

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

DEB WHITEWOOD, <i>et al.</i> ,	:	
	:	Civil Action
Plaintiffs,	:	
	:	No. 1:13-cv-1861
v.	:	
	:	Honorable John E. Jones, III
MICHAEL WOLF, in his official	:	
capacity as the Pennsylvania	:	
Secretary of Health, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**REPLY BRIEF OF DEFENDANTS MICHAEL WOLF AND DAN MEUSER
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

Defendants Michael Wolf, the Commonwealth of Pennsylvania's Secretary of Health, and Dan Meuser, the Commonwealth's Secretary of Revenue ("Defendants"), through their undersigned counsel, file this reply brief in further support of their motion for summary judgment. For the reasons set forth herein, and for those set forth at length in Defendants' Brief in Support of Motion for Summary Judgment, Plaintiffs' Amended Complaint should be dismissed in its entirety and summary judgment entered in Defendants' favor.

In their opening brief, Defendants explained how Plaintiffs were required to prove that Defendants: (i) acted under color of state law; and (ii) deprived each plaintiff of a federal constitutional or statutory right in order to establish claims under section 1983. *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000). Defendants also explained that Plaintiffs failed to meet these requirements by failing to establish state action taken by these Defendants that caused them harm. Accordingly, as Defendants explained, Plaintiffs' claims must be dismissed in their entirety and summary judgment entered in Defendants' favor.

In their responsive brief, Plaintiffs sidestep the issue of state action and focus instead on whether the harms they identify are cognizable under section 1983. Plaintiffs' argument misses the point. The issue is not merely whether the harms asserted are cognizable; the issue is whether the harms asserted, if cognizable, may be fairly traced to state action. Without a connection between state action and the alleged harm, there can be no cognizable section 1983 claim.

Try as they might, Plaintiffs cannot identify concrete state action by these Defendants that allegedly has caused them harm. Instead, as they have done throughout these proceedings, Plaintiffs rely primarily on speculation and conjecture with regard to harm that *may* occur in the future. Doc. 124, pp. 4-5 ("Tangible harms include ... substantial end-of-life tax penalties that burden surviving spouses and partners"). Without evidence of state action, Plaintiffs'

1983 claims should be dismissed and Defendants' motion for summary judgment granted.

Plaintiffs' suggestion that, because they have labeled this a "discrimination" case, they have no obligation to prove state action, *see* Doc. 124, p. 4 ("[D]iscriminatory classifications are actionable as constitutional violations even in the absence of a corresponding state benefit."), is inconsistent with controlling law. It is well-established that state action is an essential element of any discrimination claim. *Gruenke*, 225 F.3d at 298.

Further, the contention that after *United States v. Windsor*, 133 S. Ct. 2675 (2013), state action in a case challenging a state's failure to recognize an out-of-state same-sex marriage somehow should be *presumed* – *see* Doc. 124, p. 3 ("the Commonwealth's non-recognition of out-of-state marriages causes the same harms to the married Plaintiffs as in *Windsor*") – fails for two essential reasons.

First, the facts of this case stand in sharp contrast to those in *Windsor*. In *Windsor*, Plaintiffs were legally married in New York. The federal government, through its assessment and collection of federal estate tax, refused to recognize Plaintiffs' marriage and, hence, was deemed by the Supreme Court to have taken away a right New York had granted. By contrast, in this case, Plaintiffs never possessed the right to marry in Pennsylvania or to have their out-of-state marriages recognized by Pennsylvania. Thus, by failing to recognize Plaintiffs' out-of-state

marriages, Pennsylvania has not taken away any cognizable right.

Second, unlike in *Windsor*, where the plaintiff was able to point to specific conduct by the IRS resulting in concrete harm, Plaintiffs here have failed to establish *any action* taken by Defendants that has impaired the existing rights of all plaintiffs. Thus, the Supreme Court's holding in *Windsor* is wholly irrelevant to the state action inquiry in this case.

Plaintiffs' reliance on "stigma" also cannot be said to satisfy the state action predicate of a section 1983 claim. Stigma is merely *a type of harm* that may or may not be cognizable in a 1983 action. As in any 1983 case, Plaintiffs are required to show a causal connection between the harm (stigma) and the challenged law. *Bishop v. U.S. ex rel. Holder*, 962 F.Supp.2d 1252, 1268 (N.D. Okla. 2014). Here, Plaintiffs' reference to "stigma" in a vacuum, without any connection to the named Defendants, does nothing to satisfy this inquiry.

For all of these reasons, in addition to those in Defendants' summary judgment brief, Plaintiffs have failed to properly allege a cognizable section 1983 claim. For this reason alone, summary judgment should be granted in Defendants' favor.

Respectfully submitted,

LAMB McERLANE PC

Date: May 12, 2014

By: /s/ William H. Lamb

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief of Defendants Michael Wolf and Dan Meuser in Support of Defendants' Motion for Summary Judgment in the above captioned matter was served on the 12th day of May, 2014, to the attorneys/parties of record as follows:

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