RECORD NO. 14-1167(L)
CONSOLIDATED WITH 14-1169, 14-1173

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, TONY C. LONDON;
CAROL SCHALL; MARY TOWNLEY,

Plaintiffs - Appellees,

CHRISTY BERGHOFF, on behalf of themselves and all others similarly situated;
JOANNE HARRIS, on behalf of themselves and all others similarly situated;
JESSICA DUFF, on behalf of themselves and all others similarly situated;
VICTORIA KIDD, on behalf of themselves and all others similarly situated,

Intervenors,

v.

GEORGE E. SCHAEFER, III,
in his official capacity as the Clerk of Court for Norfolk Circuit Court,

Defendant - Appellant,

and

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records; ROBERT F. MCDONNELL, in his official capacity as Governor of Virginia; KENNETH T. CUCCINELLI, II, in his official capacity as Attorney General of Virginia,

Defendants,

MICHELE MCQUIGG,

Intervenor - Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

REPLY BRIEF OF APPELLANT GEORGE E. SCHAEFER, III

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Appellant George E. Schaefer, III, in his official capacity as the Clerk of Court for the Norfolk Circuit Court (hereinafter "Clerk Schaefer" or "Schaefer"), by counsel, files this Reply Brief pursuant to Rule 28 of the Federal Rules of Appellate Procedure and the Accelerated Briefing Order previously issued by this Court (Doc. 39) as follows:

Preliminary Objection to Purported Facts Not Found by the District Court

Clerk Schaefer objects to certain factual statements asserted by the other parties. First, the *Harris* Class Intervenors submit a lengthy statement which purportedly details the underlying facts of their class action case filed in the Western District of Virginia. (Doc. 130, *Harris* Class Br. at 20-24.) However, the *Harris* case is still pending, has been subject to no judicial fact-finding, and is currently subject to a stay without a ruling on any dispositive motion. *See Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 59, 56 S. Ct. 6, 80 L. Ed. 39 (1935) ("Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill."); *See also, Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498, 64 S. Ct. 731, 88 L. Ed. 883 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.")

Second, the Appellees seek to establish the factual basis for their arguments through citations of "facts" Appellees culled from news clippings and other sources which Appellees included as attachments to their brief in support of summary judgment below. (Doc. 129, Appellees' Br. at 11-14.) Appellees made no effort to establish the truth and admissibility of what is plainly hearsay. This Court should not rely upon any of Appellees' factual statements which rely for their authority upon hearsay which the District Judge neither admitted as evidence nor found to be true.

Argument

I. States have the exclusive right to define marriage.

a. *Baker v. Nelson* and *United States v. Windsor* dictate the States have the right to define marriage.

Consistent with *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), the 8th Circuit Court of Appeals in 2006 declared that "[i]n nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provisions of the United States Constitution." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006). Appellees argue that *United States v. Windsor* necessarily alters this analysis by

including a reference to *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), which they take to mean states may no longer define marriage in a manner which precludes same-sex marriages. However, as will be shown, the decision in *Windsor* promotes the rights of the states to define marriage, and the citation to *Loving* reflects a concern with overtly targeted legislation which the case *sub judice* does not present.

The last sentence of the majority's opinion in *Windsor* expressly limits itself by stating "[t]his opinion and its holding are confined to those lawful marriages." *United States v. Windsor*, __ U.S. __, 133 S. Ct. 2675, 2696, 186 L. Ed. 2d 808 (2013). The phrase "those lawful marriages" refers to those couples who the State of New York through its marriage laws recognized and granted the status of marriage. *Id.* The Court ruled that the federal government could not deny and degrade a marriage status legislatively granted to gays and lesbians by New York without violating the 5th Amendment. The constitutional violation in *Windsor* arises from the exercise of New York's legislative discretion to recognize same-sex marriage and the federal government taking away that right via DOMA. DOMA was rightly judged unconstitutional for stigmatizing and denying same-sex couples the rights and obligations attendant to New York's exercise of state legislative authority to confer marital rights and obligations upon a particular class of couples.

Thus the *Windsor* case aligns with the Supreme Court's rejection of an expressly stigmatizing state law in *Romer v. Evans* 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 855 (1996), which properly struck down a state constitutional amendment that attempted "to repeal existing statutes, regulations, ordinances and policies" establishing sexual orientation as a protected status. *Romer*, 517 U.S. at 626. The challenged constitutional amendment sought to revoke "from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627. These types of legislative schemes specifically and facially directed solely at gays and lesbians "to make them unequal to everyone else" have no place in "our constitutional tradition." *Id.* at 634-35.

The citation to *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967) in the *Windsor* opinion does not alter the status quo that has existed at least since *Baker v. Nelson*. It is noncontroversial that state laws "defining and regulating marriage…must respect the constitutional rights of persons." *Windsor* 133 S. Ct. at 2691. When the Court made this statement in *Windsor* the *Baker* decision had long-settled the point that there was no federal constitutional right to a same-sex marriage. Whether to approve same-sex marriage is a "regulation of domestic relations…that has long been regarded as a virtually exclusive province of the States." *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42

L. Ed. 2d 532 (1975) (internal quotations removed)). The people of New York decided to "give this class of persons the right to marry" as an expression of the state's "historic and essential authority to define the marital relation in this way…." *Id.* at 2692. To say a state has the "authority" to define a marital relation to include a particular class of persons does not mean no state has the authority to maintain a different, traditional definition which does not include that class. Instead, each state has the "authority" to decide whether to extend the definition to include same-sex couples. Such matters are proper for the democratic process unlike the invidious racial laws rightly judged unconstitutional in *Loving*.

Furthermore, the type of scheme addressed in *Windsor* and *Romer* is not before this Court. Appellees do not challenge a new law; they assert a new right against laws the Supreme Court have deemed constitutional since at least 1972. Since the Supreme Court decided *Baker v. Nelson*, there has been no doctrinal change in the law that the States cannot constitutionally limit marriage to couples of the opposite sex.

Thus, properly understood, the opinion in *United States v. Windsor* harmonizes with, rather than departs doctrinally from, the decision in *Baker v. Nelson*. The majority's opinion and rationale in *Windsor* regarding a state's legislative authority to recognize same-sex marriage are entirely consistent with, and in fact arise from, the ruling in *Baker* finding the States have the authority to

define marriage as between a man and a woman without violating the 14th Amendment, i.e. that such legislative action does not present a substantial federal question. Because the exercise of state legislative discretion to grant marriage status to gays and lesbians was the predicate to finding that DOMA violated the 5th Amendment, *Windsor* cannot then be a doctrinal development that eroded *Baker's* precedential force. If *Baker v. Nelson* was no longer good law—and the States did not have the right to only recognize traditional, opposite sex marriages—the Court would not have had to make such the limited and constrained ruling it did in *Windsor*. *Windsor* 133 S. Ct. at 2696.

The question of same-sex marriage does not involve comparing the relative weight of a constitutional right versus state authority over domestic relations. For the last 150 years there never has been any indication from the Supreme Court that a state's decision to limit marriage to opposite-sex couples violates the Fourteenth Amendment or any other provision of the Constitution. *Bruning*, 455 F.3d at 870. This understanding was expressly confirmed in *Baker* and again in *Windsor*. Therefore, no change in precedent or law has occurred since *Baker* that causes this particular case to present a substantial federal question.[1]

[1] The analysis of the authority for states to regulate marriage should be similar to the analysis used in connection with state regulation of voting in state and local elections. "[T]he Supreme Court has recognized that the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Evans v. Cornman*, 398 U.S. 419, 422, 90 S. Ct. 1752, 26 L.

b. *Schuette v. BAMN* reaffirms the Supreme Court's commitment and recognition of the democratic process and the States' right to resolve difficult social issues.

The Supreme Court of the United States recently issued a ruling in *Schuette v. BAMN* confirming the constitutionality of Michigan's state constitutional amendment which prohibited any preference based upon race for admission into Michigan's state universities. *Schuette v. BAMN*, No. 12-682, slip op. at 1 (U.S. Sup. Ct. April 22, 2014) (plurality, J. Kennedy). The constitutional amendment at issue was passed "[a]fter a statewide debate" by a majority of Michigan voters (58 percent to 42 percent) in response to the Supreme Court's ruling that race based preferences for university admissions could be constitutional. *Id.* at 2. The Court has repeatedly recognized the question of race based preferences (referred to by some as affirmative action) is a "complex policy question among and within the States." *Id.* at 4 (citing *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed.2d 304 (2003)). The Court reasoned that when such difficult questions are at issue, "our federal structure 'permits innovation and experimentation' and 'enables greater citizen involvement in the democratic process.'" *Id.* at 4-5 (quoting *Bond v.*

Ed. 2d 370 (1970) (quoting *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 50, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). *See also YMCA Vote at 18 Club v. Board of Elections*, 319 F. Supp. 543 (1970) holding that a challenge to state laws regulating the minimum age to vote in state elections did not present a substantial federal question.

United States, 564 U.S. __, __ (2011 (slip op., at 9)). Moreover, the case "reflects in part the national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education." *Id.* at 5. As with the choice to use or not to use race as a consideration for admission into a university, the choice to allow or not to allow same-sex marriage is the subject of active and vigorous debate across the country.

The Sixth Circuit Court of Appeals had held the Michigan ban on race based preferences was unconstitutional under what is known as the "political process" doctrine because the ban on race based admissions policies was enshrined in the Michigan state constitution. The court of appeals relied upon a series of cases culminating in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S. Ct. 3187, 73 L.Ed.2d 896 (1982). However, the Supreme Court found such reliance improper and reversed the Sixth Circuit's decision. Although the Court stopped short of fully overturning *Seattle* and other cases utilizing the political process doctrine, it found those cases should be read narrowly. *Id.* at 11. The Court specifically rejected the broad reading of *Seattle* by the lower court which in essence would have created a rule of law where "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other

groups' to 'achieve legislation that is in their interest' is subject to strict scrutiny."[2] *Id*. at 11. This expansive reading "has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence . . . . That expansive [reading] does not provide a proper guide for decisions and should not be deemed authoritative or controlling." *Id*. at 11. Instead, the political process doctrine is only to be applied to the limited circumstances when the "political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." *Id.* at 17.

The political process doctrine does not apply here because race is not a factor in the challenged laws. More importantly, the political process doctrine cannot apply because there was no injury—as required in the cases applying the doctrine—caused by the Commonwealth's passage of a constitutional amendment confirming the existing definition of marriage. Same-sex marriage proponents cannot argue the amendment inflicted any new harm upon same-sex couples. Before its passage, same-sex couples could not be married. After its passage same-sex couples could not be married. The passage of the Marshall/Newman Amendment was the policy choice of the General Assembly and the voters, after open public debate, to continue with the status quo. Thus, this case does not deal

[2] A similar broad reading of *Seattle* has been proposed by the same-sex marriage proponents in this case, and under *Schuette* must be rejected by this court. (Doc. 130 *Harris* Class Br. at 47-48.)

with the taking away of a right previously held by same-sex couples as in the *Seattle* line of cases.

Justice Breyer noted this distinction in his concurring opinion in *Schuette*. In the *Seattle* line of cases, the "minorities had participated in the political process and they had won. The majority's subsequent reordering of the political process repealed the minority's successes and made it more difficult for the minority to succeed in the future." *Id.*at 5 (J. Breyer, concurring in judgment). Such an injury—the taking away of a right previously won—is not present in the case at bar. Moreover, the political process doctrine has never been applied outside the context of invidious racial discrimination. Limiting use of the political process doctrine to racial discrimination is appropriate given the lengthy history of preventing racial minorities from meaningfully participating in the political process. *Id.* at 6-10 (J. Sotomayor dissenting). Extending the narrow political process doctrine to same-sex marriage proponents in this case would be the same impermissible, expansive reading of the *Seattle* line of cases employed by the Sixth Circuit Court of Appeals and rejected by the Supreme Court.

The plurality in *Schuette* based its ruling on the concept "that the courts may not disempower the voters from choosing which path to follow." *Id.* at 11 (J. Kennedy, plurality). The Court also found the Michigan plaintiffs had not suffered a "specific injury" like the parties in cases where the political process doctrine had

previously been applied. *Id.* at 14. In those cases, a right based upon racial lines had been conferred, but then taken away, and the ability to reclaim that right was made more difficult by changing the political landscape. In *Schuette*, the Court found there was no such injury because the Michigan voters had merely made the decision "that race-based preferences granted by governmental entities should be ended." *Id.* at 14. If the Court had removed the question from the public debate by using the political process doctrine, it would have "announce[d] a finding that the past 15 years of state public debate on this issue have been improper." *Id.* at 14.

Both *Windsor* and the recent case of *Schuette* have relied upon *United States v. Bond* for the proposition that the federal system allows States to "respond through the enactment of positive law, to the initiative of those who seek a voice in shaping their own times." *Id.* at 15; *Windsor*, 133 S. Ct. at 2692. Justice Kennedy went on to find:

> [I]ndividual liberty has constitutional protection, and that liberty's full extent and meaning may remain yet to be discovered and affirmed. Yet the freedom does not stop with individual rights. Our constitutional system embraces too, the rights of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom even greater and more secure.

Id. at 15-16.

Taking away the democratic process "would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 16. Taking difficult policy questions away from the electorate and out of the democratic process "is inconsistent with the underlying premises of a responsible, functioning democracy." *Id.* at 16.

Same-sex marriage proponents routinely cite to statements made by politicians and others who sought passage of Virginia's Marriage Laws as "proof" the laws were promoted purely by animus, hatred, homophobia and disdain for gays and lesbians. However, as noted in the Appellants' prior briefs and a plethora of *amicus* filings, there are non-animus based justifications for these laws. In *Schuette*, Justice Kennnedy recognized "[t]he process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use [ ] division and discord to their own political advantage." *Id.* at 17. Democracy dictates the public look beyond, continue the debate, and form a consensus because "First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine." *Id.* at 17.

Absent a positive state law such as a statute, marriage would be defined and understood as being between a man and a woman. The traditional definition of marriage accords with history and the common law. The voters and the legislature of the Commonwealth passed laws confirming this understanding. Same-sex marriage proponents are certainly able and permitted to seek adoption of a positive law changing this definition. However, for the present, the democratic process in Virginia has operated, and these voices of the majority cannot be ignored without offending the First Amendment concerns cited by Justice Kennedy.

Chief Justice Roberts issued a brief concurring opinion in *Schuette* wherein he showed his support for the rights of the people to debate and decide difficult social issues. He noted "[p]eople can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate." *Id.* at 2 (C.J. Roberts concurring).

Regrettably, same-sex marriage proponents want to short circuit the debate and prematurely declare their opponents will be adjudged to be on the wrong side of history. (*See e.g.* JA at 265-96.) This is exactly the type of questioning the openness and candor of the debate warned against by Chief Justice Roberts. Clerk Schaefer continues to appeal and defend Virginia's Marriage Laws so the debate can continue and obtain final resolution—regardless of his personal beliefs and ideologies. Is it possible the majority of citizens in all of the states, including

Virginia, which have passed same-sex marriage prohibitions via voter initiatives or referendum passed these laws out of hatred or animus? Is a more reasoned and rational explanation that they simply have a different idea of the purpose and definition of marriage uninfluenced by animus towards gays and lesbians; a concept of marriage that has been the norm for millennia between persons who as a couple are physically capable of natural procreation?

II. Virginia's Marriage Laws do not discriminate on sexual orientation and are not motivated solely by animus towards gays and lesbians.

This Court should take care in defining the fundamental right at issue and class being discriminated against. The fundamental right asserted must be carefully and narrowly defined (not just the right to marry generally, but the right to same-sex marriage) *Washington v. Glucksberg*, 521 U.S. 702, 722-723, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997) (defining right at issue was not just the right to die but the right to commit suicide with assistance in doing so). Defining the class at issue is the first step in analyzing whether a group is being discriminated against. *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013). The proper class definition is "same sex couples desiring a [Virginia] marriage license." *Bishop v. United States*, 962 F. Supp. 2d 1252, 1282 (N.D. Okla. 2014). The class at issue is not

homosexuals.[3] Where same-sex marriage is recognized, a heterosexual might enter into a same-sex marriage for reasons unrelated to sexuality just as a male homosexual might for reasons of his own marry a heterosexual woman. Recognizing same-sex marriage does not extend benefits to another class of people so much as it fundamentally changes the institution. The majority of prior Supreme Court precedent where marriage was found to be a fundamental right dealt with other, supplemental restrictions on marriage issues (e.g. race, incarceration, or child support), which did not change the fundamental definition of marriage. In contrast, requiring the State to redefine marriage to include same-sex couples would change the basic understanding and core concept of marriage.

The more searching rational basis review employed in *Romer v. Evans* only applies where the law's only purpose is animus—which is not the case here. The discrimination at issue in *Romer v. Evans* was irrational because there was no explanation for it other than to single out a group. Protection of children's interests was not at issue in *Romer,* as it is here. Traditional marriage has always been found legitimate, was not created to discriminate against homosexuals, and the motivation behind some individuals' recent re-affirmations of the traditional definition of marriage is irrelevant. Instead, "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*,

[3] This case was brought as a facial challenge to Virginia's Marriage Laws. On their face, Virginia's Marriage Laws make no distinction based upon sexuality.

316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Encouraging traditional marriage does not disparage other alternative parenting arrangements. State sanctioned marriage is not about acknowledging society's acceptance of two persons' love and commitment to one another. It is not about furthering or opposing the political and social objectives of a group or encouraging or discouraging the public to recognize gays and lesbians as part of society. State recognition of marriage exists to encourage a stable relationship between two persons who may be able to naturally procreate and provide a protective structure for their offspring in case they conceive children. Even the most narrowly tailored law promoting this legitimate government interest will sweep some couples which cannot or choose not to have children into the fold, but that does not invalidate the law and does not show animus towards homosexuals. Therefore, the standard, deferential version of rational basis review should be properly applied to Virginia's Marriage Laws.

III. Virginia's Marriage Laws do not discriminate based upon gender.

"The Court agrees with the vast majority of courts considering the issue that an opposite-sex definition of marriage does not constitute gender discrimination." *Bishop v. United States*, 962 F. Supp. 2d 1252, 1286 (N.D. Okla. 2014) (quoting *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1099 (D. Haw. 2012). Indeed, "[c]ommon sense dictates . . . the law cannot be subject to heightened scrutiny on"

the basis of gender discrimination. *Id.* The same-sex marriage proponents' attempt to characterize Virginia's Marriage Laws as discriminatory based upon gender are without merit and inconsistent with the majority of courts ruling on this question.

IV. *Baker v. Nelson* has not been altered by subsequent doctrinal developments.

All of the same-sex marriage proponents argue *Baker* is no longer controlling by citing to the "doctrinal developments" exception found in *Hicks v. Miranda*, 422 U.S. 332-44, 95 S. Ct. 2281, 45 L.Ed.2d 223 (1975). (*See e.g.* Rainey Br. at 70 ("a doctrinal sea change has occurred since *Baker*.")) However, they have not identified what the change has been which justifies ignoring *Baker*. *Windsor*, *Lawrence*, and *Romer*, are not such doctrinal changes. None of those cases apply heightened scrutiny or suspect class status to same-sex couples. In fact, those cases affirm that laws affecting same-sex couples and homosexuals are not entitled to anything but rational basis review. For example, *Lawrence v. Texas*, one of the cases routinely cited by same-sex marriage proponents as a doctrinal development since *Baker* expressly states it was not addressing same-sex marriage rights. *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). The Court wanted to make it clear, it was not changing its position on same-sex marriage, and to suggest otherwise is disingenuous. This consistent application of the law is anything but a doctrinal development worthy of ignoring

Supreme Court precedent directly on point. Moreover, *Schuette* further entrenches the concept that there is no compelling federal question presented when the issue, such as the States' right to define marriage, is a significant and contentious policy question best left to the democratic process and the First Amendment rights of all citizens. (*See* discussion of *Schuette v. BAMN* supra at Section I.b.).

V. Neither same-sex couples nor homosexuals are a suspect class.

As explained in Clerk Schaefer's and Clerk McQuigg's opening briefs, the question of whether or not homosexuality or same-sex couples are a suspect classification subject to heightened scrutiny has already been answered by the Fourth Circuit and the Supreme Court in the negative.[4] Appellees attempt to undermine this binding authority by pointing out that *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) and *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) were decided before the Supreme Court's ruling in *Lawrence v. Texas*. However, such a distinction is of no merit because *Lawrence* did not find homosexuals to be part of a suspect class either. Thus, a full analysis of the four factor test for recognizing a new suspect class is unnecessary.

[4] Clerk Schaefer does not concede that homosexuality would qualify for heightened scrutiny if this Court were to apply the traditional four factors in deciding whether or not a class is suspect or quasi-suspect as suggested by Appellees. Rather, because there is binding precedent on this issue, such an analysis is not necessary. Moreover, a detailed factual inquiry, based upon facts not properly before this Court, would be necessary to fully address all four factors.

The Supreme Court's recent decision in *Windsor v. United States* continues the precedent of finding neither homosexuals nor same-sex couples to be suspect or quasi-suspect classifications. There, the Court did not apply heightened scrutiny to either class or even apply the four factor test to determine if they were a suspect or quasi-suspect class. By implication, this was an affirmation of the Court's prior refusal of find such classifications. This was done despite the fact same-sex marriage proponents had argued to the Court such a classification was warranted and the Second Circuit Court of Appeals had explicitly made such a finding. *See* e.g. *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012).

VI. None of the Plaintiffs have standing or state a claim regarding the recognition portion of Virginia's Marriage Laws.

One of the many important questions before this Court is whether the parties in this case are the proper parties for a challenge to Virginia's laws refusing to recognize same-sex marriages or civil unions validly entered into in other states. The Amended Complaint failed to state any facts showing any of the Plaintiffs suffered an injury from the recognition laws due to any act by either Clerk Schaefer or Ms. Rainey.[5]

[5] Ms. Rainey states in her brief "[t]he parties agreed that the State Registrar is the proper State defendant." (Doc 126, Rainey Br. at 17.) Clerk Schaefer and his counsel are not party to any such agreement. Similarly, Appellees seem to take it as an irrefutable conclusion that Schall and Townley have standing and have stated a claim against Ms. Rainey. To the extent the question of whether or not Ms.

Other federal district court cases highlight the need for the proper facts and parties to obtain relief when challenging similar recognition laws. In *Obergefell v. Wymslo*, the constitutionality of Ohio's recognition law was at issue, but the plaintiffs in that case were surviving spouses from same-sex unions entered in other states but residing in Ohio at the time of death. *Obergefell v. Wymslo*, 962 F. Supp. 2d 968, 972-73 (S.D. Ohio 2013). Those plaintiffs sued state and local officials who refused to list the same-sex spouse from a valid out of state marriage as the surviving spouse on death certificates. *Id.* Thus, standing was not an issue because an application for a benefit (listing on a death certificate as the surviving spouse) was made and the right was denied by a government official. However, in *Bishop v. United States*, the parties did not have standing or raise a claim regarding Oklahoma's recognition statute because they only sued a local court clerk who, just like Clerk Schaefer, had no authority to recognize same-sex unions from other states. *Bishop v. United States*, 962 F. Supp. 2d 1252, 1273 (N.D. Okla. 2014). More importantly, the plaintiffs in Bishop had "not taken any steps to obtain recognition" of their out of state marriage by the public official named in their lawsuit. *Id.*

Rainey is a proper party and standing exists to assert claims against her remains a question for this Court to answer, regardless of any agreement by the parties or failure to defend claims by Ms. Rainey.

Here, there is no question that Mr. Bostic and Mr. London have no standing or claim related to the recognition laws at issue. The same-sex marriage proponents all but concede this fact in their briefs. However, Ms. Rainey argues she is a proper public official because she is "responsible for promulgating the form, maintaining the record and overseeing enforcement of rules relating to birth certificates. . . [and] plays a role in the process [of adoption]." (Doc. 126, Rainey Br. at 30 n. 11.) Even if she could be a public official subject to suit regarding Virginia's recognition laws, the proper allegations are absent. Schall and Townley make no allegation they attempted to have both their names placed on their daughter's birth certificate or that any application to adopt E.S-T. has been made in Virginia.

Rainey goes on to argue she would be required to issue a new birth certificate "if the Registrar receives a certified copy of an adoption decree entered in another state together with the information necessary to establish a new birth certificate." *Id.* However, those facts are similarly not alleged in this case. Schall and Townley have not alleged they submitted an out of state adoption decree or sought issuance of a birth certificate with both of them named as the parents. Moreover, it appears birth certificates have been issued to same-sex couples by the Department of Vital Statistics (with the approval of former Attorney General Kenneth Cuccinelli) naming both partners on a Virginia birth certificate after being presented with an adoption decree from another state. Vieth, Peter, 28 Virginia

Lawyers Weekly 43 at 1, Children of same-sex marriages recognized (Mar. 31, 2014) (available at http://valawyersweekly.com/2014/03/28/children-of-same-sex-marriages-recognized/ last visited April 28, 2014, a copy of which is attached hereto as Exhibit A). Without the necessary facts to establish an injury inflicted by Ms. Rainey, it appears Schall and Townley have failed to allege any claim and lack standing to challenge the recognition laws.

VII. Virginia's Marriage Laws survive rational basis review.

Appellees' arguments attempt to appeal to the Court's sense of fairness and equity by claiming same-sex couples have some characteristics similar to opposite-sex couples because they can enter personal relationships, raise children, and thus should be allowed to marry. However, simply having "a common characteristic shared by [same-sex couples] and [opposite-sex couples] alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Johnson v. Robison*, 415 U.S. 361, 378, 94 S.Ct. 1160, 39 L.ED.2d 389 (1974). Just as in *Johnson*, the groups at issue are not similarly situated and the classification survives constitutional scrutiny. The procreative potential of opposite-sex couples rationally explains the line drawn by Virginia law. Moreover, no right has been given and then taken away. There is nothing in Virginia's Marriage Laws

preventing same-sex couples from having a family or creating a personal relationship. There is no impediment for them to express their love for one another.

Appellees also argue that Virginia's Marriage Laws cannot withstand constitutional scrutiny because marriage licenses are not a scarce commodity. (Doc. 129, Appellees' Br. at 57.) This distinction conveniently ignores the fact allowing same-sex marriages would make numerous governmental benefits available to same-sex couples which utilize scarce State resources, the very same governmental benefits which Appellees allege they are denied due to Virginia's Marriage Laws. (JA at 63-69.) Appellees then argue Virginia's Marriage Laws are not narrowly tailored enough to promote the government interest of pairing naturally procreative couples, but they do not suggest any narrower method that would pass constitutional scrutiny. In other words, they argue that since States cannot exclude infertile couples from marriage, the scope of marriage must also be expanded to include same-sex couples who cannot naturally procreate together. This line of argument creates a self-fulfilling prophecy—with no limiting principle—which could be used by any group to expand the right to fit their needs. For these reasons and those previously asserted by Clerk Schaefer, Clerk McQuigg and the numerous amicus briefs submitted to this Court, Virginia's Marriage Laws pass rational basis review.

CONCLUSION

For the foregoing reasons, George E. Schaefer, III in his official capacity as the Clerk of Court for Norfolk Circuit Court, respectfully requests this Court reverse the district court's grant of summary judgment in favor of the Plaintiffs, vacate the permanent and preliminary injunctive relief granted by the district court, and remand this case with instructions to grant summary judgment in favor of the Defendants.

Respectfully submitted this 30th day of April, 2014,

GEORGE E. SCHAEFER, III, in his official capacity as Clerk of Court for Norfolk Circuit Court

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).
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I hereby certify that on the 30th day of April, 2014, the foregoing document was filed with the Clerk of Court in paper format with the appropriate number of copies to the Court and using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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