NO. 11CR3329

JEFFERSON CIRCUIT COURT
DIVISION TWELVE (12)
JUDGE SUSAN SHULTZ GIBSON

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V.

BOBBIE JO CLARY — DEFENDANT

** ** ** ** **

NOTICE

TO: HONORABLE STACY GREIVE
ASSISTANT COMMONWEALTH ATTORNEY

AND

HONORABLE LISA CARTIER GIROUX
ASSISTANT COMMONWEALTH ATTORNEY

Please take notice that the following motion will be made on June 6, 2013 at 9:30 a.m., in the above-styled court.

MOTION FOR INVOCATION OF MARITAL PRIVILEGE

Comes now the defendant, by and through Counsel, and hereby moves this Honorable Court for a pretrial determination allowing the invocation of the marital privilege, applying it to any proposed testimony from Ms. Geneva Case and Ms. Bobbi Clary. This is filed pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Section Two, Seven and Eleven of the Kentucky Constitution, all applicable Rules of Criminal Procedure, all applicable case and statutory authority, and all applicable Rules of Evidence. In support of this motion, she states as

follows:

1. Ms. Clary is married to Ms. Case

Ms. Clary is charged with Murder, Robbery and Tampering with Physical Evidence. The death penalty is being sought against Ms. Clary.

Ms. Clary and Ms. Geneva Case entered into a Civil Union in Vermont on December 3, 2004.[1] The Commonwealth does not challenge the existence of this legal union or its status as a marriage in Vermont. See Attachment A.

At the time of this Union, a "marriage" was unavailable in Vermont. Same-sex marriage in Vermont began on September 1, 2009. However, the civil unions that existed in Vermont at the time of Ms. Clary and Ms. Case's union were designed to afford them the rights, benefits, and responsibilities of a married couple. See, Baker v. Vermont, 744 A.2d 864 (Vt. 1999). The civil union they entered into grants them next of kin rights in Vermont and other protections that heterosexual married couples receive. Id. Vermont now offers marriage to same sex couples, and there is no distinction between Vermont civil unions and Vermont same sex marriages.[2]

[1] On December 20, 1999 the Vermont Supreme Court ruled in Baker v. Vermont that same-sex couples are "entitled under Chapter I, Article 7, of the Vermont Constitution to the same benefits and protections afforded by Vermont law to married opposite-sex couples." 744 A.2d 864 (Vt. 1999). The legislature followed by passing H.B. 846, passed into law April 26, 2000.

[2] This is demonstrated by the fact that one is not free to enter into a marriage in Vermont unless and until a previous Civil Union is dissolved or the partner in the prior civil union has deceased, lest one run afoul of the prohibition against polygamy. See, www.healthvermont.gov/research/records/documents/Getting MarriedinVermontInformationSheet_09192012.pdf. See also, Elia-Warnken v. Elia, 463 Mass. 29, 972 N.E.2d 17 (Mass. 2012) (Massachusetts Supreme Judicial Court ruling that the 2005 same sex marriage was invalid under polygamy laws because one partner had previously been involved in a 2003 Vermont Civil Union that had never been dissolved).

Ms. Clary and Ms. Case remain joined in a same-sex marriage. There has been no dissolution of this marriage. They are not free to marry other individuals.[3]

2. Kentucky provides for spousal immunity.

As the Commonwealth concedes, Ms. Case has indicated that she will refuse to testify against Ms. Clary, invoking the privilege found in Kentucky Rule of Evidence 504. The provision is as follows:

> (a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.
>
> (b) Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

KRE 504.

There are exceptions to the privilege of spousal immunity but none of those are present here. If there is any suggestion by the Commonwealth that Ms. Case was involved in any criminal activity, then the Fifth Amendment would be invoked and Ms. Case should be appropriately advised.

3. This is an issue of first impression in Kentucky.

[3] Id.

Both parties to this litigation agree that the issue of spousal privilege has not yet been address by any Court in Kentucky. See, CW Motion at 4. Yet, this is an important matter of public policy that is likely to reoccur in future cases. Undersigned counsel has searched and found no opinions of the Kentucky Courts that address this issue directly.

The only allegedly binding case the Commonwealth cites is S.J.L.S. v. T.L.S., 265 S.W.3d 804, 818 (2008) in support of their allegation that Ms. Clary and Ms. Case's marriage is a legal "fiction" that does not require any recognition by this Court. Beyond the offensiveness of this argument, it is inaccurate and a misinterpretation of S.J.L.S. v. T.L.S. Rather than supporting the notion of a "legal fiction" as applied to same sex marriages, that case merely states that where a same sex couple ***did not enter into any binding legal relationship***, they cannot claim the privileges and protections of marriage. In that scenario, where there is no binding legal relationship in any jurisdiction, the relationship is a "legal fiction."

In that case, two unmarried individuals (who happened to be of the same sex and were involved in a romantic relationship) attempted second-parent adoption. One of the women involved in that relationship had borne a child by artificial insemination. The second woman sought to adopt the child. The second woman was of not a biological parent and was not a stepparent of the child, since there was no legal relationship between the women. Thus, the family court was in no position to issue a joint custody order. The two women did not attempt to enter into a marriage or civil union in any state, or a binding relationship in any way. Id.; See also, Pinkhasov

v. Petocz, 331 S.W.3d 285 (Ky. App. 2011) (finding that where heterosexual parties entered into a religious marriage ceremony without the issuance of a civil marriage license, as required by law, does not create a legally valid civil marriage).

Thus, when the Kentucky Court of Appeals declared their relationship a "legal fiction", it was correct. Nonetheless, that has absolutely no bearing on the status of the relationship between Ms. Clary and Ms. Case, who entered into a valid and binding civil union nine years ago.

Thus, the remaining attempt of the Commonwealth to use the S.J.L.S. case here is inapposite. No binding case law directly addresses Kentucky's response to same sex marriages in other jurisdictions.

4. Kentucky's failure to recognize same sex marriages from Vermont violates the United States and Kentucky Constitutions.

The Commonwealth correctly recites the Kentucky statute on point, which declares that "a marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky," and "any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts." KRS 402.045. However, this statute runs afoul of the Kentucky and United States Constitutions.

The Commonwealth of Kentucky also purported to pass a state Constitutional Amendment in 2004 declaring that "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." This Constitutional Amendment is invalid as it runs afoul of the United

States Constitution and conflicts with other provisions of the Kentucky Constitution.

A similar marriage amendment was passed in California, commonly known as Proposition 8, in 2008. The proposition purports to provide that "only a marriage between a man and a woman is valid or recognized in California." Text of Proposition 8, Official Voter Information Guide. A federal Court of Appeals has invalidated California's constitutional amendment, the implementation of the Constitutional Amendment has been stayed, and is currently the subject of pending litigation in the United States Supreme Court. See, Perry v. Hollingsworth (initially Perry v. Schwarzenegger. The United States Supreme Court is expected to rule by Late June 2013. Liptak, Adam (December 7, 2012) "Supreme Court to rule on same-sex marriage," *Star Tribune*.

In ruling that California's proposition 8 was unconstitutional, the Ninth Circuit Court of Appeals opinion applies the United States Supreme Court decision of Romer v. Evans, 517 U.S. 620 (1996), which held that the Constitution does not allow for "laws of this sort" that single out gay men and lesbians for discriminatory treatment. Id.; Perry v.

Brown, 681 F.3d 1065 (9th Cir. 2012).[4] In the same manner, Kentucky's Constitutional Amendment and KRS 402.045 are unconstitutional and therefore not binding on this Court.

[4] As to the other provision of DOMA, exempting same sex married partners from the receipt of federal benefits, is not directly at issue in the instant case. Yet, the suit challenging this and currently pending in the United States Supreme Court may result in a ruling that would affect the ruling in this matter. See, United States v. Windsor, (12-307). There is great disagreement among the lower federal courts as to the both the result and the reasoning. The First Circuit, the Northern District of California, the Southern District of New York have held that DOMA is unconstitutional, but three other federal courts have upheld Section 3 under rational basis review. See, Lui v. Holder, No 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011), ECF No. 38 (minute order upholding DOMA's constitutionality based on Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982)); Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (upholding DOMA on rational basis review by finding it rationally related to "encouraging the raising of children in homes consisting of a married mother and father"); In re Kandu, 315 B.R. 123, 146-48 (Bankr. W.D. Wash. 2004) (finding DOMA constitutional under rational basis review because it plausibly advances legitimate interest in promoting child rearing by two biological parents).

Even courts that agree that DOMA is unconstitutional have reached that result through different legal frameworks. The First Circuit, in Massachusetts v. United States Department of Health and Human Services, concluded that the "competing formulas" of traditional rational basis analysis and heightened scrutiny were both "inadequate fully to describe governing precedent." 682 F.3d at 8. It therefore decided that "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review" was warranted. Id. at 11. Accordingly, the First Circuit "required a closer than usual review based in part on the discrepant impact among married couples and in part on the importance of state interests in regulating marriage." Id. at 8.

By contrast, the Northern District of California in Golinski v. United States Office of Personnel Management applied heightened scrutiny. 824 F. Supp. 2d at 989. Explaining that cases relying on the now-overturned Bowers v. Hardwick, 478 U.S. .186 (1986), were non bi9nding and unpersuasive, the court in Golinski wrote that "no federal appellate court has meaningfully examined the appropriate level of scrutiny to apply to gain men and lesbians," a question that "is still open." 824 F. Supp. 2d at 985. After examining each of the relevant factor4s identified by this Court, the District Court in Golinski held that heightened scrutiny was the appropriate standard of review for classifications based on sexual orientation. Ids. At 985-90.

The current situation is that marriages of same sex couples performed in or recognized by California, New York and states int eh First Circuit are provided federal benefits, while the same federal benefits are denied to same sex couples legally married in Iowa and the District of Columbia. Moreoever, different federal courts are applying different standards of scrutiny to discrimination on the basis of sexual orientation will have consequences in other situations well beyond DOMA.

(a) Kentucky's Failure To Recognize Ms. Clary's And Ms. Case's Marriage Violates Due Process

Due Process rights require that Ms. Clary and Ms. Case be granted the same substantive and procedural rights as other similarly situated individuals. The right to marry, including the right to marry whom one chooses, is a fundamental right firmly entrenched in American culture and in Constitutional law. The recognition of Ms. Clary and Ms. Case's union would not involve the creation of a new fundamental right, but rather the application of the existing right to marry.

The Due Process Clauses of the Fifth and Fourteenth Amendments protect certain procedural and substantive liberties of individuals. The Supreme Court has consistently held that the right to marry is in fact a fundamental, if not *the most fundamental*, right. In Griswold v. Connecticut, arguably the Court's most famous decision regarding the right to privacy, Justice Douglas noted that the institution of marriage was "a right of privacy [that is] older than the Bill of Rights-older than our political parties, older than our school system." Griswold, 381 U.S. 479, 486 (1965). Consequently, the Supreme Court expressed its desire to protect that right. Whether it be a divorcee who wishes to remarry but is delinquent on child support payments, see, Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that a statute prohibiting marriage to individuals who are delinquent in their child support payments violates their right to marry). or even prison inmates who wish to marry one another, see, Turner v. Safley, 482 U.S. 78 (1987) (ruling that inmate marriage prohibition was "not reasonably related" to any state interest), the Supreme Court has gone to great lengths to protect the institution of

marriage from undue infringement.

The Court first acknowledged marriage as a fundamental right in Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is. . . fundamental to our very existence and survival."). The Court in Loving overturned the convictions of a male Caucasian and an African-American female who were convicted under a miscegenation statute that forbade interracial marriages. While the bulk of the Court's opinion relied on the Equal Protection Clause, the Court went on to hold that "the [fundamental] freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State." Loving, 388 U.S. at 12. A decade later, the Supreme Court reiterated that notion in Zablocki v. Redhail, stating that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Zablocki, 434 U.S. at 383.

The denial of recognition of Ms. Case and Ms. Clary's marriage is a denial of their right to marry on an arbitrary basis - - the couple's gender or sexual orientation. Kentucky apparently recognizes that convicted felons have a protected right to marry, yet law abiding homosexuals are denied legal recognition of their marriage. This violates Due Process.

There are, of course, limitations on the right to marry: such as incestuous marriages and marriages between children and adults. However, the prohibition of same-sex marriage is solely because of the gender or sex of the individuals. The Government can infringe upon fundamental rights, though only where strict scrutiny is met. This means that the Government's actions must be necessary to serve a

compelling governmental purpose. At a minimum, the prohibition on recognition of this union must serve an important governmental purpose. No important or compelling governmental purpose can be served by Kentucky's failure to recognize the marital privilege between Ms. Clary and Ms. Case.

The United States Supreme Court found not only a fundamental right to marry in Loving, but has found a fundamental right to privacy in same sex relationships in the decision in Lawrence v. Texas. Lawrence protects homosexual activity as a fundamentally privacy right. Lawrence, 539 U.S. at 572 (2003) (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J. concurring)).

Original intent of the framers of the Fifth and Fourteenth Amendment Due Process requirements does not answer the question. While the Court has said that history and tradition are important inquiries, they are not the end point. Id. [6]

The Constitution "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 365 U.S. at 101 (discussing the meaning of the Eighth Amendment). The evidence is apparent that there has been a significant shift in favor of recognizing the legal states of same sex relationships, both in the United States and abroad. Today over twenty states plus the District of Columbia provide some significant state-level relationship protections. See, www.aclu.org/maps/same-sex-relationship-recognition. Thirteen states permit same

[56] The Fourteenth Amendment was enacted to protect former slaves from racial discrimination. U.S. Const. Amend. XIV, Sec 1. However, the US Supreme Court has clearly relied on the Fourteenth amendment in a number of instances to prevent gender discrimination. See, for example, Craig v. Boren, 429 U.S. 190, 197-98 (1977) ("Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

sex marriage; six additional states grant civil unions to same sex couples; and New Mexico recognizes out of state same sex marriages. Id.

Prior to Lawrence, it seemed that the Supreme Court was in fact willing to treat homosexuals differently regarding certain fundamental privacy rights. The decision that Lawrence overruled, Bowers v. Hardwick, indicated this very notion. 478 U.S. at 186. The Bowers majority upheld a Georgia statute criminalizing consensual sodomy. In so doing, the Court expressed its unwillingness to announce that the right to engage in homosexual sodomy was a fundamental right. Id. At 192. While on its face the law targeted all forms of sodomy, both between heterosexuals and homosexuals, the Court's opinion demonstrated that the statute in question was directed primarily at homosexuals. In fact, the basis for the majority's refusal relied on "[p]roscriptions against that conduct [having] ancient roots," Id. and that there was "[n]o connection between family, marriage, or procreation . . . and homosexual activity." Id. at 191. This language suggests that homosexuals should not be permitted to enjoy certain rights because of historical proscription, and because such "sexual deviance" serves no "legitimate" end, such as procreation. One must remember that not all heterosexual sexual activity is geared toward procreation, yet "traditional" marriage is protected as a fundamental right.

The Lawrence decision of 2003 has abolished any exception to privacy rights that Bowers may have created. Lawrence, 539 U.S. at 578. Like Bowers, the Texas statute held unconstitutional in Lawrence criminalized consensual sodomy among adults; but unlike Bowers, the Texas statute explicitly targeted only sodomy between same-sex

individuals. Tex. Penal Code Ann. Sec. 21.06(a). The Lawrence court made clear this was unacceptable and unconstitutional.

Since Lawrence removes any exception to constitutionally protected privacy rights, and the Court has already found a fundamental right to marry whom one wishes in Loving v. Virginia, 388 U.S. 1 (1967), the only logical conclusion is that states may not refuse to recognize valid marriages in other states on the basis of the gender of the parties.

Fundamental rights, such as the right to marry, can be infringed upon by states in only narrow circumstances- - where there is a compelling governmental interest. Zablocki v. Redhail, 434 U.S. 374, 388 (1978). There is little doubt here that Kentucky's statute that purports to refuse to recognize the valid marriage of Ms. Clary and Ms. Case "significantly interfere[s]" with the due process rights of Ms. Clary. KRS. 402.020. This significant interference with a fundamental right is unconstitutional unless the state is able to provide the proper justification.

While the State of Kentucky would presumably offer some attempt at justification for the infringement of fundamental right, those have not yet been raised. Of course the Commonwealth of Virginia also attempted to offer public policy justifications in Loving v. Virginia. The lower Court stated: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that *he did not intend for the races to mix.*" Id. at 3, 87 S.Ct. at 1819 (quoting the trial judge) (emphasis added). The

Lovings appealed the constitutionality of the state's miscegenation laws to the Virginia Supreme Court of Appeals, which, *inter alia,* upheld their constitutionality and affirmed the Lovings' convictions. Id. at 3–4, 87 S.Ct. at 1819. The prohibitions of mixed-race marriages were rooted in a history and tradition. As of 1949, the following thirty of the forty-eight states banned interracial marriages by statute: Alabama; Arizona; Arkansas; California; Colorado; Delaware; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; North Dakota; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; West Virginia; and Wyoming. 388 U.S. at 6 n. 5, 87 S.Ct. at 1820 n. 5. When the Lovings commenced their lawsuit on October 28, 1964, sixteen states still had miscegenation laws on the books. Id. at 3, 6 n. 5, 87 S.Ct. at 1819, 1820 n. 5. Yet, despite such history and tradition, Loving ensured that members of different races could marry with full assurance that they would enjoy the many benefits and obligations enjoyed by other married couples.

Similarly, the Court in Bowers made arguments to condemn homosexual conduct as immoral, citing religious beliefs, conceptions of right and acceptable behavior, respect for the traditional family, etc. However, the majority of the court rejected these as controlling, finding that "our obligation is to define the liberty of all, not to mandate our own moral code." Lawrence, 539 U.S. 558, 571 (2003) (citing Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

Justification that the Commonwealth might allege would be in fostering procreation: This is flawed, especially in light of the Courts ruling in Griswold v.

Connecticut in which the Supreme Court invalidated an anti-contraception law and in Lawrence v. Texas which found that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment" Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Another possible alleged justification is the argument that children are best parented by one male and one female biological parents in the home. However, the social science research very clearly refutes this point.[7] A third justification provided is a purported "slippery slope" by which the recognition of same sex marriages leads to the breakdown of prohibitions against bigamy, incest, prostitution, adultery, bestiality, etc. This is flawed logically, but also cannot provide a basis for a compelling or important governmental interest to be served. It is of note that the above arguments were all raised in Loving as well in an effort to preserve marriage to individuals of the same race. The arguments failed in Loving and they will ultimately fail in the effort to refuse to recognize valid unions like the one between Ms. Clary and Ms. Case. Ultimately, there is no compelling or important governmental interest served by Kentucky's prohibition on the recognition of this union, thus the failure to allow Ms.

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[7] It is beyond the scope of this motion to include an exhaustive treatise on the state of social science research. However, it is now apparent that children reared by same sex couples do not fare poorly compared to children from heterosexual parents, demonstrated by the American Psychological Association's Amicus Curae brief filed in Perry v. Hollingsworth. See, *www.38.106.4.56/Modules/Show Document.aspx?documentID=1231* (citing, among other studies, Chan et al., supra note 35; C.J. Patterson, *Lesbian and Gay Parents and Their Children: A Social Science Perspective, in Contemporary Perspectives on Lesbian, Gay, and Bisexual Identities*, Nebraska Symposium on Motivation 141 (D.A. Hope ed., 2009); J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (2001); C.J. Telingator & C.J. Patterson, *Children and Adolescents of Lesbian and Gay Parents*, 47 J. Am. Acad. Child & Adolescent Psychiatry 1364 (2008); J.L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 Child Dev. 1886 (2004).)

Case to assert her marital privilege violates Due Process.

(b) Kentucky's Failure To Recognize Ms. Clary And Ms. Case's Marital Privilege Violates The Full Faith And Credit Clause Of The United States Constitution.

Kentucky regularly recognizes marriages that were established in other states or even other countries. When couples marry in another state, that marriage is recognized by the state of Kentucky. The marriage requirements of different states can vary significantly in terms of who is permitted to marry, the age upon which one may marry, whether a blood test is required, whether and how long any waiting period is required, who is permitted to perform a marriage ceremony, etc. Even when other states or countries vary significantly in these matters, Kentucky recognizes those marriages. We do so because the Full Faith and Credit Clause of the U.S. Constitution requires it.

The Defense of Marriage Act (hereinafter, "DOMA") is federal legislation that not only codified the federal definition of marriage as the "legal union between one man and one woman as husband and wife," 1 U.S.C. Sec. 7, but it also sought to give the states authority not to recognize same-sex marriages, or other similar unions, even when valid in other jurisdictions that do permit them. 28 U.S.C. Sec 1738C. This latter section runs afoul of the Full Faith and Credit Clause of the United states Constitution. It reads, "No State, territory, or possession of the United States, or Indian trive, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of other State, territory,

possession, or tribe, or a right or claim arising from such relationship." Id.

The Full Faith and Credit Clause states that, "Full Faith and Credit shall be given in each state to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof." U.S. Const. Art IV, Sec. 1.

In Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981), a majority of the Supreme Court agreed that the test was the same under both the Due Process clause of the Fourteenth Amendment and the Full Faith and Credit Clause of the Constitution for determining whether a state could constitutionally apply its own law to a case.

Marriage is a public act. Ms. Case and Ms. Clary's marriage in Vermont was performed by a public official in Vermont acting in her official capacity Kentucky must provide full faith and credit to the public act of Vermont marrying Ms. Case and Ms. Clary unless there is a compelling governmental interest in doing otherwise. For all of the reasons mentioned above, there is not compelling governmental interest in the failure to provide the marital privilege to Ms. Clary and Ms. Case that would be provided if one of them were male.

Marriage is sanctioned and regulated by statute in every state. The regulation of marriage by the states includes limitations on who can marry, including age limits, the degree of consanguinity within which marriages are permitted, residency requirements for marriage, and, of course, the permissible gender of parties to marriages.

The Supreme Court has previously held that a state must accept a divorce performed in another state although the law and the policy of the objecting state prohibited such divorces. See, e.g., Williams v. North Carolina, 325 U.S. 226 (1945) ; see also Luther L. McDougal, III, et al., American Conflicts Law §§ 19, 207 (5th ed. 2001) (discussing jurisdiction to divorce based on the domicile of the plaintiff alone and full faith and credit to divorce judgments).

(c) Kentucky's Failure To Recognize Ms. Clary And Ms. Case's Marital Privilege Would Violate The Equal Protection Clauses Of The United States Constitution and Kentucky Constitution.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. Romer v. Evans, 517 U.S. 620, 623 (1996) (J. Kennedy).

The Equal Protection Clause safeguards equality by "secur[ing] every person within the State's jurisdiction against intentional and arbitrary discrimination." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

Ms. Case and Ms. Clary would have a spousal immunity to prevent the Commonwealth from calling Ms. Case to testify against Ms. Clary if either Ms. Case or Ms. Clary were a male. It is *only* because of gender and sexual orientation that the Commonwealth purports to deny them the spousal immunity privilege. This creates exactly the type of discrimination that the Equal Protect clause of the United States and

Kentucky Constitutions prevents.

The test for what level of scrutiny provides when such discrimination is alleged depends on the class of individuals discriminated against. Where, as here, gender is the bases for such discrimination, intermediate equal protection scrutiny applies. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). The United States Supreme Court has consistently applied heightened scrutiny where a group has experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (internal quotation marks omitted); see also United States v. Virginia, 518 U.S. 515, 531-32 (1996) (noting "long and unfortunate history of sex discrimination") (internal quotation marks omitted).

While the Ninth Circuit Court of Appeals has found that "gays and lesbians are the type of minority strict scrutiny was designed to protect." See, Perry v. Schwarzenegger. This Court does not have to agree. Gay men and lesbians have faced a history of discrimination based on a trait that has no bearing on their ability to contribute to society, but this Court does not even need to reach that result. This Court can merely find that the government has no legitimate or important governmental interest to be served by the failure to recognize the Clary/Case marriage to the limited degree that Ms. Case is not required to testify against her wife (as opposed to a compelling governmental interest the Ninth Circuit would require). Regardless of the standard employed, the Kentucky statute and Kentucky constitutional amendment, to

the extent they prohibit the recognition of Ms. Case's spousal privilege against testifying against her wife, discriminates on the basis of sex.

If either Ms. Case or Ms. Clary were a male, they would have been free to travel to Vermont to marry on a vacation, return to the state of Kentucky and thereafter have the right to assert spousal privilege in the instant case. Only because they are both women does the state discriminate in this way. It is no defense that the Commonwealth equally discriminates against same sex male couples. As the United States Supreme Court held in Loving v. Virginia, the mere "fact" that Virginia's anti-miscegenation law had "equal application [to both the white and African-American member of the couple] d[id] not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." 388 U.S. 1, 9 (1967). "[E]qual application" is thus a plainly insufficient basis for defending discriminatory restrictions on the right to marry.

The Commonwealth cannot satisfy any such heightened scrutiny. Thus, any failure to recognize Ms. Clary and Ms. Case's marriage for the purposes of spousal privilege is therefore unconstitutional under the Equal Protection provided in the United States Constitution because it impermissibly discriminates on the basis of sex.

Even if this Court were to find that strict or intermediate scrutiny is inapplicable, the Commonwealth cannot satisfy a heightened rational basis review as applied by Federal District Courts in similar cases. The First Circuit recently applied such a standard in assessing the constitutionality of DOMA, explaining the need for "intensified

scrutiny of purported justifications where minorities are subject to discrepant treatment." Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012). That court therefore conducted "a more careful assessment of the justifications [for the law] than the light scrutiny offered by conventional rational basis review," id. at 11, ruling that "the rationales offered do not provide adequate support for section 3 of DOMA." Id. at 15.

Kentucky's failure to allow Ms. Case to exercise spousal privilege would likewise fail the version of rational basis review applied by the First Circuit. In order to reconcile the Fourteenth Amendment's promise that no person shall be denied equal protection of the law with the practical reality that most legislation classifies for one purpose or another, the Court has stated that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. See, e.g., Heller v. Doe, 509 U.S. 312, 319–320, 113 S.Ct. 2637, 2642–2643, 125 L.Ed.2d 257 (1993).

(d) Principles Of Comity Require That The State Of Kentucky Allow Ms. Case To Exercise Spousal Privilege

Principles of Comity require that the State of Kentucky recognize the union of Ms. Clary and Ms. Case, especially since Kentucky generally recognizes the marriages of other states even if those marriages would not be valid if performed in Kentucky.

Conclusion

This Court would not *have* to find, under any of these theories, that Kentucky must actually *perform* same sex marriages, in order to find that Kentucky must recognize validly performed marriages in other states for this limited purpose. For example, in Port v. Cowan, 426 Md. 435(Md. 2012), the Maryland Court of Appeals found that, while the state did not at that time perform same sex marriages or unions, the state must recognize the validly performed same sex marriage pursuant to the common law doctrine of comity for the purposes of applying the state's divorce laws. In the same manner, New Mexico recognizes same sex marriages of other states but does not perform them.

This issue will reoccur many times in Kentucky Courts. To fail to recognize marriages validly performed in other states would lead to absurd results: it would indicate that a person could be validly married in any number of states, but unable to be divorced in any state. To fail to recognize all valid out of state same sex marriages would wreak havoc on issues of interstate property dissolution upon divorces, child custody matters, probate matters, etc. To hold otherwise would mean that Ms. Clary and Ms. Case in this instance are free to marry other individuals in Kentucky, but that "second" marriage would not be recognized (pursuant to prohibitions on bigamy) in approximately 20 other states. No state would allow Ms. Clary and Ms. Case to divorce, since they are both domiciled in Kentucky. The absurd results demonstrate the important of Comity and Full Faith and Credit among the states in matters such as marriage and divorce.

To force Ms. Case to testify against her wife and legal partner of nine years, solely because of the gender of her partner, violates principles of Comity, Equal Protection of the Law, Principles of Due Process, and the Full Faith and Credit Clause of the United States Constitution. For these reasons, Ms. Case should be permitted to invoke the spousal privilege in this matter and not be required to testify against the woman to whom she has publicly and legally vowed her loyalty.

Respectfully Submitted,

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