IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WHITEWOOD, *et al.*, Plaintiffs, v. WOLF, *et al.*, Defendants.	**Civil Action** **No. 13-1861-JEJ**

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Brief of Defendants Michael Wolf and Dan Meuser in Opposition to Plaintiffs' Motion for Summary Judgment largely recycles the same arguments they made in their opening brief. Plaintiffs do not repeat here the many reasons why those arguments should be rejected, as Plaintiffs already thoroughly addressed them in their previous two briefs on these cross-motions for summary judgment.[1] This Reply Brief briefly responds to the few new assertions made in Defendants' Opposition Brief.

ARGUMENT

I. *Baker v. Nelson* Does Not Preclude Plaintiffs' Claims.

Defendants attempt to resurrect their argument that *Baker v. Nelson*, 409 U.S. 810 (1972), precludes Plaintiffs' claims by now invoking the Supreme Court's grant of a stay pending appeal in *Kitchen v. Herbert*, 134 S. Ct. 893 (2014). Defendants try to read "volumes" (Defs. Opp. Br. 9) that just cannot be found in a one-sentence stay order that provides no indication of the Court's reason for granting the stay. None of the district courts that have ruled in marriage cases since the Supreme Court's stay in *Kitchen* have adopted the Defendants' idiosyncratic reading of the stay order. Instead, all of them have agreed with what

[1] *See* Plaintiffs Brief in Support of Motion for Summary Judgment ("Plfs. MSJ Br.") and Plaintiffs Brief in Opposition to the Motion for Summary Judgment of Defendants Michael Wolf and Dan Meuser ("Plfs. Opp. Br.").

this Court already held – that *Baker* is no bar to Plaintiffs' claims. *See Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1274-77 (N.D. Okla. Jan. 14, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 469-70 (E.D. Va. Feb. 13, 2014); *De Leon v. Perry*, No. 13-CA-982, 2014 WL 715741, *8-10 (W.D. Tex. Feb. 26, 2014); *DeBoer v. Snyder*, No. 12-cv-10285, 2014 WL 1100794, *17 n.6 (E.D. Mich. Mar. 21, 2014).

II. Plaintiffs Have Demonstrated That They Are Injured By State Action.

Plaintiffs already addressed Defendants' incredible argument that Plaintiffs supposedly failed to demonstrate state action that injures them (*see* Plfs. Opp. Br., Point I), but Plaintiffs address here Defendants' misstatement of law concerning one of the numerous harms caused by the Marriage Exclusion – the denial of access to the presumption of parentage that applies to married couples. In a footnote, Defendants' Opposition Brief asserts that the presumption of parentage that is available to married opposite-sex couples would not apply to same-sex married couples even if their marriages were recognized. (Defs. Opp. Br. 12-13 n.2.) They argue, incorrectly, that "[a] child of a same-sex marriage cannot be presumed to be a child of the marriage because it is genetically impossible." (*Id.*) This completely misunderstands the law and purpose of presumptions of parentage. The legal presumption applies when a child is born to a married woman even when it is clear that no biological relationship exists between the child and the woman's

spouse. *Brinkley v. King*, 701 A.2d 176, 180 (Pa. 1997) ("[T]he presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents."). The purpose of the presumption is to ensure that "marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage." *Id.*

III. The Marriage Exclusion Is Subject To Heightened Scrutiny Because It Burdens The Fundamental Right To Marry.

Plaintiffs already addressed Defendants' arguments related to the fundamental right to marry. (*See* Plfs. MSJ Br., Point I; Plfs. Opp. Br., Point II.)

IV. The Marriage Exclusion Is Subject To Heightened Scrutiny Because Sexual Orientation Classifications Are Suspect.

Whether laws that classify on the basis of sexual orientation are suspect or quasi-suspect has never been addressed by the Supreme Court or the Third Circuit. Contrary to Defendant's suggestion, in *Romer v. Evans*, 517 U.S. 620, 631-32 (1996), the Supreme Court did not say that the law at issue in that case "neither burdens a fundamental right nor targets a suspect class." (Def. Opp. Br. 30.) Rather, the Court did not address those questions because it held that the law fails "even" rational basis review. *Id.* The Court has never held that laws that disadvantage lesbians and gay men are *not* suspect.

Plaintiffs already explained in detail how sexual orientation classifications meet the criteria established by the Supreme Court to determine if a classification

is suspect or quasi-suspect. (*See* Plfs. MSJ Br., Point II.)[2] Defendants do not dispute the facts presented by Plaintiffs' expert witnesses demonstrating that the criteria of suspectness are met. (*See* Defendants' Response to Plaintiffs' Statement of Uncontested Facts ¶¶ 113-37, 139-44.)[3] Instead, they contend that there is an absence of evidence establishing a history of discrimination against lesbians and gay men *in Pennsylvania*. (Defs. Opp. Br. 32.) Defendants' Brief misunderstands the law and mischaracterizes the record before this Court. The Supreme Court does not look only at whether there is a local history of discrimination in evaluating this factor.[4] And the unrebutted expert report of Professor Chauncey cited numerous examples of discrimination against lesbian and gay people here in

[2] None of the Circuit Court cases cited by Defendants that rejected heightened scrutiny for sexual orientation classifications (*see* Defs. Opp. Br. 30-31) analyzed these criteria and many relied on *Bowers v. Hardwick*-era precedent.

[3] With respect to paragraph 122 of Plaintiffs' Statement of Uncontested Facts, Defendants deny that the referenced comments of a Pennsylvania legislator were contained in Dr. Chauncey's expert report. Given the remainder of Defendants' response to paragraph 122 and the fact that this statement actually does appear in Dr. Chauncey's report (*see* PX 3 ¶ 103), that appears to have been a clerical error. Even if this one statement is disputed, it is an immaterial dispute.

[4] *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 US. 432 (1985) (discussing federal laws evidencing lack of discrimination against developmentally disabled people in determining whether local zoning ordinance in Texas targeting such individuals warrants heightened equal protection scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973) (in challenge to military regulation, Court held that gender classifications are suspect after citing numerous examples of discrimination against women unrelated to the military context).

Pennsylvania, including police raids of establishments frequented by gay people (Chauncey ¶ 56), employment discrimination (*id.* ¶ 50), denial of custody or visitation to lesbian and gay parents (*id.* ¶ 70), bullying of gay teenagers (*id.* ¶ 94), hostile statements about gay people from elected officials (*id.* ¶¶ 89, 98, 99, 103, 104), and the Pennsylvania legislature's repeated attempts to enshrine anti-gay discrimination in the state constitution (*id.* ¶¶ 77, 102).

Defendants' Brief also misunderstands the history of discrimination factor to be an inquiry about "the *current* views of the Pennsylvania citizenry as a whole" (Defs. Opp. Br. 34 (emphasis added)) as opposed to whether there is a *history of* discriminatory treatment of the class. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) ("traditional indicia of suspectness" include a "history of purposeful unequal treatment"); *Cleburne*, 473 U.S. at 441 (same). The fact that some forms of discrimination against gay people have ceased or become less prevalent does not change the fact that lesbian and gay people continue to live with the legacy of a long history of discrimination that created and reinforced the belief that they are an inferior class. (Chauncey ¶ 7; Peplau ¶ 55.) *See Frontiero*, 411 U.S. at 685-86 (holding that classifications based on sex are suspect even though "the position of women in America has improved markedly in recent decades").

Defendants also quarrel with the political powerlessness factor, pointing to some recent political successes of the gay community in other states and the introduction of some bills in Pennsylvania that would, if ever passed, provide protection to lesbians and gay men. (Defs. Opp. Br. 36-39.) But as Plaintiffs have already discussed, recent advances for gay people pale in comparison to the political progress of women at the time that classifications based on sex were first recognized as suspect (*see* Plfs. MSJ Br. 35); thus, "[a]s political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it." *Obergefell v. Wymslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013).

V. The Marriage Exclusion Is Subject To Heightened Scrutiny Because It Classifies Based On Sex.

Plaintiffs already addressed Defendants' arguments related to sex discrimination. (*See* Plfs. MSJ Br., Point III.)

VI. Plaintiffs Have Met Their Burden Of Showing That The Marriage Exclusion Fails Even Rational Basis Review.

Defendants continue to misunderstand the nature of rational basis review. They seem to believe that if the legislature says it believes a discriminatory law is rationally related to a legitimate state interest, then that is the end of the rational basis inquiry. (Defs. Opp. Br. 26 ("The General Assembly appeared to believe that it was advancing several government interests" and, "[t]hus, judicial 'inquiry is at

an end.'")[5]; *see also id.* 19-20.) But it is the Court's role – not the General Assembly's – to assess whether the classification rationally furthers a legitimate government interest. *See, e.g.*, *Romer*, 517 U.S. at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."). Plaintiffs provided extensive legal arguments and undisputed expert reports demonstrating that the Marriage Exclusion fails rational basis review, even as that standard is articulated by Defendants. Plaintiffs "negate[d] every conceivable basis which might support" the Marriage Exclusion; they have shown that it "rests on grounds wholly irrelevant to the achievement of the State's objective"; and thus, they have overcome any "presumption of constitutionality" (Defs. Opp. Br. 21).[6] (*See* Plfs. MSJ Br., Point IV.) Defendants have no response

[5] *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980), cited by Defendants, does not support this proposition. There, the Court considered whether Congress furthered its purpose in an irrational way and analyzed the government's explanation for the differential treatment in the challenged benefit scheme.

[6] The presumption of constitutionality referenced in *Heffner v. Murphy*, 745 F.3d 56, 79 (3d Cir. 2014), does not insulate a law from judicial scrutiny as Defendants suggest. To the contrary, as the Court in *Heffner* explained: "We have repeatedly warned that rational basis review is by no means 'toothless'—'[a] necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational.'" *Id*. (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 112 n. 9 (3d Cir. 2008)); *see also Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d at 107-110 (striking down differential treatment of in-state and out-of-state sex offenders because it was not rationally related to the

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– they offer no legal argument as to why tradition can legally justify the perpetuation of a discriminatory law, and no explanation as to how the asserted interests in procreation, child well-being, or economic protection of Pennsylvania businesses are rationally advanced by the exclusion of same-sex couples from marriage or prohibition on recognition of their marriages.

VII. The Marriage Exclusion's Purpose And Effect Are To Disparage And Injure Same-sex Couples.

As Plaintiffs already argued, in addition to failing ordinary rational basis review, the Marriage Exclusion is unconstitutional because, like the federal DOMA struck down in *Windsor*, its purpose and effect are to disparage and injure same-sex couples. (*See* Plfs. MSJ Br., Point V.) In addition to attempting to distinguish *Windsor* as a federalism decision – which it is not (*see* Plfs. Opp. Br., Point IV) – Defendants also incorrectly argue that the Supreme Court only finds a "bare desire to harm" when laws "take away existing rights." (Def. Opp. Br. 25.) But the Supreme Court has clearly said that what prompts this type of "careful consideration" of the legislature's actual purpose is "discrimination[] of an unusual

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Commonwealth's asserted security concerns). Here too, for the reasons already discussed by Plaintiffs (*see* Plfs. MSJ Br., Point IV), the Defendants' proffered reasons for the unequal treatment are not rationally related to the Marriage Exclusion.

character," *Windsor*, 133 S. Ct. at 2692, 2693, not discrimination that takes away existing rights.[7]

CONCLUSION

Defendants have offered no legal arguments or evidence that overcomes the arguments and undisputed evidence presented by Plaintiffs demonstrating that the Marriage Exclusion is unconstitutional.

Deb and Susan Whitewood already have waited 22 years for their loving and committed relationship to be recognized and afforded the same protections and respect given to the marriages of opposite-sex couples. Ed Hill and David Palmer have waited 25 years. Fredia and Lynn Hurdle have waited 22 years. Heather and Kath Poehler have waited 10 years. Fernando Chang-Muy and Len Rieser have waited 32 years. Dawn Plummer and Diana Polson have waited 13 years. Angela Gillem and Gail Lloyd have waited 17 years. Ron Gebhardtsbauer and Greg Wright have waited 19 years. Marla Cattermole and Julia Lobur have waited 27 years. Sandy Ferlanie and Christine Donato have waited 17 years. Helena Miller

[7] In addition, Defendants' characterization of the case law is factually inaccurate. The federal DOMA struck down in *Windsor* was enacted before any state allowed same-sex couples to marry and, thus, did not "take away" any existing rights. *See also Cleburne*, 473 U.S. at 450 (striking down special zoning permit requirement for homes for developmentally disabled adults because it appeared to "rest on irrational prejudice" even though no existing rights were taken away).

and Dara Raspberry have waited 6 years and, as new parents, hope that their marriage will be recognized before their baby is old enough to be aware that her family is not considered equal to other families in the eyes of the state. Maureen Hennessey and Mary Beth McIntyre waited 29 years for their relationship to be respected in Pennsylvania and, sadly, Mary Beth passed away before they could experience that day together (*see* PX-29-G).

It is now too late for Mary Beth to experience the critical protections and respect that come with marriage in Pennsylvania, but Maureen, now being denied the protections and dignity owed to a widow, and the other plaintiff couples are still waiting today. They and thousands of other gay and lesbian couples in Pennsylvania have waited long enough for their home state of Pennsylvania, where they have built their lives and raised their families, to treat them with respect. They have waited long enough for Pennsylvania to afford them the Due Process and Equal Protection they are entitled to under the law.

Respectfully, Plaintiffs submit that this Court should grant Plaintiffs' Motion for Summary Judgment and enjoin the enforcement of the Marriage Exclusion so that the Plaintiff couples and lesbian and gay couples across Pennsylvania finally can marry and, if already married, have their marriages recognized in the Commonwealth.

Respectfully submitted,

Dated: May 8, 2014

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CERTIFICATE OF WORD COUNT

I, Mark A. Aronchick, hereby certify pursuant to Local Civil Rule 7.8(b)(2) that the text of the foregoing Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment contains 2,452 words as calculated by the word-count function of Microsoft Word.

Dated: May 8, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2014, I caused the foregoing Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment to be filed electronically using the Court's electronic filing system, and that the filing is available to counsel for all parties for downloading and viewing from the electronic filing system.

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