Civil Action No. 3:13-cv-240068

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

CASIE JO MCGEE, *et al.*,

Plaintiffs,

v.

KAREN S. COLE, *et al.*,

Defendants

JOINT MEMORANDUM OF DEFENDANTS KAREN S. COLE AND VERA J. MCCORMICK IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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A. INTRODUCTION

Plaintiffs challenge the constitutionality of W. Va. Code § 48-2-104, which defines marriage as "a loving and lifelong union between a woman and a man." The Legislature passed this bill by a nearly unanimous vote in 2000 and reenacted it in 2001. Plaintiffs also challenge the constitutionality of W. Va. Code § 48-2-401, which provides that "marriage means the performance of the formal act or ceremony by which a man and woman contract marriage and assume the status of husband and wife." This bill passed the Legislature unanimously in 2001.

Less than two (2) years ago, the Legislature reenacted W. Va. Code § 48-2-104 during the 2012 Regular Session. The reenacted provision included other pre-marital requirements and reinforced the traditional definition of marriage as a union between one man and one woman. The 2012 bill passed the Senate with a bipartisan vote of 29 to 5 and the House with a bipartisan vote of 79 to 21. Governor Earl Ray Tomblin, who also supported the 2000 and 2001 bills, immediately signed the 2012 reenactment into law. It remains the law of West Virginia today.

This Court should deny Plaintiffs' Motion for Summary Judgment, grant Defendants' Motion for Summary Judgment and dismiss all claims against Defendants Cole and McCormick because:

- Defendants' refusal to issue Plaintiffs' marriage licenses was required by validly enacted current West Virginia law.
- Defendants Cole and McCormick are constitutional office holders bound by oath, statute and the duties of their offices to follow current West Virginia law.

- Failure to obey state law subjects both Defendants to removal from office, civil penalties and incarceration.

- A decision by this Court as to the duties of Ms. Cole and Ms. McCormick has no binding effect for courts in the Northern District of West Virginia or for clerks other than Defendants Cole and McCormick.

- Neither W. Va. Code §48-2-104 nor §48-2-401 violates Plaintiffs' constitutional rights, as both statutes are rationally related to a legitimate governmental interest, as discussed at length in the Response and Cross-Motion for Summary Judgment filed on behalf of Defendant-Intervenor the State of West Virginia, (Doc. ___).

Therefore, Ms. Cole and Ms. McCormick are entitled to entry of an Order granting summary judgment in their favor, as no genuine issue of material fact exists as to Ms. Cole's or Ms. McCormick's liability to Plaintiffs for any actions they took pursuant to their Oath of Office, or to the constitutionality of the West Virginia statutes Plaintiffs challenge.

I. Statement of Facts

Plaintiffs Casie Jo McGee ("Ms. McGee"), Sarah Elizabeth Adkins ("Ms. Adkins"), Justin Murdock ("Mr. Murdock"), and William Glavaris ("Mr. Glavaris") are lesbian and gay residents of Cabell County, West Virginia who recently sought licenses to marry a person of the same sex from Defendant Karen S. Cole ("Ms. Cole"), who currently serves as Clerk of the County Commission of Cabell County, West Virginia. Plaintiffs Nancy Elizabeth Michael ("Ms. Michael") and Jane Louise Fenton ("Ms. Fenton") are lesbian residents of Kanawha County, West Virginia who sought licenses to marry a person of the same sex from Defendant Vera J. McCormick ("Ms. McCormick") (collectively hereinafter referred to with Ms. Cole as

"Defendants"), who currently serves as Clerk of the County Commission of Kanawha County, West Virginia. As required by validly enacted West Virginia law, as well as Defendants' Oaths of Office, employees of Defendants declined to issue marriage licenses to Ms. McGee, Ms. Adkins, Mr. Murdock, Mr. Glavaris, Ms. Michael, and Ms. Fenton (collectively hereinafter referred to as "Adult Plaintiffs").

Adult Plaintiffs subsequently filed their Complaint for Declaratory and Injunctive Relief on October 1, 2013. (Doc. 1). Ms. Michael and Ms. Fenton also brought claims against Defendants on behalf of their minor son, A.M.S. (hereinafter referred to jointly with Adult Plaintiffs as "Plaintiffs") In their Complaint, Plaintiffs asked this Court to declare that West Virginia laws precluding marriage for same-sex couples or precluding recognition of same-sex marriages validly performed in other states violated Plaintiffs' right to due process, discriminated against Plaintiffs, and deprived Plaintiffs of equal protection under the law. (Doc. 1). This Court dismissed Plaintiffs' challenge to West Virginia's statute prohibiting recognition of same-sex marriages performed outside of West Virginia by Order entered January 29, 2014 (Doc. 56). Therefore, the constitutionality of West Virginia laws preventing same-sex couples from marrying within West Virginia is the only outstanding issue before this Court.

II. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper if "the pleadings, the discovery and disclosure of 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(c). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). In other words, the availability of summary judgment turns on whether a proper jury question exists in a pending case, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970), and summary judgment is properly granted where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Anderson,* 477 U.S. at 248-49.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party. *Fed. R. Civ. P.* 56(e)(2).

B. ARGUMENT

I. Defendants' Oath and the Duties of Their Office Bind Them to Follow Current West Virginia Law.

Article IX, Section 12 of the West Virginia Constitution requires election of a Clerk of the Commission of each West Virginia county as follows:

> The voters of each county shall elect a clerk of the county commission, whose term of office shall be six years. His duties and compensation and the manner of his removal

> shall be prescribed by law. But the clerks of said commissions, now in office, shall remain therein for the term for which they have been elected, unless sooner removed therefrom, in the manner prescribed by law.

As Constitutional Officers and the duly elected Clerks for their respective County Commissions, Defendants each took an Oath of Office pursuant to Article IV, Section V of the West Virginia Constitution, which requires:

> Every person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or affirmation that he will support the constitution of the United States and the constitution of this state, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment; and no other oath, declaration, or test shall be required as a qualification, unless herein otherwise provided.

Defendants' Oaths of Office thus bind them to follow West Virginia law as they discharge their duties as Clerks for their respective County Commissions.

In addition to the affirmations and responsibilities imposed by the Oath of Office, the West Virginia Constitution and the West Virginia Code provide severe penalties should Defendants fail to properly execute the duties of their Office. The West Virginia Constitution subjects Defendants to "indictment for malfeasance, misfeasance, or neglect of official duty." Upon conviction for such conduct, Defendants must vacate their offices. West Virginia Constitution Article IX, Section 4. Furthermore, should Defendants knowingly issue a marriage license in violation of West Virginia law, they are "guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by

confinement in the county or regional jail for not more than one year, or by both such fine and confinement, in the discretion of the court." W.Va. Code §48-2-502.

W. Va. Code § 48-2-104 established requirements for the official state marriage application, including the requirement that the application contain the "full names of both the female and the male parties," and the requirement that the application contain the Legislature's view of the definition of "marriage" as: "[A] loving and lifelong union between a woman and a man." *Id.* (internal quotations omitted). 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. §§ 64-32-1 *et seq.*

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. The clerks have no authority to create their own marriage forms or to change the marriage forms created by the State Registrar and, as described above, would be subject to potential criminal penalties should they violate these provisions.

When faced with a request for a marriage license by two women in early 2013, Ms. Cole sought the advice of the Cabell County Prosecutor in office at that time, and asked whether she could issue a marriage license to two persons of the same gender. The prosecutor responded with a "no," based on West Virginia's clear

statutory definition of marriage as a union between one woman and one man. He provided his answer in writing in the form of a letter that Ms. Cole provided to couples seeking a marriage license, including Plaintiffs.

As Clerks for their respective County Commissions, Defendants do not act as legislators. They lack the power to make new laws or to revise existing ones, and, as Constitutional Officers of the State of West Virginia, they certainly may not arbitrarily select which laws they will obey and which they will disregard. In fact, Plaintiffs stated in their Complaint that:

> Ms. Cole's [and Ms. McCormick's] duties including issuing marriage licenses and maintaining records relating to marriage licenses, including records of marriages that take place in states other than West Virginia where one or both parties to the marriage are West Virginia residents. Ms. Cole [and Ms. McCormick] must ensure compliance through all of these functions with relevant West Virginia laws, including those that exclude same-sex couples from marriage, and forbid the filing of records relating to marriages of same-sex couples that take place in other states.

(Doc. 1, ¶18-19).

Defendants' Oaths of Office, as well as the threat of penalty, require them to follow West Virginia law as it currently stands, and Plaintiffs have not alleged that they did anything more or less than that which their office requires. Plaintiffs' Motion for Summary Judgment against Defendants should therefore be denied, as Defendants are entitled to summary judgment in their favor. They lack the power to exercise any degree of discretion on the issuance of marriage licenses, lack the

power to change the law and should not be placed in the untenable position of choosing between upholding their sworn Oaths of Office and facing a civil suit.

II. An Order By This Court Directing Ms. Cole and Ms. McCormick to Issue Marriage Licenses to Plaintiffs Would Result in State and Federal Inconsistency and Confusion.

Pursuant to Rule 19 of the Federal Rules of Civil Procedure, the injunctive relief Plaintiffs requested may not be granted if Plaintiffs failed to join parties necessary for this Court to "accord complete relief" to Plaintiffs without prejudicing absent parties or providing an inadequate resolution. *See* Fed. R. Civ. P. 19(a)-(b). This standard "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). An order granting a requested injunction affords incomplete relief when an absent party controls the means to provide the relief sought. *See City of Syracuse v. Onondaga County*, 464 F.3d 297, 299-300 (2d Cir. 2006) (Holding that the City of Syracuse was a necessary party where the defendant county could not comply with judgment in the absence of city approval); *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885, 896 (W.D. Wash. 1990) (Holding that state law determined that the "appropriate Washington state officials with responsibilities for elections are the Secretary of State and the Attorney General).

Here, Plaintiffs failed to join two necessary parties who control the means to provide the requested relief. First, an injunction prohibiting enforcement of W. Va. Code § 48-2-104 and directing Defendants to issue marriage licenses to Plaintiffs

requires modification of State marriage license applications to remove the definition of marriage required by Section 104. As discussed above, state law prohibits Defendants from altering or amending the marriage license application, as only the State Registrar is authorized to do so. Furthermore, the West Virginia Secretary of State bears responsibility for enforcing the marriage solemnization process, as set forth in W. Va. Code § 48-2-401.

Plaintiffs in this matter are seeking a declaration from this Court that the statutes prohibiting same-sex marriage are unconstitutional, thereby enjoining the enforcement of these statutes. In pursuing this matter, Plaintiffs have *only* named the Clerks of the County Commissions of Cabell and Kanawha Counties. Should this Court determine that the statutes prohibiting same-sex marriages are unconstitutional and enjoin the enforcement of these statutes, this injunction may only be enforced against the only named Defendants -- the Clerks of the County Commissions of Cabell and Kanawha Counties. It is well established that judgments are particular decisions, which apply only to particular persons, and bind no others. As Judge Learned Hand noted:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-833 (2d Cir. N.Y. 1930). "The courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *State University of New York v. Denton*, 35 A.D.2d 176, 179 (N.Y. App. Div. 4th Dep't 1970) (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945)). The *Federal Rules of Civil Procedure* codified this longstanding common law standard in Rule 65, which provides: "The [injunction] binds only the following who receive actual notice of it by personal service or otherwise: the parties[,] the parties' officers, agents, servants, employees, and attorneys[,] and other persons who are in active concert or participation" with the other bound parties. *Fed. R. Civ. P.* 65(d)(2)(A)-(C).

The only parties to this action are the Clerks of the County Commissions of Cabell and Kanawha Counties. Any other Clerk for any other County Commission in the State of West Virginia is not a party to the instant action. Accordingly, Plaintiffs may not use Rule 65(d)(2)(A) of the *Federal Rules of Civil Procedure* to enforce an adverse ruling as to the constitutionality of the statutes prohibiting same-sex marriage against a non-party Clerk for any other County Commission in the State of West Virginia. Moreover, no other Clerk in the State is an agent, employee or servant of these Defendants. Accordingly, Plaintiffs may not use Rule 65(d)(2)(B) of the *Federal Rules of Civil Procedure* to enforce an adverse ruling as to the constitutionality of the statutes prohibiting same-sex marriage against a non-party Clerk for any other County Commission in the State of West Virginia.

Rule 65(d)(2)(C), which states that an injunction may bind a non-party who is "in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)[,]" does not provide Plaintiffs with authority to enforce an adverse ruling as to the constitutionality of the statutes against any of the fifty-three (53) non-party Clerks. *See Fed. R. Civ. P.* 65(d)(2)(C). Courts have interpreted Rule 65(d)(2)(C) to mean that "[p]rivity between persons denotes the relationship arising out of mutual rights or successive rights in the same property or interest, as, for example, successors in a particular office, or assignee and assignor, or executor and testator." *Mobay Chemical Co. v. Hudson Foam Plastics Corp.*, 277 F. Supp. 413, 416-417 (S.D.N.Y. 1967) (quoting *Acheson v. Albert*, 90 U.S. App. D.C. 294, 195 F.2d 573 (1952)). Privity does not exist simply because one shares the same job title in a different district. Here, it is clear that no other Clerk is in privity with the Defendants, as the other Clerks are not "successors" to these Defendants. Because Defendants are not in privity with any other non-party Clerk, Plaintiffs may not enforce an adverse ruling as to the constitutionality of the statutes prohibiting same-sex marriage against any of the fifty-three (53) non-party Clerks.

Further, even if the Court should improperly find that privity exists between Defendants and the non-party Clerks, this Court does not have jurisdiction over clerks in the Northern District of West Virginia.[1] As this Court is aware, the enforcement mechanism for an injunction order is to hold the non-complying party

[1] There are 32 counties in the Northern District of West Virginia compared to 23 counties in the Southern District of West Virginia. The Northern District of West Virginia counties include Barbour, Berkeley, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson, Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, and Wetzel Counties.

in contempt. *See Fed. R. Civ. P.* 70. Should the Clerk of the County Commission of Harrison County, West Virginia fail to follow the injunction (should it be issued), this Court would not have jurisdiction over the Harrison County Clerk, as he or she operates solely outside the jurisdictional bounds of the Southern District of West Virginia. This problem of enforcement is compounded by the fact that Courts in the Northern District are free to disregard any decision made by this Court, as any ruling by this Court would only be persuasive, not mandatory. Thus, as it currently stands, an adverse ruling by this Court would only be enforceable against two (2) out of fifty-five (55) Clerks for their respective County Commissions in the State of West Virginia.

In sum, an adverse ruling by this Court as to the constitutionality of statutes prohibiting same-sex marriage in West Virginia would enjoin only two counties from enforcing the statutes, while the remaining fifty-three (53) Counties may continue to enforce the statutes. In other words, such a decision will be disruptive to an established coherent policy with respect to a matter of substantial public concern. *See e.g. First Penn-Pacific Life Ins. Co. v. William R. Evans, Chtd.*, 304 F.3d 345, 348 (4th Cir. 2002) (stating that Courts should abstain from ruling on issues in a federal forum that "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.")

III. Nullifying West Virginia's Laws Defining Marriage Would Disrupt The Federal Balance By Interfering With The State's Exercise Of Constitutionally Reserved Powers.

The United States Constitution establishes a system of "dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This dual sovereignty is conferred, in part, by the Tenth Amendment to the United States Constitution, which provides: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment X, United States Constitution. This fundamental principle dictates that "[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the reminder." *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2577 (2012). When exercising the powers reserved to the States, the States "are as independent of the general government as that government within its sphere is independent of the States." *The Collector v. Day*, 78 U.S. 113, 124 (1871) (overruled on other grounds by *Graves ex rel. People of the State of New York ex rel. O'Keefe*, 306 U.S. 466 (1939)). No doubt remains, therefore, that the powers delegated to the State must be given great deference based upon this system of federalism.

Plaintiffs' constitutional challenge to West Virginia's laws defining and regulating marriage invokes federal power "at its lowest ebb." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). Recently, the Supreme Court reaffirmed that "'[t]he states, at the time of the adoption of the Constitution, possessed *full power* over the subject of marriage and divorce . . . [and] the Constitution delegated *no authority* to the Government of the United States on the

subject of marriage and divorce.'" *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2691 (2013) (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)) (emphasis added). The Supreme Court further explained that "'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.* at 2680-81 (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930). There is no dispute that such marriage is almost uniquely an area where federal law is limited and the substance of said laws are reserved to the States. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (an expansive reading of the Commerce Clause would wrongly authorize Congress to regulate family law); *see also Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("[D]omestic relations, [is] an area that has long been regarded as a virtually exclusive province of the States . . . .").

The reasoning for reserving these powers with the State is well established. In addition to the lack of any provision or Amendment to the Constitution that expressly allows for the regulation of marriage by the federal government, it is also recognized that each State has legitimate concerns and interests in the marital status of individuals domiciled within its borders. *See Williams v. North Carolina*, 317 U.S. 287, 298 (1942). This legitimate concern is emphasized by that fact that "[i]t is within the States that [the people] live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the

needs of children from broken homes." *Boddie v. Connecticut*, 401 U.S. 371, 389 (1971) (Black, J., dissenting). In fact, as Justice Harlan advised, "[t]he laws regarding marriage . . . form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis." *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

The interplay between the principles of federalism and the State's almost exclusive power to regulate marriage played a central role in the Supreme Court's decision in *Windsor*. In *Windsor*, 133 S. Ct. at 2695, the Supreme Court held that Congress violated the Fifth Amendment's Due Process Clause by defining marriage for the purpose of interpreting federal law as "only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *See* 1 U.S.C. § 7. In reaching the conclusion that the Due Process Clause was violated, the Supreme Court emphasized the States' "historic and essential authority to define the marital relationship." *Windsor*, 133 S. Ct. at 2692. Specifically, the Supreme Court noted that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* at 2691 (quoting *Williams*, 317 U.S. at 298). Further, the Court added that "[c]onsistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.* at 2691.

While the Supreme Court recognized that the State of New York had properly exercised its sovereign authority in defining marriage, the violation of the Due Process Clause occurred because Congress "interfere[ed] with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power . . . ." *Id.* at 2693. In other words, the Supreme Court's decision in *Windsor* did not stand for the proposition that same-sex couples cannot be denied marriage by a State, but stands for the proposition that, because of the principles of "federalism", the federal government cannot interfere with the State's sovereign authority to define what constitutes marriage within its borders. *See e.g. Id.* at 2697 (Roberts, C.J., dissenting).

Plaintiffs' challenge to West Virginia's definition of marriage invites this Court to make the same error committed by Congress in enacting section 3 of DOMA – creating a "federal intrusion on state power" with its resulting "disrupt[ion] [to] the federal balance." *Id.* at 2692. There can be no distinction between the Supreme Court's deference to New York's law defining marriage and the deference that is necessary here with respect to West Virginia's law. Like New York, West Virginia adopted its definition of marriage through the appropriate legal process and its law reflects "the community's considered perspective on the historical roots of the institution of marriage." *Id.* at 2692-93. *Windsor* reaffirms "the long-established precept that the incidents, benefits, and obligations of marriage . . . *may vary*, subject to constitutional guarantees, from one State to the next." *Id.* at 2692 (emphasis added). Singling out West Virginia's marriage laws for

less respect or deference than the Supreme Court gave New York's laws would contradict the Supreme Court's endorsement of nationwide diversity on the States' consideration of same-sex marriage, as well as violating the "'fundamental principle of equal sovereignty' among the States." *Shelby Co., Ala. v. Holder*, 133 S.Ct. 2612, 2623 (2013) (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

Accordingly, in consideration of the foregoing, it is imperative that this Court give great consideration to the deference rightly owed to the State of West Virginia's lawfully enacted definition of marriage, particularly in undergoing the applicable rational basis standard of review. To do otherwise would substitute the federal government's judgment over the citizens of West Virginia with respect to the definition of marriage, which is a power squarely and almost exclusively reserved to the States.

IV. *Baker v. Nelson* Continues to Control This Case and Defeats Plaintiffs' Due Process and Equal Protection Claims.

Ms. Cole and Ms. McCormick note that this Court held in its January 29, 2014 Memorandum Opinion and Order that "[d]octrinal developments since [*Baker v. Nelson*, 409 U.S. 810 (1972)]. . . justify a finding that *Baker* is nonbinding." However, Ms. McCormick's Memorandum in Support of her Motion to Dismiss discussed the *Baker* holding only as it pertained to the issue of abstention. Thus, Ms. Cole and Ms. McCormick respectfully request that this Court revisit its decision that *Baker* is not controlling precedent as explained fully below.

1. ***Baker v. Nelson*** **Prohibits Constitutional Challenges to State Marriage Statutes.**

Baker v. Nelson directly controls and remains binding precedent on this case. In *Baker*, the Minnesota Supreme Court considered the constitutionality of a Minnesota statute substantially similar to the West Virginia laws at issue in this case. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The *Baker* petitioners, two adult males, applied to the respondent clerk for a marriage license. Just as in this matter, the petitioners argued that the clerk improperly denied their application and that Minnesota's law defining marriage as a union between persons of the opposite sex violated the Equal Protection Clause and the Due Process Clause.

In evaluating the petitioners' arguments in *Baker*, the court noted that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis" and that "'[m]arriage and procreation are fundamental to the very existence and survival of the race.'" *Id.* at 186 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). Therefore, "[t]his historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests" set forth by petitioners, and "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation." *Id.*

The court further concluded in *Baker* that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 187. The court also noted that "the classification is

no more than theoretically imperfect. We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment." *Id.*

The *Baker* petitioners appealed the Minnesota Supreme Court's ruling to the United States Supreme Court. In a one-line opinion, the United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. at 810. Although the Court declined to give *Baker* full consideration, the petitioners' appeal required it to deal with the merits of the case. Under the Court's prior holding in *Hicks v. Miranda*, 422 U.S. 332, 344-5 (1972), "'(v)otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case[.]'" (quoting *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); cf. R. Stern & E. Gressman, Supreme Court Practice 197 (4th ed. 1969) ('The Court is, however, deciding a case on the merits, when it dismisses for want of a substantial question . . .'); C. Wright, Law of Federal Courts 495 (2d ed. 1970) ('Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits')).

Although "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions[,]'" the Court's summary affirmance in *Baker* directly addresses the issues presented in Plaintiffs' Complaint. The petitioners' jurisdictional statement in *Baker* presented the following questions for the United States Supreme Court's consideration:

> (1) Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> (2) Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> (3) Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Jurisdictional Statement at 3, *Baker*, 409 U.S. 810, attached hereto as Exhibit A. As the first two questions presented by the appellants in *Baker* are identical to the issues raised by Plaintiffs in their Complaint, the United States Supreme Court's summary affirmation in *Baker* acts as a disposition on the merits and thus precludes Plaintiffs' claims in this matter.

The binding nature of *Baker* was most recently affirmed on January 6, 2014, when the United States 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 concluded that *Baker* is no longer controlling law, and that Utah's prohibition of same-sex marriage violated due process and equal protection under the United States Constitution. The State of 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. 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.

2. Windsor's Strong Basis in Federalism Supports the Constitutionality of West Virginia's Marriage Laws.

Plaintiffs rely almost exclusively on the United State Supreme Court's holding in *Windsor*, *supra* at 14. In *Windsor*, the Supreme Court concluded that the Federal Defense of Marriage Act unconstitutionally infringed on a New York state law recognizing same-sex marriage because the federal definition of marriage departed from the Court's historical "reliance on state law to define marriage." *Id.* at 2692. The Court refused, however, to rule on the constitutionality of state marriage laws, thus reinforcing that the regulation of marriages falls squarely within the realm of the state. In doing so, it recognized that "marriage is an area

that has long been regarded as a virtually exclusive province of the States." *Id.* at 2691. In fact, the Court justified its ruling on the basis of federalism:

> The 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 . . .
>
> It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

Id. at 2692-93. Thus, the Court recognized the legislative role in enacting changes based on the beliefs and understanding of its constituents.

By striking the limited federal definition of marriage, the *Windsor* Court respected the right of the state to define marriage but elected not to impose such changes on states with a different definition. Rather, the Court reinforced how and why individual states have the right in our system to regulate marriage. In *Windsor*, the Court had the opportunity to overrule *Baker* but elected not to do so out of deference for the states' right to self-rule on issues of marriage. West Virginia law plainly prohibits same-sex marriage, distinguishing the facts of this case from *Windsor*. This Court should defer to West Virginia's right to regulate marriage within its walls, just the *Windsor* Court deferred to the laws of the State of New York.

3. Courts Consistently Apply *Baker v. Nelson* to Preclude Constitutional Challenges to State Marriage Laws.

In the forty-two years since the Court decided *Baker*, courts have consistently applied its holding to prohibit due process and equal protection challenges to

statutes limiting marriage to a union between one man and one woman. *See*, *e.g.*, *Windsor v. United States*, 699 F.3d 169, 176, 178 (2nd Cir. 2012)(holding that *Baker v. Nelson* forecloses challenges to "the use of the traditional definition of marriage for a state's own regulation of marriage status."); *Massachusetts v. U.S. Dept. of Health & Human Services*, 682 F.3d 1, 8 (1st Cir. 2012) (*Baker v. Nelson* forecloses arguments that "presume or rest on a constitutional right to same-sex marriage."); *Perry v. Brown*, 671 F.3d 1052, 1082 n. 14 (9th Cir. 2012) (judgment vacated and remanded by *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (recognizing that *Baker v. Nelson* controls challenges to the "the constitutionality of a state's ban on same-sex marriage"); *Adams v. Howerton*, 673 F.2d 1036, 1039 n. 2 (9th Cir. 1982) (*Baker v. Nelson* resolved the constitutionality of state statutes that confer marital status only on unions between a man and a woman); *McConnell v. Nooner*, 547 F.2d 54, 55-6 (8th Cir. 1976)(per curiam)(recognizing that *Baker v. Nelson* "is binding on the lower federal courts" as to the constitutionality of state statutes prohibiting same-sex marriages); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1002-3 (D. Nev. 2012)(holding that *Baker v. Nelson* "precludes" an equal protection challenge to a state's refusal to confer marital status on same-sex persons); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1088 (D. Haw. 2012)("*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court.").

As "it is [the United States Supreme Court's] prerogative alone to overrule one of its precedents," the *Baker* holding binds this Court to dismiss Plaintiffs'

claims. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Thus, "lower courts are bound by summary decisions by th[e Supreme] Court 'until such time as the Court informs [them] that [they] are not.'" *Hicks*, 422 U.S. at 344-5 (citations omitted). The Fourth Circuit Court of Appeals also recognized this principle in *Lee-Thomas v. Prince George's Cnty. Pub. Schs.*, 666 F.3d 244, 250 (4th Cir. 2012), when it noted that "[i]t is, of course, solely the prerogative of the Supreme Court to decide when to overrule one of its decisions, and we cannot 'conclude [that the Court's] more recent cases have, by implication, overruled an earlier precedent.'"

In this case, West Virginia law plainly prohibits same-sex marriage, distinguishing the facts of this case from *Windsor*. In the absence of a decision by the United States Supreme Court overturning the *Baker* holding, *Baker* remains binding precedent and precludes Plaintiffs' claims against Defendants.

V. Should This Court Determine That *Baker* Is Not Controlling, West Virginia Law Does Not Violate The Due Process Clause Or The Equal Protection Clause.

1. Rational Basis Review Applies To Plaintiffs' Claims.

a. Same-Sex Marriage Is Not a Fundamental Right.

The United States Supreme Court defines a "fundamental right" as "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-1 (1997)(citations omitted). The Court has also recognized that "[b]y extending constitutional protection to an asserted

right or liberty interest, [the Court], to a great extent, places the matter outside the arena of public debate and legislative action. [The Court] must therefore 'exercise the utmost care whenever [it is] asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of th[e] Court." *Id.* (citations omitted).

In determining whether a fundamental right is implicated by an action of the government, a "careful description" of the right at issue must be made in order to determine the appropriate level of scrutiny. *See Glucksberg*, 521 U.S. at 728. Here, Plaintiffs attempt to shift the focus of this Court from the applicable rational basis scrutiny to a heightened level of scrutiny by asserting that this matter involves a deprivation of a fundamental right, specifically the fundamental right to marry. However, while there is no dispute that the right to marry has been deemed a fundamental right, this description of the alleged right at issue is inappropriate, as it is not carefully described.

Plaintiffs define the right at issue as whether the statutes prohibiting same-sex marriage deprives the fundamental right to marry, thereby attempting to dissuade this Court from properly defining the right by analyzing the person who is asserting the right. This is improper because no right is absolute and a right inherently depends upon the person or situation in which the right is being asserted. *See e.g. Morse v. Frederick*, 551 U.S. 393, 396-397 (2007) (holding that public school students may enjoy less freedom of speech rights in the school setting); *see also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989)

(relying on the class of employee, which are U.S. Custom employees, in allowing drug testing of these employees). In fact, the cases relied upon by Plaintiffs look at the classification of the person asserting the right in order to determine the level of scrutiny. For example, in *Zablocki v. Redhail*, the Supreme Court found that not all regulations which relate in any way to the incidentals of or prerequisites for marriage will be subject to rigorous scrutiny. 434 U.S. 374, 386 (1978). Clearly, therefore, to determine whether the right at issue is fundamental, which governs the level of scrutiny to apply, this Court must analyze the person asserting the right. As a result, the issue is *not* simply whether the right to marry has been affected, but must be carefully described as whether the liberty interest specifically protected by the Due Process Clause should be expanded to include the new concept that an individual should be entitled to marry an individual of the same sex.

After accurately and carefully describing the right at issue, there is no dispute that same-sex marriage is a not a fundamental right and is not subject to heightened scrutiny. This Court must determine whether the right being asserted as fundamental is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21. Here, the alleged right at issue – specifically, whether the liberty interest protected by the Due Process Clause includes the right to marry an individual of the same sex – is a new concept.

Chief Justice John Roberts noted in his dissent to the majority's opinion in *Windsor* that, as of the passage of DOMA in 1996, "every state in our Nation, and every nation in the world" had adopted the traditional definition of marriage as a union between one man and one woman. 133 S. Ct. at 2696. By comparison, merely a decade ago in 2003, Massachusetts became the first state to recognize same-sex marriage in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003), by interpreting its state constitution. Although a handful of other states now recognize same-sex marriage as a result of state court decisions interpreting state constitutional provisions or by statutes enacted by state legislatures, as of the date of this Motion thirty-three (33) states still define marriage as a union between one man and one woman.

Further, a type of union recognized only ten (10) years ago cannot be considered "deeply rooted in our history and traditions." *See Windsor, supra*; *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006)("[I]t was an accepted truth for almost anyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." (plurality opinion)). Furthermore, in addition to *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), which is controlling in this Court and discussed in detail below, federal courts apply rational basis review to statutes distinguishing between heterosexuals and homosexuals, indicating agreement among federal circuits that there is no fundamental right to same-sex marriage. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631-5 (1996); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Witt v. Dep't of the Air*

Force, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 (10th Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-7 (8th Cir. 2006); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Equality Found of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294-5 (6th Cir. 1997).

In sum, the issue before this Court is not whether there is a deprivation of the right to marry, but is precisely described as whether the liberty interest specifically protected by the Due Process Clause includes same-sex marriage. Based upon the various Courts analyzing this issue and a review of the history of the Nation, this is a newly created status that cannot be deemed to be a fundamental right subject to heightened scrutiny. As a result, rational basis remains the applicable level of scrutiny.

b. <u>The Fourth Circuit Applies Rational Basis Review to Statutes Involving Distinctions Between Homosexuals and Heterosexuals.</u>

The Fourth Circuit has controlling precedent directing that rational basis review applies to the statutes prohibiting same-sex marriage. The Fourth Circuit held in *Thomasson v. Perry*, which arose from a challenge to the military's "Don't Ask, Don't Tell" policy, that rational basis review applies to statutes that distinguish between homosexuals and heterosexuals. 80 F.3d at 928. The appellant in *Thomasson* argued that heightened judicial scrutiny applied to the military's policy. However, the Fourth Circuit's "searching review" confirmed that "strict scrutiny is appropriate only in limited cases, where the statute classifies along inherently suspect lines or burden the exercise of a fundamental right." *Id.* at 927-8

(citing *Heller v. Doe*, 509 U.S. 312 (1993); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). Furthermore, "only a few classifications" such as those based on race, national ancestry or origin, illegitimacy, or gender, "trigger heightened scrutiny." *Id.* at 928 (citations omitted).

The Court also noted in *Thomasson* that "because heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes." *Id.* (citations omitted). Thus, the Court declined to extend strict or intermediate scrutiny, as it would "involve the judiciary in an inventive constitutional enterprise" that "would frustrate the elected branches of government in their efforts to deal with this question." *Id.*

More recently, the *Windsor* Court applied a rational basis review rather than heightened or strict scrutiny. (Scalia, J., dissenting: "I would review this classification only for its rationality. As nearly I can tell, the Court agrees with that; its opinion does not apply strict scrutiny and its central propositions are taken from rational-basis cases." (citations omitted)).

While Plaintiffs argue that West Virginia statutes discriminate against them based on gender, thereby subjecting the laws to heightened scrutiny, the statute treats all similarly-situated men and women – namely, those individuals wishing to marry a person of the same sex – equally. The Supreme Court has consistently held that sex-based discrimination occurs only when a law subjects men and women to disparate treatment. *See Miss. Univ. for Woman v. Hogan*, 458 U.S. 718, 719

(1982); *Craig v. Boren*, 429 U.S. 190, 191-2 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 678-9 (1973); *Reed v. Reed*, 404 U.S. 71, 73 (1971). Here, rational basis review still applies because the West Virginia laws equally prohibit both men and women from marrying a person of the same sex.

Plaintiffs argue that the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) effectively abrogated *Thomasson*, as well as *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) (holding that assignment of homosexuals to single-occupancy prison cells did not violate constitutional rights), as the Fourth Circuit relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986) in reaching its decision in *Thomasson* and *Veney*. However, neither *Thomasson* nor *Veney* even mentions *Bowers*, let alone relies on *Bowers* as a basis for its decision. Further, *Lawrence* clarified that its ruling did not involve "public conduct . . . (and) whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. Justice O'Connor expanded upon the Court's rationale by stating that the ruling did not signal that bans on same sex marriages would be found unconstitutional: "other rationales exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585 (O'Connor, J. concurring). The Fourth Circuit simply held that the statute at issue in *Thomasson* did not target a suspect class or infringe upon a fundamental right, and thus that rational basis review applied to the law. *Thomasson* remains binding precedent and rational basis remains the applicable level of scrutiny.

The West Virginia statutes do not deprive Plaintiffs of a fundamental right, nor do they target a suspect class. This Court is therefore bound by the Fourth Circuit's ruling in *Thomasson*, as well as decades of Supreme Court precedent, and should apply rational basis review to the statutes at issue.

2. West Virginia Marriage Laws Are Rationally Related To A Legitimate State Interest.

The Fourth Circuit noted in *Thomasson* that "[i]t is settled law that rational basis review 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' The question is simply whether the legislative classification is *rationally related* to a *legitimate governmental interest*." *Id.* at 928 (internal citations omitted)(emphasis original). Rational basis review entitles legislation to "'a strong presumption of validity'" which must be sustained if "'there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *Heller*, 509 U.S. at 318-320). Significantly, "to sustain the validity of its policy, the government is not required to provide empirical evidence. '[A] legislative choice is not subject to courtroom factfinding . . . Rather, '[t]he burden is on the one attacking the legislative arrangement to negative [sic] every conceivable basis which might support it.'" *Id.* (citations omitted).

The West Virginia Attorney General's Office described numerous significant state interests that provide clearly rational bases supporting the West Virginia Legislature's enactment of W. Va. Code § 48-2-104 and W.Va. Code § 48-2-401. Ms. Cole and Ms. McCormick defer to the Attorney General, as the State's counsel, in articulating the rational bases supporting this statute and hereby adopt and

incorporate by reference the discussion set forth in the Attorney General's Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment.

C. CONCLUSION

Ms. Cole and Ms. McCormick are entitled to entry of an Order granting summary judgment in their favor, as no genuine issue of material fact exists as to their liability to Plaintiffs or as to Ms. Cole's or Ms. McCormick's ability to provide redress for Plaintiffs' claims. Ms. Cole and Ms. McCormick abided by their Oaths of Office and upheld the laws of the State of West Virginia, as they are bound to do regardless of their personal views or opinions regarding the Legislature's decisions. Furthermore, the statutes at issue are subject to rational-basis review, as they do not deprive Plaintiffs of a fundamental right nor do they target a suspect class. The statutes survive rational-basis review in that they are rationally related to a legitimate state interest.[2]

Defendants Karen Cole and Vera McCormick therefore respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment and instead grant summary judgment in their favor, and for any other relief this Court deems appropriate.

KAREN S. COLE and
VERA J. MCCORMICK

By counsel

[2] In the event this Court grants summary judgment to Plaintiffs, Defendants move 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 (U.S. Jan. 6, 2014) (granting a stay pending appeal of the district court's same-sex marriage ruling).

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