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' MEMORANDUM IN OPPOSITION TO THE MOTION OF DEFENDANTS SECRETARY OF HEALTH MICHAEL WOLF AND SECRETARY OF REVENUE DAN MEUSER FOR CERTIFICATION AND AMENDMENT OF ORDER PURSUANT TO 28 U.S.C. § 1292(b)

INTRODUCTION

The Motion[1] of Defendants Michael Wolf and Dan Meuser ("Commonwealth Defendants") fails to satisfy the demanding standard for certification of this Court's denial of their Motion to Dismiss for immediate interlocutory appeal under 28 U.S.C. § 1292(b). For at least the following four reasons, Plaintiffs respectfully request that this Court deny the Motion.

[1] "Motion" refers to the Motion of Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b) (Dkt. 76, filed Nov. 25, 2013).

First, the Motion fails to present the required "substantial ground for difference of opinion" concerning a "controlling question of law" because it rests on the rejected and incorrect view that a lower court does not have the authority to analyze intervening "doctrinal developments" when considering the precedential impact, if any, of a summary dismissal by the United States Supreme Court.

Second, Commonwealth Defendants' general disagreement with the Court's conclusion that *Baker v. Nelson*, 409 U.S. 810 (1972) does not control fails to provide a basis for interlocutory appeal. There is no "substantial ground for difference of opinion" regarding this Court's conclusion that the "doctrinal developments" in equal protection and due process jurisprudence since *Baker* "can only be characterized as a sea change." (Mem. & Order (Dkt. 67) at 5.) This is not open to serious question and, indeed, Commonwealth Defendants make do not even challenge the substance of the Court's conclusion. Accordingly, this circumstance does not present appropriate grounds for invoking the "extreme measure" of a Section 1292(b) interlocutory appeal. *Craig v. Rite Aid Corp.*, 08-CV-2317, 2010 WL 1994888, at *4 (M.D. Pa. Feb. 4, 2010) (Jones, J.).

Third, even if *Baker* could be held to preclude some of Plaintiffs' claims or arguments – and it cannot – such a holding would not "materially advance the ultimate termination of the litigation" because *Baker* did not address core questions presented in the Amended Complaint. Even if the Amended Complaint were to be

stripped of the "precise issues presented and necessarily decided by [*Baker*]," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), trial would still be necessary in this action and the nature and scope of that trial would not be meaningfully impacted regardless of the outcome of any immediate appeal.

Fourth, separate and apart from the statutory factors for certification, the Court should exercise its discretion not to certify this action for interlocutory appeal. Far from presenting any "exceptional circumstances" justifying an interlocutory appeal, *Craig*, 2010 WL 1994888, at *2, an appeal now would run counter to principles of judicial economy and would only serve to delay Plaintiffs' right to their day in Court to demonstrate why they are entitled to declaratory and injunctive relief to prevent Pennsylvania from continuing to enforce its discriminatory laws prohibiting marriages and recognition of marriages for same-sex couples.

ARGUMENT

I. SECTION 1292(b) OFFERS ONLY A NARROW EXCEPTION TO THE FINAL JUDGMENT RULE.

Section 1292(b) provides a narrow exception to the general rule that the Courts of Appeals have jurisdiction only over appeals from final orders, stating:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

> from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). Even if all of these criteria are met, the decision to grant certification remains within the trial court's sound discretion. *Bachowski v. Usery*, 545 F.2d 363, 368 (3d Cir. 1976).

Allowance of an immediate interlocutory appeal is an "extreme measure," and "a district court should exercise its discretion mindful of the strong policy against piecemeal appeals." *Craig*, 2010 WL 1994888, at *4, *2 (M.D. Pa. Feb. 4, 2010) (Jones, J.) (internal quotation omitted); *accord Kapossy v. McGraw-Hill, Inc.*, 942 F. Supp. 996, 1001 (D.N.J. 1996) (finding that interlocutory appeal "is necessarily a deviation from the ordinary policy of avoiding 'piecemeal appellate review of trial court decisions which do not terminate the litigation'") (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). Accordingly, district courts "should exercise th[eir] discretion and certify issues for interlocutory appeal only sparingly and in exceptional circumstances." *Knopick v. Downey*, 1:09-CV-1287, 2013 WL 5719247, at *4 (M.D. Pa. Oct. 21, 2013) (quoting *Sabree v. Williams*, Civ. No. 06-cv-2164, 2008 WL 4534073, at *1 (D.N.J. Oct. 2, 2008)).

II. THE MOTION DOES NOT PRESENT THE "EXCEPTIONAL CIRCUMSTANCES" NECESSARY TO INVOKE THE "EXTREME MEASURE" OF IMMEDIATE INTERLOCUTORY REVIEW.

For at least four reasons, the Commonwealth Defendants' Motion fails to present the kind of "exceptional circumstances" required for an interlocutory appeal.

First, the Motion rests on the flawed premise that this Court supposedly overstepped its bounds in even conducting an independent analysis of the relevant doctrinal developments since *Baker*. Specifically, the Motion argues that whether such doctrinal developments have occurred is a "determination . . . left to the United States Supreme Court." (Defs. Mem. at 4, n.1.) This argument, however, does not come close to identifying a controlling question of law about which there is substantial disagreement that may materially advance the resolution of this action because it is plainly contrary to clear Supreme Court and Third Circuit precedent and to common sense.

The Supreme Court directs lower courts to treat summary dismissals for want of a substantial federal question as precedential only until "doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)). The Third Circuit has reinforced the Supreme Court's mandate that lower courts must analyze whether intervening doctrinal

developments indicate that a summary disposition should no longer be treated as precedential. *See Lecates v. Justice of the Peace Court No. 4 of the State of Del.*, 637 F.2d 898, 904 (3d Cir. 1980) (noting that "indications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition"); *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 173-74 n.33 (3d Cir. 2002) (recognizing that subsequent doctrinal developments removed the precedential effect of the Supreme Court's dismissal of the appeal from *Cooper v. Eugene School District*).

This is only logical. If the Supreme Court were the only court empowered to analyze what doctrinal developments have occurred since a summary dismissal, there would be no point to the standard articulated in *Hicks v. Miranda* as summary dismissals would be no different than opinions of the Court. In that case, they would be absolutely binding on lower courts until expressly overruled by the Court and not just until "doctrinal developments indicate otherwise."[2] That, of course, is

[2] The cases cited in Defendants' Motion prove this very point. (*See* Defs. Mot. at 4, n.1.) *Agostini v. Felton*, 521 U.S. 203, 207 (1997) and *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989), stand only for the unremarkable proposition that lower courts should not rely upon doctrinal developments to disregard *opinions* of the Supreme Court. This is because opinions of the Supreme Court are binding on lower courts until the Supreme Court expressly overrules them, not just until "doctrinal developments indicate otherwise." But, in the case of a summary dismissal for want of a substantial federal question, which is not an opinion, the Supreme Court has made clear that lower courts should analyze doctrinal developments and not just wait for

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not the standard, and there is no "difference of opinion" under Supreme Court or Third Circuit law that this Court properly undertook its own analysis as to whether there have been intervening doctrinal developments since 1972.

Second, Commonwealth Defendants' general disagreement with the Court's conclusion that *Baker* is not preclusive in whole or in part of Plaintiffs' claims also fails to present a substantial disagreement meriting immediate interlocutory review. *See Kapossy*, 942 F. Supp. at 1001 ("[M]ere disagreement with the district court's ruling does not constitute a 'substantial ground for difference of opinion' within the meaning of § 1292(b)."). To satisfy the substantial ground for disagreement requirement of Section 1292(b), "genuine doubt must exist about the legal standard governing a particular case." *Brown v. Trueblue, Inc.*, 1:10-CV-0514, 2012 WL 1268644, at *6 (M.D. Pa. Apr. 16, 2012); *see also Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) ("That settled law might be applied differently does not establish a substantial ground for difference of opinion."). Here, there is no such "genuine doubt." As this Court has already found:

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an express statement of abrogation to determine what if any precedential value should be afforded a prior summary disposition.

> The jurisprudence of equal protection and substantive due process has undergone what can only be characterized as a sea change since 1972. The Supreme Court has decided several cases since Baker which demonstrate that it no longer views constitutional challenges based on sex or sexual identity classifications as unsubstantial.

(Mem. & Order (Dkt. 67), at 5; *see also id.* at 5-6 (citing as examples, *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973); *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting); *Lalli v. Lalli*, 439 U.S. 259, 264-65 (1978); *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012); and *United States v. Windsor*, 133 S. Ct. 2675 (2013).) The fact that there has been a "sea change" in "jurisprudence of equal protection and substantive due process" since *Baker* is not only true, the Commonwealth Defendants' Motion does not even challenge the proposition, instead focusing on disputing the Court's authority to even review doctrinal developments one way or the other. The Commonwealth Defendants may ultimately dispute the merits of Plaintiffs' claims – and Plaintiffs stand ready to address the merits of any defenses offered in support of Pennsylvania's marriage exclusions – but what cannot be contested seriously is that, 41 years after *Baker*, in the year 2013, the doors to federal courts are open for individuals to bring

constitutional challenges to classifications based on sex and sexual identity, as Plaintiffs do here.[3]

Third, the Motion also should be denied because, regardless of the outcome, an interlocutory appeal at this stage would not materially advance the ultimate termination of this action. The Motion's statement that "permitting an immediate appeal would completely eliminate the need for trial, if the Third Circuit determines that *Baker* precludes this action," (Motion at 6) is simply incorrect. A trial still will be necessary in this action because the Amended Complaint presents issues that were not raised in *Baker*. In fact, rather than satisfying Section 1292(b)'s requirement, the appeal Commonwealth Defendants seek would necessarily *delay*, not advance, the ultimate termination of this action.

The precedential effects of summary dismissals are limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *accord Lecates*, 637 F.2d at 904 ("[T]he precedential value of a summary disposition by the Supreme Court is to be confined to the exact facts of the case and to the precise question posed in the jurisdictional statement.").

[3] The out-of-circuit cases cited in the Motion as finding *Baker* to be controlling do not present a "substantial ground for difference of opinion" required by Section 1292(b). Each of those cases is distinguishable and, significantly, pre-dates the Supreme Court's recent decision in *United States v. Windsor*, 570 U.S. –, 133 S. Ct. 2675 (2013).

They do not resolve "[q]uestions which merely lurk in the record." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (internal quotation omitted).

The precise question addressed in *Baker* was the constitutionality of an indefinite Minnesota marriage law that had been construed to allow only opposite-sex couples to marry in Minnesota. *Baker* did not consider the constitutionality of a law barring recognition of valid marriages of same-sex couples entered into in other jurisdictions. Even regarding the claims of same-sex couples seeking the right to marry (as opposed to having their existing marriages recognized), *Baker* did not consider the constitutionality of a law, like Pennsylvania's, that specifically was enacted to preclude such marriages or whether such an enactment had the "purpose and effect to disparage and to injure" same-sex couples.[4] *Windsor*, 133 S. Ct. at 2696. The Minnesota Supreme Court noted that the marriage statutes at issue in *Baker* dated from territorial days, long before there was any public discussion about marriage for same-sex couples, and thus the exclusion of same-sex couples was not its aim. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

[4] Like the federal Defense of Marriage Act at issue in *Windsor*, the Pennsylvania statutes challenged here were enacted in 1996 in response to the Hawaii Supreme Court's finding that strict scrutiny would apply under the Hawaii constitution to a challenge to the state's ban on same-sex marriage. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

Whatever the Commonwealth Defendants may say about *Baker*'s precedential effect, these issues from Plaintiffs' Amended Complaint are not among the "precise question[s] presented by the jurisdictional statement" in that action, *Lecates*, 637 F.2d at 904, and a trial would still be needed to resolve them.

Not only will Commonwealth Defendants' appeal, even if successful, not dispose of the entire action, it will not even significantly alter the scope and nature of the trial in this case. By way of example only, many of the Plaintiff couples are already married in another state and seek recognition of their marriages in Pennsylvania. The factual proofs regarding their claims, including expert testimony, essentially are co-extensive with those regarding the claims of the unmarried Plaintiffs in the action. Since, as discussed above, these Plaintiffs' claims for recognition of their out-of-state marriages were not addressed by *Baker* and will proceed to trial regardless of any interlocutory appeal, the evidence at trial will not be impacted or materially advanced by interlocutory appeal. *See, e.g.*, *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1121 (E.D. Pa. 1979) (declining to certify a decision for appeal where, regardless of the result of the appeal, a trial would "involve substantially the same evidence"). Accordingly, an interlocutory appeal will likely have no effect other than delaying trial rather than advancing or meaningfully narrowing it.

Fourth, even if this Court were to find that the Motion meets the statutory criteria of Section 1292(b) – and it should not – both principles of judicial economy and the nature of the claims at stake in this case favor the Court exercising its discretion to deny the requested certification. *Bachowski*, 545 F.2d at 368. "In considering whether to certify an interlocutory appeal, a district court should exercise its discretion mindful of the strong policy against piecemeal appeals" and such appeals should only be granted where the moving party demonstrates "exceptional circumstances." *Craig*, 2010 WL 1994888, at *2 (internal quotations omitted). Nothing about this case presents the sort of "exceptional circumstances" that would justify an immediate appeal. Indeed, the thrust of the Commonwealth Defendants' argument here – that had this Court decided their motion to dismiss differently, the case might be different – is a proposition that applies to all purportedly dispositive motions to dismiss in any litigation. The avoidance of multiple appeals in such cases is the precise purpose of the final judgment rule. *See United States v. Nixon*, 418 U.S. 683, 690 (1974) ("The finality requirement of 28 U.S.C. §1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.").

This matter is scheduled for trial in June 2014. Rather than resulting in "protracted" litigation, as argued in the Motion, it is very possible that trial in this

case will be completed before any interlocutory appeal would be decided by the Third Circuit. Further, whatever the result at trial, the aggrieved party is almost certain to appeal. Accordingly, in less than one year, Commonwealth Defendants likely will either have prevailed at trial or will have an opportunity to present their argument that *Baker* controls to the Third Circuit.

By way of contrast, every day that Plaintiffs and other same-sex couples in Pennsylvania are denied the ability to marry or have their marriages recognized is another day that their core Constitutional rights are being violated. Plaintiffs are entitled to be heard and to present their case in this federal court as to why the real and irreparable harms they suffer every day finally must come to an end.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Commonwealth Defendants' Motion.

Respectfully submitted,

Dated: December 2, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2013, I caused the foregoing Plaintiffs' Memorandum in Opposition to the Motion of Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b) 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.

/s/ Mark A. Aronchick
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