § 31-11-1-1; N.C. Gen. Stat. §§ 51-1, 51-1.2; 23 Pa. Cons. Stat. Ann. § 1704; W. Va. Code § 48-2-603; Wyo. Stat. Ann. § 20-1-101.

reform. Governor Underwood requested that the Legislature pass a marriage bill that session, instead of waiting for the larger recodification of the State's domestic relations laws. Jennifer Bundy, *W.Va. Votes To Ban Same-Sex Marriage*, AP Online, Mar. 11, 2000; Fred Anklam, Jr., *Same-sex ban*, USA Today, Mar. 13, 2000, at 2A. As the Governor's spokesman explained: "The situation in Vermont gave it a greater sense of urgency this year." Karin Fischer, *W.Va. bill was reaction to Vt. ruling*, Charleston Gazette & Daily Mail, Mar. 21, 2000, at 1A.

So after four years of debate, the Legislature enacted a law clarifying that marriage in West Virginia is permitted only between a man and a woman. *See* S. 146, 75th Leg. (2000 Regular Session) (codified at W. Va. Code §§ 48-2-104, 48-2-603); Exh. 17–19 (full legislative history). This law required West Virginia marriage applications to include language clarifying that marriage is between one man and one woman, W. Va. Code § 48-2-104, and prohibited recognition of same-sex marriages validly entered into outside the State, *id.* § 48-2-603. At that time, a total of thirty States and the federal government had "passed laws denying recognition to same-sex marriages." Associated Press, *W. Va. votes to ban same-sex marriages*, Mobile Register, Mar. 12, 2000, at A10.

The law passed with widespread support. The Senate passed the law unanimously, 34–0, with no abstentions or absences. Exh. 18 at 8–9 (I Journal of the Senate at 1184–85 (2000)). In the House of Delegates, 97 of the 100 members supported the bill. Exh. 19 at 5 (II Journal of the House of Delegates at 1800–01 (2000). And the Governor promptly signed it into law. Exh. 18 at 16 (III Journal of the Senate at 3367 (2000)); Exh. 19 at 10 (II Journal of the House of Delegates at 2886 (2000). One poll reported that "97 percent of state residents" supported the law. Daily Mail (Feb. 22, 1999).

D. The Legislature Reenacted the State's Traditional Definition of Marriage in 2001 and 2012

In 2001, the Legislature reenacted the traditional definition of marriage in conjunction with the much-anticipated reform of the state's domestic relations code. H.B. 2199, 75th Leg. (2001 Regular Session) (Exh. 22–24). This reform bill expressly "reenacted" the two prior statutes and added Section 401, which provided that state-authorized celebrants could only solemnize marriages between a man and a woman. Section 401 accompanied a transfer to the Secretary of State of all state authority to authorize marriage celebrants. Other parts of the law addressed paternity, child support, divorce, domestic violence, consanguinity, and pre-marital blood tests. Exh. 22–24 (various proposals).

This law received unanimous support. Both the House and Senate passed the law unanimously, with no abstentions or absences. *See* Exh. 23 at 59 (I Journal of the House of Delegates at 774 (2001); Exh. 24 at 48–49 (I Journal of the Senate at 599–600 (2001)). And then-Governor Bob Wise signed it into law. Exh. 23 at 61 (I Journal of the House of Delegates at 1272 (2000)); Exh. 24 at 52 (I Journal of the Senate at 1056 (2001)).

In 2012, the Legislature again reenacted the traditional definition of marriage—this time while requiring marriage license applicants to state whether or not they completed premarital education. H.B. 4605, 81st Leg. (2012 Regular Session) (Exh. 29–31). In parts of the bill, the Legislature created new free-standing statutory sections for other pre-marital provisions. *See* Exh 29 at 51 (providing that the "[domestic relations] code be amended by adding thereto two new sections, designated § 48-2-701 and § 48-2-702"). But the Legislature also deliberately added new provisions to and reenacted *all* of Section 104, including the existing language stating that marriage is between one man and one woman. *Id*. ("AN ACT to amend and reenact § 48-2-

104 of the Code of West Virginia"); *see also id.* (providing that W. Va. Code § 48-2-104 & § 59-1-10 are "amended and reenacted").

Like the 2000 and 2001 marriage laws, the 2012 bill received overwhelming bipartisan support. The Senate passed the bill, 29–5, with no abstentions or absences. Exh. 31 at 9 (II Journal of the Senate at 1847 (2001)). The House of Delegates supported it by a vote of 79 to 21. Exh. 30 at 23 (II Journal of the House of Delegates at 2185 (2012). And Governor Earl Ray Tomblin, who as President of the Senate voted for the 2000 and 2001 laws, signed it without delay. Exh. 31 at 19 (II Journal of the Senate at 2265 (2012)); Exh. 30 at 33–34 (II Journal of the House of Delegates at 2783–84 (2012).

From 1993 to the present, no legislator has proposed any bill that would change the traditional definition of marriage.[2] The only bill that came even close was a 2012 proposal in the

[2] Eighty-eight of the 213 different state legislators who voted in 2000, 2001, or 2012 for the traditional definition of marriage are still sitting: Everette W. Anderson (R)—2000, 2001; Tim Armstead (R)—2000, 2001; Bob Ashley (R)—2001, 2012; Tom Azinger (R)—2000, 2001, 2012; Anthony Barill (D)—2012; Robert Beach (D)—2001, 2012; Brent Boggs (D)—2000, 2001, 2012; Donna Boley (R)-2000, 2001, 2012; Samuel Cann (D)—2000, 2001; Ray Canturbury (R)—2001, 2012; Denise Campbell (D)—2012; Mike Caputo (D)—2000, 2001, 2012; Mitch Carmichael (R)—2001; H. Truman Chafin (D)—2000, 2001, 2012; Kevin Craig (D)—2001, 2012; Phil Diserio (D)—2012; Larry Edgell (D)—2000, 2001, 2012; John Ellem (R)—2001, 2012; Joe Ellington (R)—2012; Allen Evans (R)—2000, 2001, 2012; Douglas Facemire (D)—2012; Ryan Ferns (D/R)—2012; Michael Ferro (D)—2012; Barbara Fleischauer (D)—2001, 2012; Ron Fragale (D)—2001, 2012; Mike Green (D)—2012; Nancy Guthrie (D)—2012; Daniel Hall (D)—2012; Mike Hall (R)—2000, 2001, 2012; Bill Hamilton (R)—2012; William Hartman (D)—2012; Mark Hunt (D)—2000, 2012; Richard Iaquinta (D)—2012; Evan Jenkins (D/R)—2000, 2012; Ronnie Jones (D)—2012; Jeffrey Kessler (D)—2000, 2001, 2012; Art Kirkendoll (D)—2012; William Laird (D)—2000, 2012; Patrick Lane (R)—2012; Tiffany Lawrence (D)—2012; Linda Longstreth (D)—2012; Tim Manchin (D)—2012; Mike Manypenny (D)—2012; Justin Marcum (D)—2012; Charlene Marshall (D)—2001, 2012; Brooks McCabe (D)—2000, 2001, 2012; Timothy Miley (D)—2012; Carol Miller (R)—2012; Clif Moore (D)—2012; Jim Morgan (D)—2001, 2012; Rick Moye (D)—2012; David Nohe (R)—2012; John O'Neal (R)—2012; John Overington (R)—2000, 2001, 2012; Corey Palumbo (D)—2012; Amanda Pasdon (R)—2012; Brady Paxton (D)—2000, 2001, 2012; Don Perdue (D)—2000, 2001, 2012; David Perry (D)—2001, 2012; Dave Pethtel (D)—2000, 2001, 2012; Linda Phillips (D)—2012; Rupert Phillips (D)—2012; John Pino (D)—2000, 2001, 2012; Robert Plymale

House of Delegates to create civil unions, and that bill expressly disclaimed "revis[ing] the definition or eligibility requirements of marriage." H.B. 4569, 81st Leg. (2012 Regular Session). That bill did not proceed to a vote. Exh. 32 (legislative history).

E. The West Virginia Supreme Court of Appeals Has Refused To Invalidate the State's Definition of Marriage

In 2004, the West Virginia Supreme Court of Appeals rejected a constitutional challenge to the State's definition of marriage. *See* Order Denying Writ of Mandamus, *Link v. King*, No. 04-0475 (W. Va. Apr. 1, 2004) (Exh. 39). Several same-sex couples asked the court for a writ of mandamus against the Kanawha County Clerk, Alma Y. King, arguing that the state and federal constitutions granted them a right to same-sex marriage. Petition for Writ of Mandamus, *Link v. King*, No. 04-0475 (W. Va. Mar. 5, 2004) (Exh. 40); Brief of Petitioners in Support of Their Petition for Writ of Mandamus, *Link v. King*, No. 04-0475 (W. Va. Mar. 22, 2004) (Exh. 41). Both the county clerk and several state legislators defended the State's definition of marriage. Respondents' Rule 14 Response to Original Jurisdiction Petition, *Link v. King*, No. 04-0475 (W. Va. Mar. 23, 2004) (Exh. 42); Order Denying Intervention to State Legislators as Moot, *Link v. King*, No. 04-0475 (W. Va. Apr. 1, 2004) (Exh. 43). The court denied the writ 3–2 without a published opinion. Exh. 39.

(D)—2000, 2001, 2012; Daniel Poling (D)—2012; Mary Poling (D)—2001, 2012; Meshea Poore (D)—2012; Roman Prezioso (D)—2000, 2001, 2012; Doug Reynolds (D)—2012; William R. Romine (R)—2001, 2012; Ruth Rowan (R)—2012; Doug Skaff (D)—2012; Margaret Smith (D)—2012; Herb Snyder (D)—2000, 2001, 2012; Margaret Staggers (D)—2012; Dale Stephens (D)—2001, 2012; Ron Stollings (D)—2012; Erikka Storch (R)—2012; Randy Swartzmiller (D)—2001, 2012; Gregory Tucker (D)—2012; John Unger (D)—2000, 2001, 2012; David Walker (D)—2012; Ron Walters (R)—2001; Danny Wells (D)—2012; Erik Wells (D)—2012; Harry White (D)—2000, 2001, 2012; Larry Williams (D)—2000, 2001, 2012; Jack Yost (D)-2012. *See* Exh. 18–19, 23–24, 30–31.

III. This Case

On October 1, 2013, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief, challenging the constitutionality of West Virginia Code §§ 48-2-104, 48-2-401, and 48-2-603 and "any other sources of West Virginia law that exclude same-sex couples from marriage or from recognition of marriages entered into in another jurisdiction." Compl. at 28. Plaintiffs sought a declaration that the laws violate the Due Process and Equal Protection Clause of the U.S. Constitution, an order permanently enjoining enforcement of those laws, and an order requiring the two Defendant County Clerks to "accept applications and issue marriage licenses to same-sex couples on the same terms as different-sex couples." *Id.* Because Plaintiffs did not name as a defendant the State of West Virginia or any state "agency, officer, or employee," the State moved to intervene as of right pursuant to 28 U.S.C. § 2403(b). *See* Doc. 25. The State intervened for limited purpose of defending the constitutionality of the statutes in question and did not waive its sovereign immunity. *Id.* at 2.

According to the Complaint, "Plaintiffs are six lesbian and gay West Virginians who comprise three loving and committed same-sex couples, and a child of one of the couples." Compl. ¶ 1. The adult Plaintiffs claim that they are "legally qualified to marry under the laws of West Virginia"—but for the fact that they are of the same sex—and "wish[] to marry in the State." *Id.* ¶ 21. They assert that they have sought marriage licenses from the Defendant County Clerks and were denied. *Id.* ¶ 22–24.

Because the Complaint included no allegations that Plaintiffs have valid out-of-state marriages or even intend to be married elsewhere, the State moved to dismiss the Complaint to the extent that it challenged West Virginia Code § 48-2-603, which prohibits the recognition of valid out-of-state same-sex marriages. *See* Doc. 34. This Court agreed. On January 29, 2014,

this Court "dismisse[d] from the case all claims that relate to West Virginia Code Section 48-2-603." *See* Motion to Dismiss Order, Doc. 56 at 27 (MTD Order).

Now pending before the Court is the question of summary judgment, and there is no dispute of material fact. Plaintiffs have submitted to this Court a "Statement of Undisputed Facts," to which the State believes no response is required. *See* Doc. 40-1.[3] None of the alleged facts contained therein—which relate to the harms each Plaintiff has allegedly suffered as a result of his or her inability to marry in West Virginia—are material to the resolution of summary judgment. As set forth in this memorandum, summary judgment turns on several pure questions of law. To the extent any facts are necessary, they are set forth in this memorandum, are drawn from undisputed and self-authenticating public records, and are subject to judicial notice. *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *opinion readopted*, 101 F.3d 325 (4th Cir. 1996); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); Fed. R. Evid. 201(b), 902; Exh. 44 (Declaration of Authenticity for all State exhibits).[4]

LEGAL STANDARD

Under Rule 56, summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A party seeking summary judgment has the burden of establishing that there is no genuine issue of fact and that the party is entitled to judgment as a matter of law. *U.S. v. Ball*, 326 F.2d 898 (4th Cir. 1964). "[T]he party opposing a motion for summary judgment is entitled to all

[3] No rule requires parties to submit or numerically respond to an itemized statement of undisputed facts.

[4] The State's separately filed motion includes a categorized index of exhibits.

favorable inferences which can be drawn from the evidence." *Kinney v. Daniels*, 574 F. Supp. 542, 543 n.1 (S.D. W.Va. 1983).

In considering summary judgment, a court may consider legislative facts, legislative history, and other evidence subject to judicial notice. Fed. R. Civ. P. 56(c)(1)(A) & (B); Fed. R. Evid. 201(a); *Clatterbuck* v. *City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013); *see Isaacson* v. *Horne*, 716 F.3d 1213, 1220 n.7 (9th Cir. 2013) (observing that "publicly available primary sources," including those "not developed in the record," "are often considered" by courts in constitutional adjudication because they are "legislative facts").

ARGUMENT

Defendants are entitled to summary judgment on three independent grounds. *First*, Plaintiffs have failed to sue the state officials responsible for enforcing the challenged laws. *Second*, this case is controlled by the Supreme Court's long-standing merits decision in *Baker v. Nelson*. *Third*, the challenged laws easily survive rational basis review under the Equal Protection and Due Process Clauses of the U.S. Constitution.

Even if not entitled to full summary judgment, however, Defendants should be granted partial summary judgment with respect to West Virginia Code § 48-2-104(c). That statutory provision sets forth nothing more than the West Virginia Legislature's view on what "marriage is" and imposes no substantive restrictions on Plaintiffs. Under the Supreme Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), this Court lacks jurisdiction to take any action on such a non-operative provision of law.

I. PLAINTIFFS' FAILURE TO JOIN THE STATE REGISTRAR AND SECRETARY OF STATE PRECLUDES THEIR DESIRED RELIEF

As a threshold matter, this Court should grant judgment to Defendants because the absence of key state officials precludes Plaintiffs' desired relief. Under Rule 19 of the Federal

Rules of Civil Procedure, a ruling against Plaintiffs is appropriate if they have failed to join defendants necessary for the Court to "accord complete relief" to Plaintiffs, *i.e.*, if judgment in favor of Plaintiffs would prejudice those absent defendants or be inadequate in some way. *See* Fed. R. Civ. P. 19(a)–(b). "The 'complete relief' standard of Rule 19(a)(1) is designed to insure that all persons who have an interest in the litigation are present so that any relief to be awarded will effectively and completely adjudicate the dispute." *Smith v. Mandel*, 66 F.R.D. 405, 408 (D.S.C. 1975). This usually applies when an unjoined party controls the means by which the requested relief would be effectuated or administered. *See City of Syracuse v. Onondaga County*, 464 F.3d 297, 299–300 (2d Cir. 2006) (finding that a city was a necessary party because a county-defendant would be unable to comply with the terms of the judgment without the city's approval); *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885, 896 (W.D. Wash. 1990) (holding that under state law, the "appropriate Washington state officials with responsibilities for elections are the Secretary of State and the Attorney General").

Here, Plaintiffs have failed to join two state officials who control the means by which the requested relief would be effectuated or administered. *First*, Plaintiffs seek to enjoin enforcement of West Virginia Code § 48-2-104 and to be granted state-recognized marriage licenses, *see* Compl. at 28, but they cannot obtain that relief without the State Registrar. That specific relief requires modification of the State's marriage license applications to remove the language required by Section 104, which is something only the State Registrar has the authority to do. *See supra* at 3. State law prohibits Defendant Clerks from creating or altering state marriage forms. *Second*, Plaintiffs also seek to enjoin enforcement of West Virginia Code § 48-2-401, *see* Compl. at 28, but they cannot obtain that relief without the Secretary of State. As described above, it is the Secretary of State who is responsible for enforcing solemnization

prohibition on state-authorized celebrants. *See supra* at 4. Defendant Clerks have nothing to do with the enforcement of Section 401.

As the State has previously noted, *see* Doc. 25 at 2–3; Doc. 34 at 3–4; Doc. 49 at 3 & n.3, its presence is not an adequate substitute for the absent state officials. The Eleventh Amendment bars this Court from ordering injunctive relief against the State, which has not waived its sovereign immunity by appearing in this suit pursuant to 28 U.S.C. § 2403(b) for the limited purpose of defending state law. *See, e.g.*, *Comfort ex rel. Neumyer v. Lynn Sch.*, 131 F. Supp. 2d 253, 254 (D. Mass. 2001) (concluding that Massachusetts had not waived its sovereign immunity by intervening pursuant to 28 U.S.C. § 2403(b) to defend the constitutionality of the Massachusetts Racial Imbalance Act); Doc. 25 at 2–3 (expressly reserving sovereign immunity). In these circumstances, prospective injunctive relief is available only against state officers that have a "special relation" with and "*proximity to* and *responsibility for*" the "challenged statute." *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (internal quotations omitted); *see also Ex Parte Young*, 209 U.S. 123 (1908). Here, those officers are the State Registrar and the Secretary of State. *Cf. Harris v. McDonnell*, No. 5:13-cv-077, __F. Supp. 2d__, 2013 WL 6835145, at *6 (W.D. Va. Dec. 23, 2013) (holding that "the State Registrar of Vital Records, has [the necessary] proximity and responsibility and is a proper party defendant" even though the State of Virginia intervened to defend the state statute and a county clerk was already a defendant).

II. *BAKER V. NELSON* MANDATES JUDGMENT IN FAVOR OF DEFENDANTS

Although this Court previously concluded in its MTD Order that *Baker v. Nelson*, 409 U.S. 810 (1972), is "not binding on the current case," Doc. 56 at 18, the State respectfully submits that the limited briefing on the question did not bring to this Court's attention two

critical arguments that compel the opposite conclusion.[5] *First*, the exception set forth in *Hicks v. Miranda*, 422 U.S. 332 (1975), on which this Court relied, Doc. 56 at 15, has been clarified by more recent Supreme Court precedent. *Second*, the analysis of *Windsor v. United States*, 133 S. Ct. 2675, 2696 (2013), that this Court found persuasive, Doc. 56 at 18, has been undermined by the Supreme Court's order issuing a stay in *Kitchen v. Herbert*, No. 13A687, 2014 WL 30367 (Jan. 6, 2014).

A. *Baker* Is Binding Because It Has Never Been Expressly Overruled

As this Court recognized, the presumption is that *Baker* controls because the "precise issue presented and decided" in *Baker* is "the same issue presented here." Doc. 56 at 16. The first two questions presented in *Baker*'s statement of jurisdiction—and dismissed summarily by the Supreme Court "for want of a substantial federal question," 409 U.S. 810—were whether Minnesota's "refusal to sanctify" the same-sex couple's marriage violated "due process of law under the Fourteenth Amendment" or "the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker*, 409 U.S. 810 (No. 71-1027). Plaintiffs' claims here are identical. Under the rules in effect at the time of *Baker*, the summary dismissal is deemed to have "reject[ed] the specific challenges presented in the statement of jurisdiction" and therefore "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Like a written decision after oral argument, it is considered to have been a precedential ruling "on the merits"—albeit with a more limited substantive reach because the underlying "rationale" is not obvious. *Id.*; *see also Edelman v. Jordan*, 415 U.S. 651, 671 (1974) ("[S]ummary affirmances obviously are of precedential value. . . .").

[5] *Baker* was noted by Clerk McCormick in her motion to dismiss on abstention grounds, but was not raised "for substantive purposes" and therefore was not fully briefed. Doc. 35 at 1.

Relying on *Hicks v. Miranda*, however, this Court concluded that *Baker* has been implicitly overtaken by changes in the law. Doc. 56 at 15–17. In 1975, the Supreme Court explained in *Hicks* that until it "instruct[ed] otherwise," the rule was that summary decisions bind lower courts "except when doctrinal developments indicate" differently. 422 U.S. at 344 (internal quotations omitted). The Supreme Court offered no further guidance, leaving the phrase "doctrinal developments" undefined. Taking a broad view of the term, this Court determined that several cases on topics related to *Baker*—none of which expressly overruled that case—"justif[ied] a finding that *Baker* is nonbinding." Doc. 56 at 17.

But the Supreme Court has clarified since *Hicks* that its precedents remain binding unless and until they have been *expressly* overruled. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Supreme Court stated unequivocally: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 490 U.S. 477, 484 (1989). Twelve years later, the Supreme Court "reaffirm[ed]" that strict rule, forbidding lower courts from "conclud[ing] [that] more recent [Supreme Court] cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Importantly, both *Rodriguez* and *Agostini* refer generically to the Supreme Court's "precedents," and neither draws any distinction between summary decisions and written opinions. Nor should they have. While summary decisions may be more easily distinguished on their facts than written opinions, *see Mandel*, 432 U.S. at 177, and thus have a narrower substantive reach, they are no less controlling decisions of the Supreme Court in the circumstances where they have "direct application," *Rodriguez de Quijas*, 490 U.S. at 484. It

should be the "prerogative" of the Supreme Court—and no other court—to determine when, if at all, such decisions are no longer controlling. *Cf. Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 912 (1986) ("Our summary affirmance in *August v. Bronstein*, 417 U.S. 901 (1974), is hereby overruled." (citations omitted)).

Baker is thus still binding because it has never been explicitly overruled. Quite the opposite, in fact. The Supreme Court has carefully avoided the precise *Baker* issue—whether the Constitution requires a State to permit same-sex marriages—in several cases. In *Windsor*, the Supreme Court expressly "confined" its "opinion and its holding" to the constitutionality of a *federal* law that refused to recognize "same-sex marriages made lawful by the State." 133 S. Ct. at 2696. Similarly, the Supreme Court in *Lawrence v. Texas* took care to note that the case "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. 558, 578 (2003).

B. The Supreme Court Also Has Not Implicitly Overruled *Baker*

Even if a lower court could unilaterally determine that a Supreme Court precedent has been implicitly overruled, however, the Supreme Court's jurisprudence does not support such a conclusion about *Baker*. This Court relied on an analysis of the *Windsor* dissents by two federal district courts in Utah and Oklahoma, as well as a number of earlier Supreme Court cases, to "justify a finding that *Baker* is nonbinding." Doc. 56 at 17. The Supreme Court's recent stay order in *Kitchen v. Herbert*, though, reveals that the Supreme Court itself takes a different view.

1. On January 6, 2014, the Supreme Court granted an application to stay a district court's order enjoining the State of Utah's state constitutional prohibition of same-sex marriages. *Kitchen v. Herbert*, No. 13A687, 2014 WL 30367 (Jan. 6, 2014). The district court had concluded that *Baker* is no longer controlling law, and that Utah's prohibition violated due process and equal protection under the U.S. Constitution. Utah challenged the merits of the

decision and argued that, as an intrusion on state sovereignty, the decision caused irreparable harm. Application to Stay Judgment Pending Appeal, No. 13A687 at 8–13 (Dec. 31, 2014).

By granting the application, the Supreme Court made clear that Utah had met the rigorous standards for a stay, which includes a "fair prospect" of success on the merits. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Specifically, "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Id.*

This is strong evidence that the Supreme Court does not agree that *Baker* has been implicitly overruled. As noted above, *Baker* was a decision "*on the merits*" because the law at that time granted an appeal as of right—as opposed to the ability to seek discretionary certiorari review—from any state supreme court decision involving a federal constitutional challenge to a state statute. *Hicks*, 422 U.S. at 344 (emphasis added). Unlike a denial of certiorari, which can be issued for any or no reason, the Supreme Court's dismissal of the appeal in *Baker* clearly constituted a rejection of the plaintiffs' claims as meritless—in short, that Minnesota's prohibition on same-sex marriage *did not* violate the Fourteenth Amendment. *Id.* To conclude that *Baker* has been *overruled*, therefore, is to conclude that the state law prohibition *did* violate the Constitution. But if the Supreme Court agreed with that conclusion, it would not have granted the stay in *Kitchen* because Utah would have no chance—much less a "fair prospect"—of defending its same-sex marriage prohibition against the same charges.[6]

[6] Some courts have interpreted the summary dismissal language in *Baker*—"want of a substantial federal question"—to mean that *Baker* was a jurisdictional decision dismissed for lack of a sufficiently federal question. *See, e.g.*, *Kitchen v. Herbert*, No. 2:13-217, __F. Supp. 2d__, 2013

2. Furthermore, contrary to the conclusions of the Utah and Oklahoma district courts, *Windsor* is fully consistent with *Baker*. At bottom, *Windsor* is a decision that commands respect for an individual State's "considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Windsor*, 133 S. Ct. at 2692–93. It is a reminder to the federal government that "[t]he dynamics of state government in the federal system are to allow the formation of consensus respecting the way *the members of a discrete community* treat each other in their daily contact and constant interaction with each other." *Id.* at 2692 (emphasis added).

Throughout the opinion, the Supreme Court repeatedly reaffirms a State's prerogative to define marriage. "[T]he definition of marriage," the Court explained, "is the foundation of the State's broader authority to regulate the subject of domestic relations"—"an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 2691 (internal quotations omitted). In fact, the Court stressed, "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning: for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)). Thus, "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.*

WL 6697874, at *8-*9 (D. Utah Dec. 20, 2013). That is incorrect. The case involved a federal constitutional challenge to a state law; there was clearly a federal question sufficient for jurisdiction. As the Supreme Court has explained, that language was a comment on the insubstantiality of the *merits*—its justification for deciding the appeal summarily without oral argument. *See Hicks*, 422 U.S. at 344 (explaining that dismissing an appeal for want of a substantial federal question reflects the Court's decision "not . . . to grant the case plenary consideration" because "the constitutional challenge . . . was not a substantial one").

And what made Section 3 of DOMA unlawful was that the law sought to take away the status of marriage that New York—exercising its prerogative *within its own borders*—had granted to same-sex couples in the State. The State's decision to give that class of persons the right to marry had "conferred upon them a dignity and status of immense import," "enhance[d] the[ir] recognition," and "give[n] [them] further protection" within the State. *Id.* at 2692. But Section 3 of DOMA sought to "use[] this state-defined class for the opposite purpose—to impose restrictions and disabilities." *Id.* The law "injure[d] the very class New York [sought] to protect" by "depriv[ing] [those] same-sex couples of the benefits and responsibilities that come with the *federal* recognition of their marriages." *Id.* at 2693. In short, Congress sought to take away where New York sought to give.

That is why the Court found that Section 3 of DOMA was "motivated by an improper animus or purpose." *Id.* Much like the law found unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996), this law seemed to the *Windsor* Court to intentionally target and strip away deliberately conferred benefits. *Compare Windsor*, 133 S. Ct. at 2695–96 (describing Section 3 of DOMA as "impos[ing] a disability" on the specific "class of persons deemed by a State entitled to recognition and protection"), *with Romer*, 517 U.S. at 627 ("The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination."). And thus, just like the law in *Romer*, this law's principal purpose could only be to "disapprov[e]," "humiliate[]," and "demean." *Id.* at 2693, 2694, 2695; *cf. Romer*, 517 U.S. at 634 (reaching the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

Consistent with *Baker*, the Supreme Court in *Windsor* never once suggested that an individual *State's* decision to prohibit same-sex marriage is indicative of animus or improper

purpose. Instead, the Court stressed how fair-minded individuals could disagree over the concept. On one hand, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Id.* at 2689. On the other hand, some have come to the "new insight" that "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, . . . [is] an unjust exclusion." *Id.* The Court emphasized that in New York, these disagreements were resolved through "a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage." *Id.* at 2689. And New York was entitled to settle on its own "community's considered perspective." *Id.* at 2692.

To be sure, the *Windsor* Court noted that there are some limits on a State's regulation of marriage. Specifically, "[s]tate laws defining and regulating marriage … must respect the constitutional rights of persons." *Id.* at 2691. But it highlighted only the right to be free from racial discrimination, *id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)), and said nothing there to imply that a prohibition on same-sex marriage would be unconstitutional.

3. The *Windsor* dissents—on which the Utah and Oklahoma district courts placed great emphasis—are no less consistent with *Baker*. In dissent, both the Chief Justice and Justice Scalia explained that *Windsor* can and should be distinguished when it comes to state law prohibitions of same-sex marriage—the very issue in question here and decided in *Baker*. *Id.* at 2697 (Roberts, C.J., dissenting) (writing "to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve" the constitutionality of the state law question); *id.* at 2709 (Scalia, J., dissenting) ("I do not mean to suggest disagreement with the Chief Justice's view that lower courts and state courts can distinguish today's case when the

issue before them is state denial of marital status to same-sex couples. . . . State and lower federal courts should take the Court at its word and distinguish away."). The Utah and Oklahoma district courts concluded that this "judicial hand-wringing," *Bishop v. United States*, No. 04-848, __F. Supp. 2d __, 2014 WL 116013, at *17 (N.D. Okla. Jan. 14, 2014), proves that *Windsor* has displaced *Baker*.

But that has it exactly backwards. If the Chief Justice and Justice Scalia are correct—as the Utah and Oklahoma district courts suggest they are—then *Windsor* has not decided the constitutionality of state law prohibitions on same-sex marriage and has not *sub silentio* revisited *Baker*. *Baker*, therefore, is still controlling precedent.

4. Finally, none of the other Supreme Court cases on which this Court relied, *see* Doc. 56 at 17, come close to implicitly overruling *Baker*. At most, those cases show an evolution of the Supreme Court's equal protection jurisprudence, but none involved the constitutionality of same-sex marriage or subjected a classification based on sexual orientation to heightened scrutiny. They can hardly be said to have reached—jointly or severally—the opposite conclusion to that reached in *Baker*, *i.e.*, that a state law prohibition on same-sex marriage *does* violate the Fourteenth Amendment. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1081, 1085–86 (D. Haw. 2012).

III. IN THE ALTERNATIVE, WEST VIRGINIA'S MARRIAGE LAWS ARE VALID UNDER SETTLED PRINCIPLES OF CONSTITUTIONAL LAW

Even assuming that *Baker* simply has no continuing relevance, West Virginia's marriage laws survive both due process and equal protection scrutiny. As shown below, the laws are subject only to rational basis review, a standard of scrutiny that is easily satisfied by at least two conceivable legislative interests: (1) incremental expansion of gay rights; and (2) ameliorating a unique consequence of opposite-sex intercourse, *i.e.*, unplanned offspring.

A. The Challenged Laws Are Subject to Rational Basis Review

Under established due-process and equal-protection precedent, the State's marriage laws need only pass rational basis review. Heightened scrutiny is reserved for laws that implicate either a fundamental right or a suspect (or quasi-suspect) class. Neither of those requirements is present here.

1. The challenged laws do not implicate a fundamental right

a. The controlling precedent on fundamental rights is *Washington v. Glucksberg*, 521 U.S. 702 (1997), a case that Plaintiffs conspicuously fail to mention. As the Court explained there, under the doctrine of substantive due process, the Constitution's Due Process Clause "provides heightened protection against government interference with certain *fundamental* rights and liberty interests." *Id.* at 720 (emphasis added). It is a doctrine that must be "exercise[d] [with] the utmost care," however, because "[b]y extending constitutional protection to an asserted right or liberty interest, [the courts], to a great extent, place the matter outside the arena of public debate and legislative action." *Id.*

The "established method of substantive-due-process analysis" has "two primary features." *Id.* *First*, a court must make a "'careful description' of the asserted fundamental liberty interest." *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). In *Glucksberg*, for example, the respondents sought to broadly describe the asserted fundamental right as a "liberty to choose how to die" or "the liberty to shape death," *id.* at 722, but the Court reframed the interest far more precisely as "a right to commit suicide with another's assistance," *id.* at 724. *See also Flores*, 507 U.S. at 302 (restating the right at issue as "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution"). *Second*, the right as

described must be one that is, "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21 (internal quotations omitted).

Under this test, the precise right at issue here—the alleged right to marry a person of the same sex—plainly does not qualify as fundamental. A right to same-sex marriage is not deeply rooted in the Nation's history and traditions. Until 2003, no State had ever permitted same-sex marriage. *See supra* at 5. As the Supreme Court explained in *Windsor*, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." 133 S. Ct. at 2689.

Plaintiffs never expressly cite or discuss *Glucksberg*, but appear to suggest that the Supreme Court's decision in *Lawrence*—which itself never mentions *Glucksberg*—has revised the test for a fundamental right. Citing *Lawrence*, they assert that "'history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" Pls.' MSJ at 7 (quoting *Lawrence*, 539 U.S. at 572). In context, however, it is clear that neither that statement nor any other part of *Lawrence* should be understood as a *sub silentio* revision of *Glucksberg*. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

In fact, *Lawrence* is fully consistent with *Glucksberg* because it was not a *fundamental*-rights case. In *Glucksberg*, the Supreme Court explained that the Due Process Clause protects many forms of liberty, only some of which—"certain fundamental rights and liberty interests"—are provided heightened protection against government interference. 521 U.S. at 719–20; *see*

also Lawrence, 539 U.S. at 593 (Scalia, J., dissenting) ("All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest."). For several reasons, it is clear that *Lawrence* involved a non-fundamental form of liberty. *See Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) ("We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right."). *First*, the Supreme Court concluded in *Lawrence* that the "individual decisions" by married and unmarried persons "concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause." 539 U.S. at 578 (internal quotations omitted). But it never once identified that form of liberty as "fundamental." *Second*, it did not apply heightened scrutiny but rather rational basis review, holding that "[t]he Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual." *Id*. at 578 (emphasis added); *cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (rational basis test requires "legitimate state interest"); *Romer*, 517 U.S. at 632 (same); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (same).

b. Recognizing the impossibility of establishing a fundamental right to same-sex marriage, Plaintiffs argue instead that the challenged laws implicate the "freedom to marry" recognized in *Loving* and other Supreme Court cases. Pls.' MSJ at 2–3. But Plaintiffs overstate the scope of that right. As recognized by the Supreme Court, the fundamental right to marry includes only the right to marry a person of the opposite sex.

The critical flaw in Plaintiffs' reasoning is—again—their failure to acknowledge the lessons of *Glucksberg*. Though Plaintiffs claim that the scope of a right can evolve over time, *see* Pls.' MSJ at 5–7, *Glucksberg* teaches that fundamental rights are only those "deeply rooted

in our legal tradition," 521 U.S. at 722, such as the "right[] to marry," *id.* at 720. The scope of the fundamental right to marry, therefore, cannot be divorced from the historical understanding of the word "marriage." And as even Plaintiffs must admit, "marriage between a man and a woman no doubt ha[s] been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

Moreover, the Supreme Court's cases vindicating the fundamental right to marry have all involved opposite-sex couples and, more importantly, have generally described the right in terms that assume opposite-sex spouses. In *Loving*, the Court called marriage "fundamental to our very existence and survival." 388 U.S. at 12. And in *Zablocki v. Redhail*, the Court characterized marriage as "'the foundation of the family and of society, without which there would be neither civilization nor progress.'" 434 U.S. 374, 384 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)). These statements—linking marriage to the survival of our species—clearly view marriage as a naturally procreative endeavor between men and women. *See Abercrombie*, 884 F. Supp. 2d at 1095–96.

c. Plaintiffs fall back to "a host of other related fundamental liberty interests," Pls.' MSJ at 8, but none of these justifies heightened scrutiny either. *First*, they point to *Griswold v. Connecticut*, 381 U.S. 479 (1965), which found a fundamental right to "privacy surrounding the marriage relationship," *id.* at 486. The problem with this, however, is that the challenged laws do not burden this right. They concern who may get married, but say nothing whatsoever about the private conduct of individuals who are in fact married.

Second, Plaintiffs point to *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), which found a fundamental right of "parents and guardians to direct

the upbringing and education of children under their control," *id.* at 534–35. Again, however, the challenged laws do not burden this right. They do not dictate—or even seek to influence—how a parent or guardian may raise or educate his or her child.

Third, Plaintiffs assert a vague "protected interest in autonomy over 'personal decisions relating to . . . family relationships.'" Pls.' MSJ at 8 (quoting *Lawrence*, 539 U.S. at 573). But no such fundamental right exists. The language they quote from *Lawrence* is *dicta* that in turn relies on *dicta* from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Neither *Lawrence* (which found no fundamental right at all, *see supra* at 28–29) nor *Casey* (which found a fundamental right to abortion) stand for such a broad and limitless principle. As the Supreme Court explained in *Glucksberg*, "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." 521 U.S. at 727.

2. Plaintiffs are not members of a suspect or quasi-suspect class entitled to heightened scrutiny

a. Under binding Fourth Circuit precedent, sexual orientation is not a classification entitled to heightened scrutiny under the Equal Protection Clause. In *Veney v. Wyche*, the Fourth Circuit squarely held that an equal protection claim "on the basis of sexual preference" is "subject to rational basis review." 293 F.3d 726, 732 (4th Cir. 2002) (citing *Romer*, 517 U.S. at 631–32). The appeals court has also summarized in *Goulart v. Meadows* that "[c]lassifications based on race, national origin, alienage, sex, and illegitimacy must survive heightened scrutiny," while "[a]ll other classifications need only be rationally related to a legitimate state interest." 345 F.3d 239, 260 (4th Cir. 2003) (citing *City of Cleburne*, 473 U.S. at 440–41).[7]

[7] The same is true in many other federal courts of appeals. *See, e.g.*, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d

Plaintiffs suggest that "there is no controlling law in this Circuit regarding the appropriate level of scrutiny for classifications based on sexual orientation," Pls.' MSJ at 9, but they are simply mistaken. They assert that the Fourth Circuit's decision in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), and therefore is no longer good law because *Bowers* has been overruled by *Lawrence*. Pls.' MSJ at 9. Whatever might be said about *Thomasson*, however, does not apply to the Fourth Circuit's decisions in *Veney* and *Goulart*. *First*, Plaintiffs are incorrect in asserting that *Veney* relied on *Thomasson*. Pls.' MSJ at 10 n.7. In fact, *Veney* independently relied on the Supreme Court's decision in *Romer*, which is indisputably still good law. *Second*, *Goulart* relied not on *Bowers* but rather *City of Cleburne*. And in any event, *Goulart* post-dates *Lawrence*.[8]

Windsor is also of no help to Plaintiffs. Although one court has concluded that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation," *SmithKline Beecham Corp. v. Abbott Labs.*, No. 11-17357, __F.3d__, 2014 WL 211807, at *6 (9th Cir. Jan. 21, 2014), a close review of *Windsor* belies that claim. Most informative is that the principle at the heart of *Windsor*—that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot 'justify disparate treatment of that group," 133 S. Ct. at 2693 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973))—draws from the Supreme Court's *rational basis review* jurisprudence. In more fulsome terms, the principle is that animus

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250, 261 (6th Cir. 2006); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton*, 358 F.3d at 818.

[8] If the Fourth Circuit had not already decided the appropriate level of scrutiny for a classification based on sexual orientation, this Court would be obligated to apply the factors set forth in *Wilkins v. Gaddy*, 734 F.3d 344, 348 (4th Cir. 2013). Other courts that have applied those factors have determined that sexual orientation is *not* a quasi-suspect classification. *See Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1007-13 (D. Nev. 2012); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990).

or a bare desire to harm "cannot constitute a legitimate government interest" for purposes of rational basis review. *Moreno*, 413 U.S. at 534. By concluding that "DOMA cannot survive" under this principle, *Windsor* clearly applied rational basis review. 133 S. Ct. at 2693; *see also id.* at 2696 ("[N]o legitimate purpose overcomes the purpose and effect to disparage. . . ."); 133 S. Ct. at 2706 (Scalia, J., dissenting) (noting that the majority opinion's "central propositions are taken from rational-basis cases").

b. To salvage some form of heightened scrutiny, Plaintiffs retreat to the assertion that the challenged laws discriminate on the basis of sex (rather than sexual orientation), but this argument lacks merit as well. West Virginia's marriage laws are gender-neutral. The laws "do[] not draw any distinctions between same-sex male couples and same-sex female couples, do[] not place any disproportionate burdens on men and women, and do[] not draw upon stereotypes applicable only to male or female couples." *Bishop*, 2014 WL 116013, at *24. They are different entirely from the facially gender-discriminatory practices at issue in the two cases cited by Plaintiffs—*United States v. Virginia*, 518 U.S. 515 (1996) (involving Virginia's "categorical exclusion of women" from admission to the Virginia Military Institute), and *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) (involving intentional gender discrimination in peremptory challenges).

Citing *Loving*, Plaintiffs respond that a "restriction on marriage is no less invidious because it equally denies men and women the right to marry a same-sex life partner." Pls.' MSJ at 11 n.8. It is true that the Supreme Court rejected in *Loving* "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8. But as the *Loving* Court also observed, the law at issue there "prohibit[ed] only interracial

marriages involving white persons" and therefore was clearly a "measure[] designed to maintain White Supremacy." *Id.* at 11. Here, "there is no indication of any intent to maintain any notion of male or female superiority." *Sevcik*, 911 F. Supp. 2d at 1005.[9]

Furthermore, "[c]ommon sense dictates" that "this case has nothing to do with gender-based prejudice or stereotypes," but rather turns on sexual orientation. *Bishop*, 2014 WL 116013, at *24. The conduct prohibited by the challenged laws—same-sex marriage—"is so closely correlated with being homosexual that sexual orientation provides the best descriptor for the class-based distinction being drawn." *Id.* at *25; *see also Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) ("The benefit denied by the marriage statute . . . is so 'closely correlated with being homosexual' as to make it apparent the law is targeted at gay and lesbian people as a class.").

c. Plaintiffs' further fallback position that the challenged laws "discriminate against all Plaintiffs in their exercise of their fundamental rights and liberty interests," Pls.' MSJ at 11, fails because no fundamental rights are at issue here, *see supra* at 27–31.[10]

B. Rational Basis Review Is a Highly Deferential Standard

Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Under this level of scrutiny, laws are "accorded a strong presumption of validity," *Heller v. Doe*, 509 U.S. 312, 319 (1993), and courts should be "very reluctant" to "closely scrutinize legislative choices as to

[9] The assertion that the challenged laws "requir[e] men and women to adhere to traditional marital roles," Pls.' MSJ at 11 n.9, is patently absurd. Nothing in the West Virginia laws remotely dictates the "talents" or "capacities" that a man or woman must bring to a marriage. *Id.* (internal quotations omitted).

[10] Plaintiffs separately assert that the challenged laws violate the child A.S.M.'s right to equal protection, Pls.' MSJ at 20, but they correctly do not suggest that this somehow elevates the appropriate level of scrutiny.

whether, how, and to what extent [a State's] interests should be pursued," *Cleburne*, 473 U.S. at 441–42.

A classification survives rational basis review simply if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 382–83 (1974). The question is whether "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Id.* at 378. A State is not required to show that *exclusion* of any group is necessary to promote the State's interest or that an excluded group will suffer no harm.

Importantly, the State "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. Under rational basis review, an asserted legislative interest "is not subject to courtroom factfinding," may be "based on rational speculation unsupported by evidence or empirical data," and must be upheld "if there is any reasonably conceivable state of facts" that could support it. *Id.* Moreover, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] *actually motivated* the legislature." *FCC*, 508 U.S. at 315 (emphasis added). In short, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320–21 (internal quotations and citations omitted). Of course, a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

Demanding evidence to support a rational basis—in direct contravention of the Supreme Court's repeated instruction—has been the critical error of many district courts ruling on the question of same-sex marriage. *See Kitchen*, 2013 WL 6697874, at *26 ("[T]he State is not able

to cite any evidence to justify its fears."); *Bourke v. Beshear*, No. 13-750, slip op. at 16 (W.D. Ky. Feb. 12, 2014) ("[N]o one has offered evidence. . . ."). That is simply not required under rational basis review.

Finally, "courts are compelled to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. For purposes of rational basis review, laws need not be made "with mathematical nicety." *Id.* (internal quotations omitted). This is because "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Id.* (internal quotations omitted).

C. The Challenged Laws Are Rationally Related to Several Legitimate State Interests

West Virginia's marriage laws satisfy rational basis review because the traditional definition of marriage furthers at least two conceivable state interests that same-sex marriage would not further or would not further to the same degree. *First*, it advances a conceivable legislative interest in expanding gay rights incrementally to avoid the unforeseen or disruptive consequences of an abrupt expansion of marriage to same-sex couples. *Second*, it furthers a conceivable legislative interest in ameliorating a unique consequence of opposite-sex intercourse: unplanned children.

1. The traditional definition of marriage advances a conceivable State interest in expanding gay rights incrementally to avoid disruptive or unforeseen consequences from an abrupt change

a. The Supreme Court has frequently held that a "legislature must be allowed leeway to approach a perceived problem incrementally." *FCC*, 508 U.S. at 316. A legislature can "reasonably take one firm step toward [a] goal . . . without accomplishing its entire objective in the same piece of legislation." *Califano v. Jobst*, 434 U.S. 47, 57–58 (1977) (citing *Williamson*

v. Lee Optical Co., 348 U.S. 483, 489 (1955)). Legislators are free to remedy all sorts of problems a little bit at a time, even if "by doing so [they] create arbitrary distinctions until correction is complete." *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998). A law "is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

Here, the West Virginia Legislature could reasonably have believed that there would be benefits to expanding gay rights incrementally. No society has yet had a generation's worth of experience permitting same-sex marriage. A cautious approach could be beneficial in a number of ways. Significantly, none of these possible benefits is "subject to courtroom factfinding," but rather may be "based on rational speculation unsupported by evidence or empirical data." *Heller*, 509 U.S. at 320.

First, incremental progression could have helped to avoid unforeseen disruption to other important legislative judgments and to the public fisc. Every West Virginia statute on the books assumes the traditional definition of marriage. To have altered or expanded these different laws—all at once—could have confused many areas of state law as well as affected the rights of numerous third parties. In particular, a redefinition of marriage could have had a significant and potentially unpredictable effect on the state budget. Even if the net financial effect of same-sex marriage had been neutral across state government, individual state agencies and programs that suddenly had to pay for benefits for same-sex couples could have faced budget shortfalls. *See Massachusetts v. HHS*, 682 F.3d 1, 9 (1st Cir. 2012) (finding that Congress "could rationally have believed that [declining to extend benefits to same-sex couples] would reduce costs").

This is not to say that "tradition" or "[a]ncient lineage" justifies a law. Pls.' MSJ at 13–14 (internal quotations omitted). The point is simply that, for purposes of rational basis review,

it would have been acceptable for the Legislature to be concerned about the legal and fiscal effect of "an all-or-nothing approach." *Bowen v. Owens*, 476 U.S. 340, 347 (1986). A legislature may proceed "cautiously" even if it "create[s] distinctions among categories of beneficiaries." *Id.* at 348.

Second, another benefit of incremental action is the ability to evaluate accommodations for private citizens and institutions who conscientiously object to endorsing or facilitating same-sex marriages. It is beyond dispute that the combination of same-sex marriage and existing discrimination laws creates numerous conflicts with fundamental First Amendment rights—conflicts that the traditional definition avoids. *See generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock et al. eds., 2008). As other States have found, same-sex marriage can cause problems—including legal penalties—for those who conscientiously refuse to endorse or facilitate same-sex marriages. *See* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty, *Hollingsworth v. Perry*, Nos. 12-144, 12-307, 2013 WL 439976 at *6–27 (U.S. Jan. 28, 2013) (describing how conscientious opposition to same-sex marriage can exclude objectors from government facilities and fora, disqualify objectors from government grants and contracts, and lose objectors licenses, accreditation, tax exemptions, and opportunities in education and employment).[11] While the First Amendment and other statutes provide some protection for speech and religious exercise, a cautious approach to same-sex

[11] For instance, a state university in Michigan expelled a counseling student who said that she could not in good conscience help gay and lesbian clients with their same-sex relationships. *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). New Mexico's human rights commission fined a wedding photographer who refused to endorse same-sex marriage by filming a same-sex commitment ceremony. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). And in Colorado, a baker who conscientiously objected to decorating a same-sex wedding cake faces a potential jail sentence under state anti-discrimination law. *Craig v. Masterpiece Cakeshop, Inc.*, No. 2013-0008, Notice of Appeal (Colo. Civil Rights Comm'n Jan. 4, 2014).

marriage could have allowed the Legislature to better evaluate the efficacy of such safeguards and determine what further safeguards, if any, are necessary.

Third, incremental action could have allowed the Legislature to learn from the experiences of other States that have expanded their definitions of marriage. One of the advantages of federalism is that it allows States, "if its citizens choose," to adopt "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Other States' experiments could provide valuable practical data about the effects of same-sex marriage, which in the fullness of time could allow the Legislature to decide how best to implement same-sex marriage.

b. The challenged laws plainly further this conceivable and reasonable state interest in incremental progress. By making clear that same-sex marriage is not yet permitted in West Virginia and declining to recognize out-of-state same-sex marriages "by default," the laws avoid the unforeseen consequences of a sudden and dramatic change to the definition of marriage. They preserve for the Legislature the ability to critically evaluate the State's laws—in particular, the protections for private citizens and institutions who conscientiously object to endorsing or facilitating same-sex marriages—and to learn over time from the experiences of other States. *See, e.g.*, AP Online (Mar. 11, 2000) (these laws are "'an opportunity for the legislative and executive branches to develop a law rather than have the judiciary develop the law'").

c. As noted above, "it is entirely irrelevant for constitutional purposes whether th[is] conceived reason [of incrementalism] *actually motivated* the legislature." *FCC*, 508 U.S. at 315 (emphasis added). A law can be sustained in light of any "conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320–21 (internal quotations and citations omitted). The Constitution "does not demand for purposes of

rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. The only question is whether "a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959)).

Nevertheless, the record does suggest that incremental progress may be what the Legislature has been trying to achieve. While the Legislature has retained the traditional definition of marriage, it has adopted or proposed a number of other measures that expand gay rights. It has prohibited bullying on any basis in schools, including bullying children based on their sexual orientation or gender identity. W. Va. Code, § 18-2C-1 *et seq.* (enacted April 14, 2001). When the Legislature passed the 2001 marriage laws, it separately allowed "[a]ny person not married" to adopt children. *Id.* § 48-22-201. Five years later, the Legislature created an express statutory right for everyone, same-sex couples included, to designate their visitors in a hospital. W. Va. Code § 16-5B-15. And since then, legislators have proposed various other bills expanding gay rights, including laws allowing civil unions and banning discrimination based on sexual orientation. *E.g.*, H.B. 4569, 80th Leg. (2012) (Exh. 32); S. 600, 78th Leg. (2008) (Exh. 25) (passed Senate); S. 238, 79th Leg. (2009) (Exh. 26) (passed Senate); S. 226, 80th Leg. (2011) (Exh. 27); H.B. 2045, 80th Leg. (2011) (Exh. 28); S. 14, 80th Leg. (2012) (Exh. 33); H.B. 2045, 80th Leg. (2012) (Exh. 34); H.B. 2856, 81st Leg. (2013) (Exh. 35); S. 472, 81st Leg. (2014) (Exh. 36); H.B. 2054, 81st Leg. (2014) (Exh. 37); H.B. 2856, 81st Leg. (2014) (Exh. 38).

2. The traditional definition of marriage also furthers the conceivable State interest in ameliorating a unique consequence of opposite-sex intercourse

a. A second interest rationally furthered by the Legislature's definition of marriage is the care of unintentionally conceived offspring. When opposite-sex couples conceive an unplanned

child and then shirk responsibility, the child becomes a burden on the State, its social welfare programs, and society as a whole. Marriage makes it easier for opposite-sex couples to raise their unanticipated children and harder to abandon them. This has long been a reason why government encourages marriage between opposite-sex intimate partners. *Cf. Yarborough v. Yarborough*, 290 U.S. 202, 221 (1933) ("[I]n order that children may not become public charges, the duty of maintenance is one imposed primarily upon the parents."). And it remains so, even as changing laws and social values have caused other historical incidents of marriage to fall away. *See* Pls.' MSJ at 6–7.

This is a "characteristic[] peculiar to only one group [that] rationally explain[s] the [Legislature's] different treatment of" opposite-sex and same-sex couples. *Johnson*, 415 U.S. at 382–83. Same-sex couples do not present the same potential for unintended pregnancies because "[s]ame-sex couples cannot naturally procreate." *Jackson*, 884 F. Supp. 2d at 1112. Even with surrogacy, reproductive technology, and adoption, same-sex couples can raise children only with substantial commitment, resources, and advance planning. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005). The default principle is that "all persons similarly circumstanced shall be treated alike," so the question is whether there exists a "ground of difference" that justifies the differential treatment. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Here, the answer to that question is "yes." Only one group can have unplanned pregnancies, and that characteristic is a conceivable explanation for the Legislature's decision to create only for that group an incentive under the law to stay together.

The laws are no less rational simply because they also permit the marriage of opposite-sex couples that are infertile or sterile. *Contra* Pls.' MSJ at 3–4, 14–15; *Bishop*, 2014 WL 116013, at *30; *Kitchen*, 2013 WL 6697874, at *18. As noted above, the Supreme Court has

stressed that laws scrutinized under rational basis review need not be made "with mathematical nicety," as "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *Heller*, 509 U.S. at 321 (internal quotations omitted). "[C]ourts are compelled to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* Moreover, the Legislature is entitled to "rational[ly] speculate" that the vast majority of opposite-sex couples have at least some chance of unintentionally conceiving a child,[12] as compared to same-sex couples, which are categorically incapable of unplanned procreation. *Id.* at 320; *see also FCC*, 508 U.S. at 320 ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the [legislative] choice from constitutional challenge.").

b. Plaintiffs challenge whether this interest is sufficient to sustain the traditional definition of marriage, but their argument is premised on a flawed conception of rational basis review. They assert that "rational basis analysis … requires a rational connection between a legitimate governmental interest" and, therefore, that "the relevant inquiry is whether the law's classification *excluding* same-sex couples bears a rational relationship to a legitimate governmental interest." Pls.' MSJ at 15.

Their understanding of rational basis review is inconsistent with Supreme Court precedent. The focus under the case law is solely on whether *including* a group would advance a legitimate interest. As the Supreme Court has clearly explained, a classification survives rational

[12] This is especially true given the "pragmatic and constitutional problems with the State inquiring whether each couple that applies for a license has the ability or desire to have children." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1113 (D. Haw. 2012); *Nguyen v. INS*, 533 U.S. 53, 69 (2001) (upholding an "easily administered scheme" that avoids "subjectivity, intrusiveness, and difficulties of proof").

basis review if "the *inclusion* of one group promotes a legitimate governmental purpose, and the *addition* of other groups would not." *Johnson*, 415 U.S. at 382–83 (emphasis added). Here, the inclusion of different-sex couples in the definition of marriage would advance the interest in ensuring care of unintentionally conceived children, but the further inclusion of same-sex couples would not, as the latter simply cannot conceive unplanned children.[13]

Plaintiffs' focus on the groups excluded by a law confuses rational basis review with higher levels of scrutiny that require a more precise means-ends fit. For example, strict scrutiny requires the government to use "the least restrictive means available," *Bernal v. Fainter*, 467 U.S. 216, 219 (1984), and intermediate scrutiny mandates a "substantial[] relat[ion]" to achieving an important governmental objective, *Massachusetts*, 682 F.3d at 9. That sort of tailoring is not required under rational basis review. *See Jackson*, 884 F. Supp. 2d at 1106–07; *see also Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) ("[E]very line drawn by a legislature leaves some out that might well have been included.").

c. Plaintiffs' other arguments—focusing on various other reasons for and against same-sex marriage—also lack merit. *First*, it is irrelevant that other public and private reasons for marriage—such as money, intimacy, social status, and taking care of intentionally conceived children, *see Kitchen*, 2013 WL 6697874 at *15, 25–26—may be advanced by allowing same-

[13] Numerous courts agree that "conferring the unique and socially significant legal status of marriage on same-sex couples would not further the interest in decreasing the number of children accidently conceived outside of a stable long-term relationship." *Jackson*, 884 F. Supp. 2d at 1112; *see Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Anderson v. King County*, 138 P.3d 963 (Wash. 2006); *Morrison*, 821 N.E.2d at 25; *Standhardt v. Superior Court*, 206 Ariz. 276, 77 P.3d 451, 463 (Ariz. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *see also Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005);. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), aff'd 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004).

sex couples to marry. Under rational basis review, the Legislature is not required to have evaluated or attempted to advance every possible interest. It need not show that it has "draw[n] the perfect line nor even . . . [have] draw[n] a line superior to some other line it might have drawn." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012). To the contrary, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320–21 (internal quotations and citations omitted).

Second, it is beside the point that there may conceivably be illegitimate bases for excluding same-sex couples from marriage. For example, the Supreme Court has held that traditional sexual morality is not a rational basis for limiting marriage to opposite-sex couples. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); Pls.' MSJ at 14. But the mere presence of potentially illegitimate reasons for a law does not negate other legitimate reasons. As the Supreme Court has explained, even where it has "rejected one asserted purpose as impermissible, [it has proceeded to] consider[] other purposes to determine if they could justify the statute." *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 472 n.7 (1981). This follows the "familiar practice of constitutional law that [a] court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.*[14]

[14] Although heightened scrutiny is inappropriate, *see supra* at 27–34, the challenged laws survive even under that more demanding standard. *First*, given the potentially wide-reaching effect of same-sex marriage on West Virginia laws and the public fisc, it is plainly an "important governmental objective[]" for the Legislature to be able to expand gay rights incrementally. *Craig v. Boren*, 429 U.S. 190, 197 (1976). And the challenged laws are "substantially related to achievement of th[at] objective[]" because a restriction on same-sex marriage is critical to ensuring that the Legislature has sufficient opportunity to actually learn from the experiences of other States. *Id.* *Second*, there can be no dispute that the provision of care for unintentionally conceived children is an important governmental interest. The challenged laws are also "substantially related" to that objective because opposite-sex and same-sex couples are, in the vast majority of cases, undeniably different with respect to their ability to unintentionally conceive children. Even when heightened scrutiny applies, "[t]he Constitution requires that [a State] treat similarly situated persons similarly, not that it engage in gestures of superficial

3. The Legislature was not motivated by a bare desire to harm homosexuals

a. Citing *Windsor*, Plaintiffs suggest that the challenged laws fail rational basis review whether or not the Legislature had a conceivable and appropriate reason for the laws. According to Plaintiffs, "[t]he Supreme Court in *Windsor* recently reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the law is unconstitutional regardless of whether the law may also incidentally serve some other neutral governmental interest." Plaintiffs assert that the challenged laws fail this standard since, in their view, the challenged laws were "enacted because of, not in spite of, [their] adverse effect on same-sex couples." Pls.' MSJ at 18.

As a threshold matter, even a court that found same-sex marriage required under the Constitution, *see Kitchen*, 2013 WL 6697874, at *29, refused to attempt this inquiry "because the Supreme Court has not yet delineated the contours" of the test, *id.* at *21. In particular, the court found it "unclear how a mix of animus and good intentions affects the determination of whether a law" improperly discriminates. *Id.* at *23. This Court, too, should be "wary of adopting such an approach here in the absence of more explicit guidance." *Id.* at *22.

b. But if this Court were to undertake this analysis, it should reject Plaintiffs' argument for at least two reasons. *First*, the Supreme Court has found laws to be motivated by a "bare desire to harm" only when the statutes on their face specifically target and take away existing rights. That was the case in *Romer*, where a state constitutional amendment "with[drew] from

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equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). As the Supreme Court has stated, "[t]o fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen*, 533 U.S. at 73; *see Michael M.*, 450 U.S. at 471. Under heightened scrutiny, a classification need not be accurate "in every case" so long as "in the aggregate" it advances the underlying objective. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

homosexuals, but no others, specific legal protection from the injuries caused by discrimination." 517 U.S. at 627; *see also id.* at 635 ("A State cannot . . . deem a class of persons a stranger to its laws."). And it was also true in *Windsor*, where the federal government purported to strip from married same-sex couples rights specifically granted to them by New York law. *See supra* at 23–26.

The challenged West Virginia laws do not specifically target and take away existing rights. The West Virginia Legislature has never recognized same-sex marriage; the laws at issue merely maintain the status quo. Nor has the Legislature sought to exclude gays and lesbians from the general protections of law or the political process. Unlike in *Windsor*, "a state law defining marriage is not an 'unusual deviation' from the state/federal balance, such that its mere existence provides 'strong evidence' of improper purpose." *Bishop*, 2014 WL 116013 at *19. "A state definition must be approached differently, and with more caution, than the Supreme Court approached DOMA." *Id.*

Second, even if a "bare . . . desire to harm" could be found outside the limited context of a statute that strips existing rights, *Windsor*, 133 S. Ct. at 2693, this is not the case. Some lower courts have found a "bare desire to harm" from an overwhelming legislative record of discrimination at the time of a law's passage, *e.g.*, *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918 at *4 (N.D. Ill. Dec. 5, 2013); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 946, 968–69 (E.D. Mich. 2013), but no such record exists here. In the more than a thousand pages of West Virginia's official legislative record, there are no animus-based statements like those found by other courts. No such justifications for the law appear in any statements of purpose, legislative findings, floor debates, or signing statements. From the first proposals in 1997 to the latest law

in 2012, West Virginia's legislators and governors have cooperated in an amicable and deliberate consideration of the definition of marriage.

Nor is there an overwhelming record of animus in unofficial public statements. Plaintiffs cite two statements, both of which express "moral" disapproval of same-sex marriage. *See* Pls.' MSJ at 18 n.16. But they conflate morality with animus. While the Supreme Court has explained that morality is not a legitimate state interest, *see supra* at 44, morality is not the same as the raw malice, "negative attitudes," "fear," "irrational prejudice," or "some instinctive mechanism to guard against people who appear to be different" that constitutes animus, *City of Cleburne*, 473 U.S. at 448, 450. As many courts have recognized, "moral disapproval often stems from deeply held religious convictions." *Bishop*, 2014 WL 116013, at *27. Furthermore, two lone unofficial statements to the press are hardly enough to suggest that three Governors from different parties, as well as nearly every member of the 2000, 2001, and 2012 Legislatures, were all motivated by a "bare … desire to harm." *Windsor*, 133 S. Ct. at 2693 (internal quotations omitted). Other lower courts finding animus have required more. *E.g.*, *Gray v. Orr*, 2013 WL 6355918 at *4 (finding animus based on multiple legislative transcripts); *see also Bassett v. Snyder*, 951 F. Supp. 2d 939, 946, 968–69 (citing multiple statements from elected officials stating illegitimate bases for the law).

Moreover, far from exhibiting desire to harm gays and lesbians, the Legislature has been gradually expanding their protections. This commitment began forty years ago when West Virginia voluntarily repealed its ban on sodomy decades in advance of the Supreme Court's mandate in *Lawrence*. *See* S. 154 (63rd Leg.) (1976), codified at W. Va. Code ch. 43 (1976) (preface) (repealing W. Va. Code § 61-8-13 (1931)). And it has continued, as described above, with new laws that permitted any unmarried person to adopt a child, that prohibited bullying on

any basis in schools, and that allowed anyone to designate their visitors in a hospital. *See supra* at 40. The Senate, in particular, has taken even more steps. On the same day that the Senate enacted the 2000 marriage law, it also voted for a hate crimes law that would provide additional civil rights protection to gays and lesbians. S. 422, 75th Leg. (2000 Regular Session) (Exh. 21). The Senate has also twice passed bills to prohibit discrimination in housing or the workplace based on sexual orientation. S. 600, 78th Leg. (2008) (Exh. 25); S. 238, 79th Leg. (2009) (Exh. 26).

IV. THIS COURT LACKS JURISDICTION TO ENJOIN WEST VIRGINIA CODE § 48-2-104(c)

Even if the Fourteenth Amendment requires the State to permit same-sex marriage, this Court cannot enjoin the Legislature's non-operative statement in West Virginia Code § 48-2-104(c) about what "marriage is." In *Webster v. Reproductive Health Services*, the Supreme Court refused to "pass on the constitutionality" of a "precatory" provision that "impose[d] no substantive restrictions" and that merely "express[ed] [a] sort of value judgment." 492 U.S. 490, 505 (1989). There, the Missouri Legislature included in a statute's preamble the following statements: "[t]he life of each human being begins at conception"; and "[u]nborn children have protectable interests in life, health, and well-being." *Id.* at 504. The Supreme Court agreed that these statements did not "restrict [the plaintiffs'] activities . . . in some concrete way," and that it therefore lacked the power to take any action. *Id.* at 506.

Like the preamble in *Webster*, which merely expressed the Missouri Legislature's position on abortion, West Virginia Code § 48-2-104(c) simply states the West Virginia Legislature's view on what "marriage is." The provision requires every state-produced marriage application to include certain statements of *the State*. One such statement expresses the Legislature's view on violence and abuse in marriage: "The laws of this state affirm your right to

enter into this marriage and to live within the marriage free from violence and abuse." Another concerns the Legislature's opinion on what "marriage is": "Marriage is designed to be a loving and lifelong union between a woman and a man." W. Va. Code § 48-2-104(c). These statements are non-operative and "impose[] no substantive restrictions." *Webster*, 492 U.S. at 505.

It is irrelevant whether the provision suggests a view that, if operationalized, would contravene the Fourteenth Amendment. The statements in *Webster* were arguably of that type, as they expressed a view about when life begins. But the Supreme Court made clear that the Fourteenth Amendment "implies no limitation on the authority of a State to make" and merely "express" a "value judgment." *Id*. (internal quotations omitted).

Indeed, the Supreme Court has repeatedly held that a State "is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and "to select the views that it wants to express," *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009). The statement in West Virginia Code § 48-2-104(c) is government speech because the State is unquestionably "the 'literal speaker' . . . who bears 'ultimate responsibility' for the speech." *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002). There is no danger that anyone would confuse the written expression of the State as the speech of any one individual. Moreover, the State maintains complete "editorial control" over the message because it has been enshrined in a statute. *See id.* at 620–21; *see also ACLU of N.C. v. Tata*, No. 13-1030, __ F.3d __, 2014 WL 521934 at *8 (4th Cir. Feb. 11, 2014) (concluding that the "editorial control" factor favors the State where permitting a pro-life message on specialty license plates was established by statute).

Nor does it matter that a precatory statement could be used in the future to "interpret other state statutes or regulations." *Webster*, 492 U.S. at 506. The Supreme Court in *Webster*

rejected that concern as "something that only the courts of [the State] can definitively decide." *Id.* The Supreme Court, however, was "not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Id.* at 507 (internal quotations omitted). So too, here.[15]

CONCLUSION

This Court should grant the State summary judgment and deny Plaintiffs summary judgment.[16]

Respectfully submitted,

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Dated: February 12, 2014

[15] Severability is not a concern as the default rule under West Virginia law, which presumes that statutory provisions are severable, applies here. *See* W. Va. Code § 2-2-10.

[16] In the event this Court determines to grant summary judgment to Plaintiffs, the State moves the Court stay the effect of its order until the matter has been fully resolved on appeal. Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a); *see Herbert v. Kitchen*, No. 3A687, 2014 WL 30367 (U.S. Jan. 6, 2014) (granting a stay pending appeal of the district court's same-sex marriage ruling). Plaintiffs do not oppose such a stay. Doc. 61 at 17.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON DIVISION

CASIE JO MCGEE and SARA ELIZABETH ADKINS; JUSTIN MURDOCK and WILLIAM GLAVARIS; and NANCY ELIZABETH MICHAEL and JANE LOUISE FENTON, Individually and as next friends of A.S.M., minor child,

Plaintiffs,

v. **Civil Action No. 3:13-24068**

KAREN S. COLE, in her official capacity as CABELL COUNTY CLERK; and VERA J. MCCORMICK, in her official capacity as KANAWHA COUNTY CLERK,

Defendants

and

STATE OF WEST VIRGINIA,

Defendant-Intervenor.

CERTIFICATE OF SERVICE

I, Elbert Lin, counsel for the Movant, hereby certify that on February 12, 2014, I electronically filed the foregoing *State Of West Virginia's Memorandum Supporting Its Cross Motion For Summary Judgment And Opposition To Plaintiffs' Motion For Summary Judgment* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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