**In the United States District Court**
**For the Western District of Virginia**
Harrisonburg Division

JOANNE HARRIS and JESSICA DUFF, and CHRISTY BERGHOFF and VICTORIA KIDD, on behalf of themselves and all others similarly situated,

*Plaintiffs*,

v.

ROBERT F. MCDONNELL, in his official capacity as Governor of Virginia; JANET M. RAINEY, in her official capacity as State Registrar of Vital Records; THOMAS E. ROBERTS, in his official capacity as Staunton Circuit Court Clerk,

*Defendants*.

No. 5:13-cv-00077

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ROBERTS' MOTION TO DISMISS**

Plaintiffs submit this Memorandum of Law in Opposition to Defendant Roberts' Motion to Dismiss.

## INTRODUCTION

Plaintiffs Joanne Harris and Jessica Duff, and Christy Berghoff and Victoria Kidd (collectively, "Plaintiffs") are committed same-sex couples who seek the freedom to marry. They brought this putative class action seeking declaratory and injunctive relief for the violation of their and other class members' rights under the Fourteenth Amendment caused by Defendants' enforcement of Virginia's statutory and constitutional provisions excluding same-sex couples from marriage and barring recognition of the marriages some have entered in other jurisdictions (the "marriage bans"). All Plaintiffs brought official-capacity claims against

Governor Robert F. McDonnell, who has moved to dismiss the claims against him, and the State Registrar of Vital Records, Janet M. Rainey, who has answered the complaint. Plaintiffs Harris and Duff, an unmarried couple, also brought official-capacity claims against Staunton Circuit Court Clerk Thomas E. Roberts ("Roberts"), who filed the motion to dismiss at issue here.

**ARGUMENT**

In his motion to dismiss, Roberts primarily argues that the claims of Plaintiffs Harris and Duff should be dismissed for lack of standing and ripeness under Federal Rule of Civil Procedure ("Rule") 12(b)(1). Mem. In Supp. of Def. Roberts' Mot. to Dismiss ("Mem.") 9-13. These arguments are frivolous. Roberts concedes that Plaintiffs Harris and Duff visited his office and inquired about marriage. *Id.* 3; Aff. of Laura Moran ("Moran Aff.") ¶¶ 2-3. He agrees that he told them Virginia law does not permit same-sex couples to marry. Mem. 3; Moran Aff. ¶ 3. Roberts complains mainly that – *after he confirmed that marriage was unavailable to them* – Plaintiffs Harris and Duff did not specifically ask for a marriage license, or insist on taking every component step in the marriage license process for which he already had stated they were ineligible. Mem. 3 (asserting that Plaintiffs Harris and Duff did not ask for a marriage license, complete an application for a marriage license, ask about the fee for a marriage license, or tender the fee for a marriage license). Plaintiffs Harris and Duff did in fact inquire about a marriage license, as they testify through concurrently submitted declarations (*see* Decl. of Joanne Harris ("Harris Decl.") ¶¶ 4-5; Decl. of Jessica Duff ("Duff Decl.") ¶¶ 4-5), but as described further below, no such request is even required under standing and ripeness principles.

Roberts seems most concerned, however, with whether Plaintiffs Harris and Duff are otherwise eligible to marry in the state, as they expressly alleged they were in the complaint. Mem. 3-4, 12 (noting that Plaintiffs Harris and Duff did not testify under oath to their eligibility;

arguing that the case is not "fit for review" because Roberts had not been able to "consider all of the necessary facts and evidence" to make an "official determination" as to their eligibility); Compl. ¶ 44 (alleging that Plaintiffs Harris and Duff meet all eligibility requirements to marry under Virginia law, except for the fact that they are a same-sex couple). Federal standing and ripeness doctrines require no such showing for claims to proceed against an absolute barrier in the law such as the marriage bans. To end all doubt, however, Plaintiffs Harris and Duff now have confirmed their eligibility under oath. Harris Decl. ¶¶ 7-10; Duff Decl. ¶¶ 7-10; *see also Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (under a Rule 12(b)(1) motion the court may look beyond the pleadings to evidence without converting the motion to one for summary judgment).

## I. PLAINTIFFS HARRIS AND DUFF HAVE STANDING AND THEIR CLAIMS ARE RIPE.

Three elements comprise the "irreducible constitutional minimum of standing" under Article III of the federal Constitution, all of which are satisfied here:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks, citations, and alterations omitted). Roberts does not argue that the third element – injury redressable by a favorable decision – is lacking here. Rather, he challenges the existence of the first two elements. Mem. 9 (claiming that Plaintiffs Harris and Duff "have not suffered an injury that is

concrete, particularized, and actual or imminent and which is fairly traceable to the acts or omissions of Roberts").[1]

Because Virginia law is crystal clear in barring same-sex couples from marrying, Plaintiffs Harris and Duff would have standing to bring their claims even if they had never set foot in Roberts' office. Indeed, Roberts' motion is most notable for what it does *not* challenge:

1. Roberts does not dispute that Plaintiffs Harris and Duff suffer existing and continuous injury from the marriage bans. *See*, *e.g.*, Compl. ¶¶ 14-15 (Plaintiffs Harris and Duff are unable to have the state-approved wedding that would be profoundly meaningful for both them and their four-year-old son; Plaintiff Duff is not able to become a legal parent to her son in Virginia) and 12-17, 28-33, 56-61 (detailing the sweeping harms imposed by the marriage bans).

2. Roberts does not challenge that he is the appropriate officer statutorily authorized to issue marriage licenses to couples from his locality, such as Plaintiffs Harris and Duff, or from anywhere in the state. *See* Va. Code Ann. § 20-14 ("Every license for a marriage shall be issued by the clerk or deputy clerk of a circuit court of any county or city."). Nor does he argue that the

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[1] Roberts packages his motion as a challenge under Rule 12(b)(1) to the jurisdictional factual predicate of Plaintiffs Harris and Duff's claims. As described below, however, Plaintiffs Harris and Duff's standing, and the ripeness of their claims, does not depend on a marriage license application. They now have testified about their eligibility for marriage under oath, so no factual dispute remains. Should this Court find it necessary, however, to examine the facts under Rule 12(b)(1), the Court should treat them as "intertwined with the facts central to the merits of the dispute." *Kerns*, 585 F.3d at 192-93. This is appropriate where the defendant challenges "not only the court's jurisdiction but also the existence of the plaintiff's cause of action." *Id.* at 193. Roberts does precisely that by arguing that Plaintiffs Harris and Duff may not even qualify for the relief they ultimately seek. Mem. 12 (arguing that it "very well could be that Plaintiffs Harris and Duff are not entitled to a marriage license for reasons unrelated to the constitutional challenge present here").

In these circumstances, "the trial court should ordinarily assume jurisdiction and proceed to the intertwined merits issues." *Id.* (citing *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009)). It is "only when the jurisdictional allegations are 'clearly . . . immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous,'" that such claims should be dismissed. *Kerns*, 585 F.3d at 193 (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

outcome of their visit to his office could be any different even if Plaintiffs Harris and Duff had insisted that they proceed with the marriage application process and proven their eligibility. Roberts does not contest that Virginia law expressly forbids Plaintiffs Harris and Duff from marrying each other. *See*, *e.g.*, Va. Const. art. 1, § 15-A; Va. Code Ann. § 20-45.2. Nor does he dispute that he is obligated to comply with Virginia's exclusion of same-sex couples from marriage. In fact, he would face mandatory criminal punishment for issuing a license in violation of Virginia's marital law. Va. Code Ann. § 20-33 ("If any clerk of a court knowingly issue a marriage license contrary to law, he shall be confined in jail not exceeding one year, and fined not exceeding $500."). Accordingly, Roberts does not on any of those grounds deny his causal connection to Plaintiffs Harris and Duff's inability to marry.[2]

Even though Plaintiffs Harris and Duff went above and beyond what is necessary by speaking directly with Roberts and hearing him confirm that they are categorically barred from marrying, Roberts now argues that they should have taken even more specific futile actions before their claims can be heard in court. Mem. 3, 10; Moran Aff. ¶ 3. Roberts couches his argument in terms of challenging Plaintiffs' standing and the ripeness of their claims. But because Virginia law clearly and definitively prohibits Roberts from issuing a marriage license to same-sex couples, Plaintiffs Harris and Duff would have had standing to challenge the marriage bans even if they had never visited Roberts' office because "[t]he law does not require [] a futile act," *Townes v. Jarvis*, 577 F.3d 543, 547 n.1 (4th Cir. 2009). *Cf. Int'l Bh'd of Teamsters v.*

[2] Aside from a stray allegation that Plaintiffs Harris and Duff have not suffered an injury that is "fairly traceable to the acts or omissions of Roberts," Roberts makes no other substantive argument about traceability. Mem. 9. Nor could he. Issues of traceability "become problematic when third persons not party to the litigation must act in order for an injury to arise or be cured." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013). No third party stands between Plaintiffs Harris and Duff, who wish to marry, and Roberts, the official statutorily authorized to provide them with the necessary license. Va. Code Ann. § 20-14.

*United States*, 431 U.S. 324, 365-66 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."). *See also Sammon v. N.J. Bd. of Med. Examiners*, 66 F.3d 639, 643 (3d Cir.1995) (where law clearly barred midwives from obtaining license without undergoing 1,800 hours of instruction, principles of ripeness did not require aspiring midwives to go through futile gesture of submitting a license application in order to challenge the training requirement); *S.D. Mining Ass'n, Inc. v. Lawrence Cnty.*, 155 F.3d 1005, 1009 (8th Cir. 1998) ("Because applying for and being denied a county permit for surface metal mining would be an exercise in futility, we will not require plaintiffs to do so before they may challenge the ordinance."); *Triple G Landfills, Inc. v. Bd. of Comm'rs*, 977 F.2d 287 (7th Cir. 1992) (holding that plaintiffs had standing and their constitutional challenge to county ordinance regulating landfills was ripe even though plaintiff had not applied for, or obtained, a state permit to operate a landfill); *LeClerc v. Webb*, 419 F.3d 405, 413-14 (5th Cir. 2005) (holding plaintiffs had standing and their claims were ripe where they sought to challenge statutory prohibition on nonimmigrant aliens sitting for Louisiana bar without having to go through futile gesture of submitting an application).

Roberts relies primarily on *Doe v. Va. Dep't of State Police*, 713 F.3d 745 (4th Cir. 2013), to support his argument that Plaintiffs Harris and Duff have not yet suffered an injury conferring standing upon them. Mem. 10-11. *Doe*, however, is inapposite. *Doe* involved a challenge to certain Virginia statutes that classified the plaintiff as a sexually violent offender

and prevented her from entering the grounds of a school or day care facility without permission from a Virginia circuit court and the school board or the owner of the day care facility. 713 F.3d at 750. While those statutes provided her with means to seek and potentially receive permission to enter such premises, the plaintiff did not avail herself of any of those mechanisms, and instead preemptively sued in federal court. *Id.* at 751-52. *Doe* explained that it rejected several of plaintiff's claims because the court was "required to wait until Doe obtains a decision from the Virginia authorities in order to contend with an injury – if it still exists after Doe petitions those entities – that affects her with finality." *Id.* at 754 n.5. Roberts' reliance on this case is ironic. He already has given Plaintiffs Harris and Duff his final decision – one mandated as a matter of law by provisions of the Virginia Constitution and state code – and confirmed that no requests to complete an application or tender the relevant fee will provide them with any relief. Moran Aff. ¶ 3 ("Mr. Roberts came out to talk with the women and advised them that he had checked the statute and that at this time in Virginia same sex couples could not get married.").[3]

Nor do the two other authorities that Roberts cites on this point help him. *See* Mem. 11 (citing *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), and *El-Amin v. McDonnell*, 2013 U.S. Dist. LEXIS 40461 (E.D. Va. March 22, 2013)). *Clapper* dealt with a challenge to a section of the Foreign Intelligence Surveillance Act of 1978 authorizing surveillance of individuals outside the United States. 133 S. Ct. at 1142. The plaintiffs could not demonstrate that any of their

[3] Roberts also cites *Doe's* discussion of federalism and comity concerns, but does not explain how they are relevant here. *See* Mem. 10-11 (stating that *Doe* "emphasized the strong concerns of federalism and comity which weighed against a finding of standing where the plaintiff sought federal jurisdiction before the state defendants had an opportunity to act"). As *Doe* clarified, "we advance here only the unremarkable proposition that a plaintiff avail herself of state remedies at her disposal . . . before coming into district court." 713 F.3d at 754 n.5. There is *no* state law remedy at the disposal of Plaintiffs Harris and Duff. Unlike the plaintiff in *Doe*, where it was "far from clear whether she w[ould] ultimately be barred from entering these properties," excluding same-sex couples from marriage is required as a matter of state law.

communications already had been intercepted, and argued unsuccessfully that they could demonstrate standing based on a reasonable likelihood that their communications would be intercepted in the future. *Id.* at 1143, 1148. This case is entirely different. Plaintiffs Harris and Duff are presently denied the right to marry, and continuously suffer a host of harms flowing from that denial. Their exclusion from marriage is not speculative and hypothetical, but actual and ongoing. *Compare* Va. Const. art. 1, § 15-A and Va. Code Ann. § 20-45.2 (prohibiting marriage for same-sex couples such as Plaintiffs Harris and Duff) with *Clapper*, 133 S. Ct. at 1148 (observing that "respondents fail to offer any evidence that their communications have been monitored," and noting that the challenged statute actually exempts "U.S. persons" such as the respondents from surveillance).

*El-Amin* is similarly inapposite to this case. The court in *El-Amin* rejected a challenge to Virginia's process for reinstating the voting rights of convicted felons, where the plaintiff had not attempted to use that process before initiating suit. 2013 U.S. Dist. LEXIS 40461, at *14-15. Whereas the law challenged there *allowed* El-Amin to seek reinstatement of his voting rights, the laws challenged here *disallow* Plaintiffs Harris and Duff to marry. Neither *Clapper* nor *El-Amin* have any relevance to the present case, where plaintiffs are suffering immediate ongoing injury from Virginia's marriage bans and there is no possibility that making a futile application to Roberts could ever redress their injuries.

Roberts relies on *Texas v. United States*, 523 U.S. 296, 300 (1998), for the proposition that a claim is not ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," and on *Doe*, 713 F.3d at 758, for the idea that a claim is unripe if the "future impact remains wholly speculative" (internal quotation marks omitted). Mem. 7. Given the clarity of Virginia's marriage bans, however, one is left to wonder what precisely may

"not occur as anticipated," "not occur at all," or "remains wholly speculative." To the extent Roberts was concerned with Plaintiffs Harris and Duff's eligibility to marry, they have laid those concerns to rest. Harris Decl. ¶¶ 7-10; Duff Decl. ¶¶ 7-10. Roberts cannot suggest that the outcome of their application for a marriage license is uncertain, as he already verified for them that they cannot marry in the Commonwealth. Moran Aff. ¶ 3.

Roberts' reliance on *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203 (4th Cir. 1992), is likewise misplaced. Mem. 7-8. *Charter* involved a suit by a bank against, *inter alia*, the Federal Deposit Insurance Corporation ("FDIC"), seeking declaratory relief to prevent the FDIC's anticipated enforcement of new federal legislation against the bank. 976 F.2d at 207. But the FDIC had neither been appointed a conservator or receiver for the bank, nor initiated any of the steps available to the FDIC that *might*, but would not necessarily, result in punitive action against the bank. *Id.* at 209. Unlike *Charter,* the "agency" here already confirmed in person for Plaintiffs Harris and Duff that their attempt to marry would be rejected as a matter of law. *See also Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 666 (4th Cir. 1997) (finding the claims ripe because for "all practical purposes, . . . the [agency] decision has been made").

Plaintiffs Harris and Duff have standing to pursue their claims, which are ripe and should be permitted to proceed. Alternatively, should the Court find that Plaintiffs Harris and Duff must revisit Roberts' office and undergo each step in the marriage application process before being denied again, the appropriate remedy would be leave to amend the complaint after they have taken those steps. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (leave to amend should be freely given when the amendment would not be futile).

## II. PLAINTIFFS BERGHOFF AND KIDD HAVE NOT ASSERTED ANY CLAIMS AGAINST ROBERTS.

At the outset of his motion, Roberts makes a puzzling request for the court to dismiss non-existent claims against him by Plaintiffs Berghoff and Kidd, who seek recognition of the marriage they entered in Washington, D.C. Mem. 2, 8-9, 13. Plaintiffs Berghoff and Kidd have not filed any claims against Roberts. Nowhere does the complaint allege that Roberts has violated their constitutional rights, or the rights of any other members of the putative *married* class. Instead the complaint alleges only that Roberts has violated the due process and equal protection rights of Plaintiffs Harris and Duff, an unmarried couple, and the putative *unmarried* class. *See* Compl. ¶ 89 (alleging that Roberts violates the due process rights "of Joanne Harris and Jessica Duff, and the unmarried members of the Plaintiff Class."); *id.* ¶ 98 (alleging that Roberts violates the right to equal protection "of Joanne Harris and Jessica Duff, and the unmarried members of the Plaintiff Class.").[4]

[4] Where the complaint does allege claims against a defendant on behalf of all Plaintiffs, the complaint so states. *See* Compl. ¶ 1 (defining "Plaintiffs" as all "members of the Plaintiff Class . . . collectively, with the Named Plaintiffs"); Compl. ¶ 87 (alleging that Governor McDonnell violates all Plaintiffs' right to due process); Compl. ¶ 88 (alleging that Rainey violates all Plaintiffs' right to due process); Compl. ¶ 96 (alleging that Defendant Governor McDonnell violates all "Plaintiffs' constitutional rights to equal treatment"); Compl. ¶ 97 (alleging that Defendant Rainey violates the rights of all "Plaintiffs to equal treatment").

## CONCLUSION

For all the reasons above, Roberts' motion to dismiss should be denied.

Dated: September 11, 2013

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.

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**CERTIFICATE OF SERVICE**

I, Rebecca K. Glenberg, hereby certify that Plaintiffs' Memorandum of Law in Opposition to Defendants Roberts' Motion to Dismiss was filed on September 11, 2013 with the Clerk of Court using the CM/ECF system, which will automatically send a copy to the following:

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