IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOANNE HARRIS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 5:13-cv-00077
	)	
ROBERT F. McDONNELL, JANET M. RAINEY, and THOMAS E. ROBERTS, in their official capacities	)	
	)	
Defendants.	)	

STATE DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

COME NOW Robert F. McDonnell, Governor of Virginia, and Janet M. Rainey, State Registrar of Vital Records, in their official capacities, by counsel, and for their brief in opposition to Plaintiffs' motion for class certification state as follows.

I. Introduction.

Plaintiffs correctly note that a proponent of class certification must demonstrate that all four elements of Rule 23(a) have been satisfied and must also satisfy at least one prong of Rule 23(b). (Doc. 27 at 3.) However, Plaintiffs fail to carry that burden with respect to all three of their proposed subclasses.

II. Proposed Class Definitions.

Although Plaintiffs purport to propose a class consisting of two subclasses, substantively there are three subclasses, framed as follows:

> "all persons residing in Virginia who are unmarried, and either
>
> 1. wish to marry a person of the same sex, have applied for a marriage license in the Commonwealth with a person of the same sex, and have been denied the license; or

> 2. wish to marry a person of the same sex in the Commonwealth, but have not attempted to apply for a marriage license because the marriage ban would render such an attempt futile[;] . . .
> [3.] all persons residing in Virginia who are validly married to a person of the same sex in another jurisdiction, and wish to have their marriage recognized by the Commonwealth."

(Doc. 27 at 4.)

Plaintiffs' filings project a well-justified uneasiness with the fact that the members of the second and third proposed subclasses are unascertainable by objective criteria. (Doc. 27 at 4-5.) While Plaintiffs selectively cite the MANUAL FOR COMPLEX LITIGATION (FOURTH), NEWBERG ON CLASS ACTIONS (5th ed.), and out-of-circuit cases for the proposition that this is supposedly unremarkable and unobjectionable with respect to a Rule 23(b)(2) class, that is not the law. A judgment in favor of a Rule 23(b)(2) class must "include and describe those whom the court finds to be class members." Fed. R. Civ. P. 23(c)(3)(A).

> An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against).

MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004).

The requirements of ascertainability and the prohibition against defining a class in subjective or in merits terms ultimately rest upon due process considerations. Absent such requirements and prohibitions, only the defendants are at risk of being bound on class action claims. *See Randleman* v. *Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (fail-safe class improper); *Melton ex rel. Dutton* v. *Carolina Power & Light Co.*, 283 F.R.D. 280, 288 (D.S.C. 2012) (same).

While ascertainability of the personal identity of members of an objectively defined class may not be required in a Rule 23(b)(2) class action until some class member seeks to enforce a class action judgment, the class still must be objectively defined. *See* 5 JERALD S. SOLOVY, *ET.*

AL., MOORE'S FEDERAL PRACTICE - CIVIL § 23.21 (3d ed. 2013). "Rule 23(a) does not expressly require that a class be 'definite' in order to be certified; however, a requirement that there be an identifiable class has been implied by the courts." *Zapka* v. *Coca-Cola Co.*, No. 99-cv-8238, 2000 U.S. Dist. LEXIS 16552, *6 (N.D. Ill. Oct. 27, 2000) (citing *Alliance to End Repression* v. *Rockford*, 565 F.2d 975, 977 (7th Cir. 1977) and *Elliott* v. *ITT Corp.*, 150 F.R.D. 569, 573-74 (N.D. Ill. 1992)); *accord Oshana* v. *Coca-Cola Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005); *Fears* v. *Wilhelmina Model Agency*, No. 02-cv-4911, 2003 U.S. Dist. LEXIS 11897, *6 (S.D.N.Y. July 15, 2003). "An identifiable class exists if its members can be ascertained by reference to objective criteria." *In re Methyl Tertiary Butyl Ether Prods. Liability Litig.*, 209 F.R.D. 323, 336 (S.D.N.Y. 2002). "Membership should not be based on subjective determinations, such as the subjective state of mind of a prospective class member, but rather on objective criteria that are administratively feasible for the Court to rely on to determine whether a particular individual is a member of the class." *Id.*; *see Marcus* v. *BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) ("If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."). And where, on the face of complaint, "no ascertainable class" has been identified, "a district court may dismiss the class allegation on the pleadings." *See Xavier* v. *Belfor Grp. USA, Inc.*, 254 F.R.D. 281, 286 (E.D. La. 2008) (citing *John* v. *Nat'l Security Fire & Casualty Co.*, 501 F.3d 443 (5th Cir. 2007)).

III. Plaintiffs Do Not Satisfy All Four Requirements of Rule 23(a).

A. Numerosity.

An element of the definition of the first subclass is an application for a marriage license. So far as the public record makes out there are possibly four people known to meet this definition: the two Plaintiffs in the earlier, first-filed case pending in the Norfolk Division of the Eastern District of Virginia, *Bostic* v. *McDonnell*, No. 2:13-cv-00395, and Plaintiffs Harris and

Duff. However, the affidavit of deputy clerk Lauren Moran traduces the allegations of Harris and Duff that they applied for a marriage license. (Ex. A.) In any event, two or four persons is not a number that "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see Thaxton* v. *Vaughan*, 321 F.2d 474, 478 (4th Cir. 1963) (seven insufficient).

The members of the other two proposed subclasses are unascertainable because they are based upon subjective criteria, and therefore the numerosity calculation is not possible, *see Greene* v. *Brown*, 451 F. Supp. 1266, 1276 (E.D. Va. 1978), because such calculation goes beyond commonsense estimation, *see Talbott*, 191 F.R.D. at 102, and passes into speculation. *Marcus*, 687 F.3d at 596 ("The party supporting the class cannot rely on conclusory allegations that joinder is impractical or on speculation as to the size of the class in order to prove numerosity." (internal quotation marks omitted)).

B. Commonality.

A purpose of the commonality requirement is to insure that trial of the claims of the class representatives will also resolve the claims of the class "'in one stroke.'" (Doc. 27 at 7) (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011)). Because the members of the second and third subclass are defined in individualized, subjective terms that turn on issues of their state of mind commonality does not exist in that sense. Thus, a judgment in favor of the named plaintiffs would have no effect on the putative members of the second and third subclass absent further proceedings.

C. Typicality.

To the extent that "[t]he essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class,'" (Doc. 27 at 8) (quoting *Deiter* v. *Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (quoting *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998))), there is a want of

typicality for the second two subclasses for the same reason that there is a failure of commonality. *See Deiter*, 436 F.3d at 466 (noting that the typicality requirement "tends to merge with the commonality and adequacy of representation requirements"). Furthermore, if in fact Harris and Duff failed to apply for a marriage license, their claims are not typical of the members of the first subclass and it lacks a class representative. *Anchem Prods.* v. *Windsor*, 521 U.S. 591, 625-26 (1997) (class representative must be part of class, having suffered the same injury).

D. Adequacy of Representation.

With respect to the first subclass—which is the only ascertainable one—there is a clear conflict between the litigation theory in this case and in the first-filed case in the Eastern District. There the case has been pled as turning on a pure issue of law based upon legislative facts. *Bostic*, No. 2:13-cv-00395 (Doc. 1). This case has been pled as though it turns on evidentiary facts. (Doc. 1). Clearly the Plaintiffs in the Eastern District prefer their own theories and their own counsel. Hence, the effort of counsel in this case to draft the first-filed Plaintiffs into a non-opt out class creates a conflict. *See Scott* v. *Univ. of Del.*, 601 F.2d 76, 88 (3d Cir. 1979) ("The numerosity requirement was designed to prevent members of a small class from being unnecessarily deprived of their rights without a day in court . . . by only a few members of the class resorting to Rule 23." (internal quotation marks omitted)); *accord Marcus*, 687 F.3d at 594-95 (same).

IV. Class Certification Is Inappropriate under Rule 23(b)(2).

Class certification here would as a practical matter add nothing to the relief accorded by injunction and/or declaratory judgment and thus should be denied. *See, e.g.*, *Sanford* v. *R.L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978) ("Since the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed

class action, class certification was unnecessary in order to give the plaintiffs the injunctive relief they requested through class certification." (citing *Gray* v. *Int'l Bhd. of Elec. Workers*, 73 F.R.D. 638, 640-41 (D.D.C. 1977), for the rule that class actions are unnecessary and inappropriate where remedy otherwise sufficient)); *Doe* v. *Commonwealth's Att'y for the City of Richmond*, 403 F. Supp. 1199, 1200 n.1 (E.D. Va. 1975) (three-judge court deciding constitutional challenge and rejecting class certification under Rule 23(b)(1)(A)), *aff'd* 425 U.S. 901 (1976); *Thomas* v. *Weinberger*, 384 F. Supp. 540, 543 (S.D.N.Y. 1974) (rejecting class certification as unnecessary on a constitutional challenge); *cf.* 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1785.2 (3d ed. 2013) (noting that "the vast majority of courts" apply a "need requirement" to deny class certification for suits seeking declaratory or injunctive relief under Rule 23(b)(2) where "a class action is not necessary inasmuch as all the class members will benefit from any injunction issued on behalf of a single plaintiff.").

"Class certification is particularly unnecessary where, as here, 'the suit is attacking a statute or regulation as being facially unconstitutional.' In that circumstance, 'there would appear to be little need for the suit to proceed as a class action' because 'it can be assumed that if the court declares the statute or regulation unconstitutional then the responsible government officials will discontinue the [regulation's] enforcement.'" *Mills* v. *District of Columbia*, 266 F.R.D. 20, 22 (D.D.C. 2010) (quoting *Alliance to End Repression,* 565 F.2d at 980); *see also Galvan* v. *Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) (Friendly, J.) (affirming the district court's denial of class certification on the ground that "an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality," especially where "the judgment run[s] to the benefit not only of the named plaintiffs but of all other similarly situated"

claimants and the "State has made clear that it understands the judgment to bind it with respect to all claimants").

Nor, because the second and third subclasses are defined in terms of subjective states of mind, is the text of Rule 23(b)(2) satisfied. *See* Fed. R. Civ. P. 23(b)(2) (certification permissible where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"); *Wal-Mart Stores*, 131 S. Ct. at 2557 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'").

Until the subjective state of mind issues are resolved, the putative class members of the second and third subclasses lack even the Article III requirements of standing, which include an injury that is "concrete" and "actual or imminent." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). And because of the dispute whether Harris and Duff are in the first or second subclass, they have not demonstrated standing for each subclass, a showing that must be made before any class certification. *Mills* v. *Foremost Ins. Co.*, 269 F.R.D. 663, 670 (M.D. Fla. 2010) ("the district court must determine that at least one of the named class representative has Article III standing to raise each class subclaim before the court can undertake any formal review of the Rule 23(a) prerequisites."); *Brenner* v. *Future Graphics, LLC*, 258 F.R.D. 561, 566 (N.D. Ga. 2007) ("[P]rior to the certification of a class, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.").

Plaintiffs pled both Rule 23(b)(1) and (b)(2) in their Complaint. (Doc. 1 at 27). They presumably have abandoned Rule 23(b)(1) because there is no practical danger of inconsistent results in this circuit because any of the marriage cases would be subject to an appeal of right, Fed. R. App. P. 4(a), and the Court of Appeals will impose uniformity either because panel decisions are binding on other panels, *Capital Produce Co.* v. *United States*, 930 F.2d 1077, 1079 (4th Cir. 1991) (noting that "the rule of interpanel accord [is] uniformly followed in the Fourth Circuit" and thus that an earlier panel decision "is immune from attack at the panel level"), or because the court takes the question *en banc*. Fed. R. App. P. 35(b)(1); *see Capital Produce*, 930 F.2d at 1079 (noting that earlier panel decisions are "subject to reversal by the Court of Appeals *en banc*"). Plaintiffs' attempted escape from Rule 23(b)(1) to Rule 23(b)(2), however, does not help because a ruling in favor of Plaintiffs would not automatically affect the members of the two unascertainable subclasses without further proceedings.

V. Discovery Is Both Warranted and Necessary.

Where the pleadings do not conclusively show that the requirements of Rule 23 are met, parties must be permitted discovery. *Walker* v. *World Tire Corp., Inc.*, 563 F.2d 918, 921 (8th Cir. 1977) ("Where, however, the pleadings themselves do not conclusively show whether the Rule 23 requirements are met, the parties must be afforded the opportunity to discover and present documentary evidence on the issue."); *McCray* v. *Standard Oil Co.*, 76 F.R.D. 490, 499 (N.D. Ill. 1977) (noting that ordinarily class discovery is permitted and that "[m]any courts have recognized the propriety of allowing discovery or evidentiary hearings before deciding the class certification issue," citing, for example, *Doctor* v. *Seaboard Coast Line R.R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976)). Here there are at least serious questions of adequacy of representation and conflicts within the first putative subclass sufficient to require discovery. And if the second and

third subclasses are not dismissed for unascertainability on the pleadings, discovery should be permitted on them as well.

VI. Conclusion.

Because the second and third subclasses are unascertainable on the face of the pleadings they should be dismissed. In the alternative, all subclasses should be dismissed following discovery for all the reasons stated above.

Respectfully Submitted,

ROBERT F. MCDONNELL and
JANET M. RAINEY,
in their official capacities

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to counsel who are registered CM/ECF users.

/s/
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