NO. 11CR3329

JEFFERSON CIRCUIT COURT
FAMILY DIVISION TWELVE (12)

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V.

BOBBIE JO CLARY
DEFENDANT

To:

Hon. Angela S. Elleman
Michael Ferraraccio
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MEMORANDUM
SUPPORTING MOTION TO QUASH SUBPOENA

Comes the Movant, Geneva case, by counsel, and tenders her Memorandum Supporting Motion To Quash Subpoena.

A. DEFENDANT BOBBIE JO CLARY'S MOTION FOR INVOCATION OF MARITAL PRIVILEGE THOROUGHLY ADDRESSES THE ISSUES

Movant, Geneva Case, has filed a Motion to Quash the subpoena issued to her by the Commonwealth of Kentucky, which is a corollary motion for invocation of marital privilege filed by the defendant in this action, Bobbie Jo Clary.

In her motion, defendant, through counsel, thoroughly discusses and lays out for this court the correct legal issues and status of the law before this court. In the interest of judicial economy, therefore, the movant shall in her memorandum expound upon caselaw

developments in this fast changing legal landscape since the filing of the motion by defendant.

B. KENTUCKY'S EQUAL PROTECTION CLAUSE TREATS GAY AND LESBIAN KENTUCKIANS AS A PROTECTED CLASS

In her memorandum accompanying her motion, defendant argues correctly that both the equal protection clause of the Commonwealth of Kentucky as well as the equal protection clause of the United States requires the recognition of marriage of a same-sex couple legally performed in another state by the Commonwealth of Kentucky. With regard to the Kentucky Constitution, Movant Case invites the court to review the Kentucky Supreme Court ruling in the matter of *Commonwealth v. Wasson*, 842 S.W.2d 487 (1992). In that case, the Kentucky Supreme Court noted that the Commonwealth Kentucky has a stronger history of equal protection than that provided by the federal Constitution. In so doing, the Supreme Court struck down Kentucky's anti-sodomy law long before the United States Supreme Court chose to do so. In a well-reasoned opinion, the court noted,

> We do not speculated on how the United Supreme Court as presently constituted will decide whether the sexual preference of homosexuals is entitled to protection under the Equal Protection Clause of the Federal constitution. We need not speculated as to whether male/or female homosexuals will be allowed status as a protected class if and when the United States Supreme Court confronts this issue. They are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution. (p.501) To be treated equally by the law is a broader constitutional value than due process of the law as discussed in the *Bowers* case. We recognize it as such under the Kentucky Constitution, without regard to whether the United States Supreme Court continues to do so in federal constitutional jurisprudence. (*Id. at 502)*.
>
> It was perhaps the knowledge of this strong history of equal protection in Kentucky as set out by the Kentucky Supreme Court that prompted legislators to put

before the voters of Kentucky the constitutional amendment in question before this court which bans the recognition of same-sex marriages from other states. The legislators, with the support of the majority of voters in Kentucky, have sought to carve out an exception to Kentucky equal protection for the gay and lesbian citizens of the Commonwealth through this constitutional amendment.

C. FEDERAL EQUAL PROTECTION

While it is certainly an interesting issue of constitutional law and jurisprudence as to whether or not voters can take away equal protection rights of a particular class of fellow citizens based upon both presumed and open animus toward that group, this court need not address that issue today. Rather, it has become even more clear since the filing of this invocation by the defendant that the federal equal protection clause requires that states recognize a marriage, whether same-sex for not, which was valid in the state where it occurred. Movant invites this court to review the United States Supreme Court's recent decision in *United States v. Windsor*, 570 U.S._____ (2013).

The court in that case did not address the issue of equal protection as it pertains to the recognition of a same-sex marriage by state that bans same sex marriage when the marriage was performed in a state which legally recognizes those marriages. Rather, in that case, the court dealt with the Defense of Marriage Act (DOMA), and the federal government's refusal to recognize a legally sanctioned same-sex marriage for federal purposes.

However, the Court did note, with regard to the federal government's efforts to ignore legally sanctioned same sex marriages,

> DOMA seeks to injure the very class New York seeks to protect. By doing so it violates the basic due process and equal protection principles applicable to the

> Federal Government…The 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. *Id at p. 20*, *citing* *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-535 (1973).

The Court went on to note,

> By creating two contradictory marriage regimes within the same State, DOMA forces same sex-couples to live a married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations…*Id. at 22.*

Essentially, the Court reasoned that it is a violation of federal equal protection to create a system where the state recognizes same-sex marriages which the federal government then ignores. Although the issue was not before the Court (see *Hollingsworth v. Perry, 570 U.S. _____(2013))*, it follows that it is equally unconstitutional to create a system where same-sex marriages are legal in the state where consummated, recognized by the federal government, but not recognized by the state in which the same-sex couple resides. Essentially the Commonwealth of Kentucky seeks to create such an environment, and, in cases such as the one at bar, the refusal to recognize a legitimate marriage from another state can impact something so critical and basic as the right of spousal privilege in a capital murder case.

D. *OBERGEFELL V. KASICH*

The legal landscape regarding recognition of same sex marriages is shifting in such a rapid manner that it is difficult to stay abreast of the latest rulings. Accordingly, the court is invited to review the ruling issued just yesterday in the United States District Court for the Southwestern District of Ohio, Western Division, in the matter of **Obergefell v. Kasich,** as it is directly on point and takes place in a similarly situated state geographically "next-door". Ohio, like Kentucky, has both state statutes and a

constitutional amendment banning the recognition of same-sex marriages solemnized in a state that allows such unions. [1]As the federal court notes, "This is not a complicated case. The issue is whether the State of Ohio can discriminate against same sex marriages lawfully solemnized out of state, when Ohio law has historically and unambiguously provided that the validity of a marriage is determined by whether it complies with the law of the jurisdiction where it was celebrated." **Obergefell v. Kasich** 1:13-cv-00501.

The court concludes, as Movant herein has noted, that "While the holding in *Windsor* is ostensibly limited to a finding that the federal government cannot refuse to recognize state laws authorizing same-sex marriage, the issue whether States can refuse to recognize out-of-state same-sex marriages is now surely headed to the fore." *Id. at 2.*

The Court in Obergefell clearly sets out the issue before the Court, "Plaintiff's seek an order of this Court unconstitutional the Ohio laws forbidding recognition of legal same sex marriages from other states…" *Id. at 4.* In a well-reasoned analysis, the court takes apart Ohio's attempt at an argument to justify its behavior. The court notes, "Although law has long recognized that marriage and domestic relations are matters generally left to the states, the restrictions imposed on marriage by the states, however, must nonetheless comply with the Constitution." *Id at p 6, citing Loving v. Virginia,* 388 U.S. 1, 12 (1967).

The court also noted that Ohio, like Kentucky[2], recognizes marriages of opposite sex couples that, although invalid or not recognized if solemnized in Ohio, were valid or recognized in the state were solemnized, and that is the fatal flaw.

> Under Supreme Court jurisprudence, states are free to determine conditions for valid marriages, but these restrictions must be supported by legitimate state

[1] *See Ohio Rev. Code Sec. 3101.01(c)(2) &(3) and Ohio Constitution Art. XV, Sec. 11.*
[2] *See Howard v. Asher, 292 SW 1089 (1927), KRS 402.040*

> purposes because they infringe on important liberty interest around marriage and intimate relations.
>
> In derogation of law, the Ohio scheme has unjustifiably created two tiers of couples: (1) opposite sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal. *Id. at p. 8.*

Essentially, the federal courts ruling boils down to this: Ohio, like Kentucky, recognizes marriages of opposite-sex married couples if that couple is married in another state which recognize that marriage, even if that marriage, if performed in the state of Kentucky or Ohio, would not be valid. The example used by the federal court is that Ohio recognizes first cousins were married in another state if that state recognizes the marriage even though Ohio does not allow first cousins to marry. Similarly, Kentucky recognizes common-law marriages which have occurred and would be recognized in other jurisdictions even though Kentucky itself does not recognize common-law marriage (see footnote 2). It is worth noting that the very Kentucky statute which codifies the recognition of the marriage of a opposite sex couple solemnized in another state even though it is not recognized if solemnized in Kentucky in the second provision denies that recognition of sameness of a similarly situated same-sex marriage (see KRS 402.040).

This disparate treatment cannot stand, because

> there is no legitimate state purpose served by refusing to recognize same-sex marriages celebrated in states where they are legal. Instead, as in Windsor, and at least on this early record here, the very purpose of the Ohio provisions, enacted in 2004, is to 'impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states.'…It is beyond cavil that it is constitutionally prohibited to single out and disadvantage an unpopular group. Even if there were proffered some attendant governmental purpose to discriminate against gay couples, other than to effect pure animus, it is difficult to imagine how it could outweigh the severe burden imposed by the ban imposed on same sex couples married in other states. *Id. at 11*… this court on this record cannot find a rational basis that is not related to the impermissible expression of disproval of same-sex married couples. *Id. at 12.*

E. CONCLUSION

Based upon this reasoning, the federal court in the Southern District of Ohio has invalidated both Ohio's constitutional amendment prohibiting the recognition of same-sex marriages validly solemnized in another jurisdiction which recognizes them, as well as the attendant Ohio statute which seeks to do the same. Likewise, this court should strike down both Kentucky's constitutional amendment which seeks to deny recognition of same-sex marriages performed validly in another state which recognizes them, as well as the Kentucky statutes which seek to do the same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Petitioner, Bryan Gatewood, mailed a copy of this Motion to the parties listed above, by US First Class mail; postage prepaid this 23rd day of July, 2013.

_____

Bryan D. Gatewood