UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY; REBECCA BICKETT; ANDREA SANDERS; JOCELYN PRITCHETT; and CARLA WEBB,	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3:14-cv-00818-CWR-LRA**
vs.	§	
PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; JIM HOOD, in his official capacity as Mississippi Attorney General; and BARBARA DUNN, in her official capacity as Hinds County Circuit Clerk,	§	
Defendants.	§	

REPLY MEMORANDUM OF LAW IN FURTER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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In seeking to defend the constitutionality of the Mississippi laws that exclude gay couples from civil marriage, Defendants do not offer a single argument that has not already been rejected—repeatedly—by federal courts across the country. This reply focuses mainly on the arguments not previously addressed, none of which provide any persuasive justification for the ongoing discrimination against the gay citizens of Mississippi at issue here.

I. *Baker* v. *Nelson* Does Not Control the Outcome Here

This Court is not bound by the Supreme Court's summary affirmance in *Baker* v. *Nelson*, a case brought by a gay couple in Minnesota arguing that their inability to marry constituted unlawful sex discrimination in the early 1970s, before these Plaintiffs were even born. 409 U.S. 810 (1972). The Supreme Court, which was then required to accept plaintiffs' appeal under its since-repealed mandatory appellate jurisdiction, summarily dismissed the *Baker* appeal in a one-sentence order for "want of a substantial federal question." *Id.* But while "summary affirmances obviously are of precedential value," they "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). *See also Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 203 n.1 (1996); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

Although Defendants argue that lower courts may only depart from a summary disposition "when the Court has overruled the decision by name . . . or when the Court has overruled the decision by outcome," *DeBoer* v. *Snyder*, No. 14-1341, 2014 WL 5748990, at *7 (6th Cir. Nov. 6, 2014), the Supreme Court has made it clear that summary dispositions are not binding "when doctrinal developments indicate otherwise." *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). Here, "[t]he jurisprudence of equal protection and substantive due process has undergone what can only be characterized as a sea change since 1972." *Whitewood* v. *Wolf*, 992

F. Supp. 2d 410, 420 (M.D. Pa. 2014). In 1972, when *Baker* was decided, the Supreme Court had not yet decided that (a) sex is a quasi-suspect classification, *Frontiero* v. *Richardson*, 411 U.S. 677, 688 (1973), (b) "a classification of [gays and lesbians] undertaken for its own sake" lacked a rational basis, *Romer* v. *Evans*, 517 U.S. 620, 635 (1996), (c) "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," *Lawrence* v. *Texas*, 539 U.S. 558, 574 (2003) or (d) treating gay couples' marriages differently from straight couples' "demean[ed] the couple, whose moral and sexual choices the Constitution protects," *United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013).

It is therefore not surprising that nearly every court to consider the issue *since* *Windsor* (other than the Sixth Circuit) has concluded that the Supreme Court's forty-two year old summary affirmance in *Baker* does not bar claims like those made by plaintiffs here. "*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin* v. *Bogan*, 766 F.3d 648, 659-60 (7th Cir. 2014), *cert. denied*, --- S. Ct. ---, 2014 WL 4425162 (U.S. Oct. 6, 2014).[1] "Given that the Second Circuit concluded *Baker* was not binding, and that the Second Circuit was later affirmed in the *Windsor*,

[1] *See also Latta* v. *Otter*, No. 14-35420, 2014 WL 4977682, at *3 (9th Cir. Oct. 7, 2014); *Bostic* v. *Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) ("In light of the Supreme Court's apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent."); *Kitchen* v. *Herbert*, 755 F.3d 1193, 1204-08 (10th Cir. 2014); *Marie* v. *Moser*, No. 14-cv-02518, 2014 WL 5598128, at *1 n.4 (D. Kan. Nov. 4, 2014); *Brenner* v. *Scott*, 999 F. Supp. 2d 1278, 1290 (N.D. Fla. 2014); *De Leon* v. *Perry*, 975 F. Supp. 2d 632, 647 (W.D. Tex. 2014); *Bowling* v. *Pence*, No. 1:14-CV-00405, 2014 WL 4104814, at *4 (S.D. Ind. Aug. 19, 2014); *Love* v. *Beshear*, 989 F. Supp. 2d 536, 542 (W.D. Ky. 2014); *Baskin* v. *Bogan*, No: 1:14-CV-00355, 2014 WL 2884868, at *5–*6 (S.D. Ind. June 25, 2014); *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 989–91(W.D. Wis. 2014); *Whitewood*, 992 F. Supp. 2d at 419–20; *Geiger* v. *Kitzhaber*, 994 F. Supp. 2d 1128, 1133 n.1 (D. Or. 2014); *Latta* v. *Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *7–*9 (D. Idaho May 13, 2014); *Tanco* v. *Haslam*, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *Bostic* v. *Rainey*, 970 F. Supp. 2d 456, 469–70 (E.D. Va. 2014); *Bishop* v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014); *Kitchen* v. *Herbert*, 755 F.3d 1173, 1204–08 (10th Cir. 2014); *Kitchen* v. *Herbert,* 961 F. Supp. 2d 1181, 1195 (D. Utah 2013); *Wright* v. *State of Ark.*, No. 60-CV-13-2662, 2014 WL 1908815, at *6 (Ark. Cir. Ct. May 9, 2014); *Huntsman* v. *Heavilin*, No. 2014-CA-305-K, at *4 (Fla Cir. Ct. July 17, 2014); *Pareto* v. *Ruvin*, No. 14-1661 CA 24, at *10 (Fla. Cir. Ct. July 25, 2014); *Barrier* v. *Vasterling*, No. 1416-CV-03892, at *11 (Mo. Cir. Ct. Oct. 3, 2014). *But see DeBoer* v. *Snyder,* 2014 WL 5748990, at *5–*7; *Conde-Vidal* v. *Garcia-Padilla*, No. 14-cv-1253, 2014 WL 5361987, at *4–*10 (D.P.R. Oct. 21, 2014).

'[t]he Supreme Court's willingness to decide *Windsor* without mentioning *Baker* speak volumes regarding whether *Baker* remains good law.'" *Lawson* v. *Kelly*, No. 14-0622, slip op. 7 (W.D. Mo. Nov. 7, 2014) (citing *Bostic* v. *Schaefer*, 760 F.3d at 374 (4th Cir. 2014)).[2]

II. Neither Federalism nor "Democratic Means" Can Justify Mississippi's Overt Discrimination Against Gay People

Nor do principles of federalism permit Defendants to deprive gay and lesbian Mississippians of equal protection or due process of law. "One might think *Windsor* was a case about federalism. However, the majority [in *Windsor*] said 'it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance,' and couched the violation in terms of the Fifth Amendment. Therefore, according to the majority, *Windsor* is not a case about federalism." *Lawson*, slip op. at 4 n.2 (citing *Windsor*, 133 S. Ct. at 2690).

Justice Kennedy made this point explicitly in *Windsor* when he stated three times that while "the definition and regulation of marriage has . . . been treated as being within the authority and realm of the separate States . . . *[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons.*" *Windsor*, 133 S. Ct. at 2690–91 (emphasis added). *See also id*. at 2692 ("The States' interest in defining and regulating the marital relation [is] *subject to constitutional guarantees*.") (emphasis added); *id*. ("DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, *subject to constitutional guarantees*, from one State to the next.") (emphasis added). Indeed, in his dissent,

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[2] Contrary to the suggestion in footnote 1 of the Defendants' brief, it is absolutely clear that a summary disposition *cannot* be cited as endorsing the rationale of the decision below. *See Wis. Dep't of Revenue* v. *William Wrigley Jr., Co.*, 505 U.S. 214, 225 n.2 (1992) ("In any event, our summary disposition affirmed only the *judgment* below, and cannot be taken as adopting the reasoning of the lower court." (emphasis in original)); s*ee also Montana* v. *Crow Tribe of Indians*, 523 U.S. 696, 715 n.14 (1998).

Justice Scalia noted that the *Windsor* majority "formally disclaimed reliance upon principles of federalism." *Id.* at 2705 (Scalia, J., dissenting).

For these reasons, courts have held that the Supreme Court's decision in *Windsor* does not support upholding the constitutionality of state marriage bans. "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379. *See also Latta* v. *Otter*, No. 12-17668, 2014 WL 4977682, at *9 (9th Cir. Oct. 7, 2014); *Kitchen* v. *Herbert*, 755 F.3d 1193, 1207 (10th Cir. 2014); *Marie*, 2014 WL 5598128, at *10.

III. Caution/"Wait and See" is Not a Legitimate Justification Even Under Rational Basis

While Defendants argue that gay marriage bans pass rational basis review on the ground that a state might wish to "exercise caution" or "wait and see" before "changing a norm . . . accepted for centuries," *DeBoer*, 2014 WL 5748990, at *11, indulging an aversion to or fear of change at the expense of depriving individuals of constitutionally-guaranteed rights is not a legitimate governmental objective.[3] Judge Sutton, referring to the fact that marriage for gay people has been legal in Massachusetts since 2003, asserted that: "[e]leven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage." *Id.* But under Judge Sutton's logic, when would the "clock have run"? In 2053, after 50 years? In 2103, after a century?[4] Such a "wait and see" approach "fails to recognize the role of courts in

[3] Indeed, Mississippi law is hardly the product of a "wait and see" approach. By enshrining discrimination in the State constitution, Section 263A fixed the status quo in stone, requiring another statewide referendum in order to change it.

[4] In fact, although marriage between gay couples has been authorized for a decade in Massachusetts, there have been no adverse impacts on divorce rates or other metrics of the stability of marriage. *See, e.g.*, Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, FiveThirtyEight (Jan. 12, 2010, 9:12 AM), http://fivethirtyeight.com/features/divorce-rates-appear-higher-in-states/ (citing government data and noting that divorce rates in Massachusetts went *down* by 21 percent after the state legalized gay marriage).

the democratic process. . . . Judges may not simultaneously find a right violated yet defer to an uncertain future remedy voluntarily undertaken by the violators." *McGee* v. *Cole*, 13 Civ. 24068, slip op. 17 n.5 (S.D. W. Va. Nov. 7, 2014).[5]

Judge Posner, quoting Justice Alito's dissent in *Windsor*, characterized this type of argument as follows: "'at present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.'" *Baskin*, 766 F.3d at 669 (quoting *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting)). Judge Posner, however, then explained the problem with this with this line of reasoning: "What follows, if prediction is impossible? . . . [W]hile many heterosexuals (though in America a rapidly diminishing number) disapprove of same-sex marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of. . . . Many people strongly disapproved of interracial marriage, and, more to the point, many people strongly disapproved (and still strongly disapprove) of homosexual sex, yet *Loving* v. *Virginia* invalidated state laws banning interracial marriage, and *Lawrence* v. *Texas* invalidated state laws banning homosexual sex acts." *Id.* at 669–70.

Thus, at its essence, any such appeal to "wait and see" or "go slow" is really most likely the result of an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Alabama* v. *Garrett*, 531 U.S. 356,

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[5] If Judge Sutton's view that courts are bound by the "original meaning" of the drafters of the Fourteenth Amendment, *DeBoer*, 2014 WL 5748990, at *8–*9, were correct, segregation in public facilities would still be constitutional since there is no question that that was the common practice and understanding when the Fourteenth Amendment was ratified. Professor Noah Feldman of Harvard Law School has made this point: "Imagine that you were the federal judge deciding on the lawfulness of segregation in the school boards of Topeka, Kansas, in 1951, before the case that became Brown v. Board of Education reached the Supreme Court. According to [Judge] Sutton, you'd have to decide for the school board and uphold segregation, which had been deemed constitutional since Plessy v. Ferguson in 1896. But that can't be right. By 1951, it had become clear that a constitution that recognizes separate but equal would be a constitution hardly worth following at all." Noah Feldman, *Gay Marriage Ruling is Conservative, and Wrong*, BloombergView (Nov. 6, 2014, 7:42 PM), http://www.bloombergview.com /articles/ 2014-11-06/gay-marriage-ruling-is-conservative-and-wrong.

374 (2001) (Kennedy, J., concurring). After all, this very same "go slow" argument was made in the past against extending rights to African-Americans, among others. *See, e.g., Watson* v. *City of Memphis*, 373 U.S. 526, 535–36 (1963). But an "instinctive mechanism to guard against people who appear to be different" can never be a legitimate governmental objective. *See Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (citation omitted, emphasis in original)). "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin* 766 F.3d at 671.

IV. "Encouraging Biological Parents" Is Not Connected to Discriminating Against Gay People in Marriage

Finally, in response to the Defendants' and Sixth Circuit's assertion that states have an interest in "regulat[ing] sex, most especially the intended and unintended effects of male-female intercourse," *DeBoer*, 2014 WL 5748990, at *9, Judge Posner observed that: "the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656 (emphases in original).

Indeed, this argument cannot withstand analysis because the remedy—the right to marry only for straight couples—applies to vast numbers of people for whom no such incentive is needed or even relevant. They include the old, the infertile, and those who have no intention of having children, all of whom may marry under Mississippi law. "Same-sex couples are not the only category of couples who cannot reproduce accidentally. For example, opposite-sex couples cannot procreate unintentionally if they include a post-menopausal woman or an individual with a medical condition that prevents unassisted conception." *Bostic*, 760 F.3d at 381. If Mississippi

really wants "to increase the percentage of children being raised by their two biological parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by single people." *Latta*, 2014 WL 4977682 at *7. And, as discussed in our moving brief, marriage in Mississippi confers a wide range of benefits that have absolutely nothing to do with procreation or children, including filing joint tax returns, hospital visitation, and inheritance, among many others.

* * *

This case is *not* a "legal dispute over social policy" (Opp. Br. at 1) or a debate about "whether to allow the democratic processes begun in the States to continue . . . or to end them now." *DeBoer*, 2014 WL 5748990, at *1. Rather, it is about the lives of real people like Plaintiffs who work hard at their jobs, pay their taxes, and raise their kids. As Judge Daughtrey, the dissenting judge in the Sixth Circuit explained last week: "Instead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry . . . , my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win 'the hearts and minds' of . . . voters. . . . But these plaintiffs are not political zealots trying to push reform on their fellow citizens; they are committed same-sex couples . . . who want to achieve equal status . . . with their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools." *Id.* at *27.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2014, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing

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