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

WHITEWOOD, *et al.*, Plaintiffs, v. CORBETT, *et al.*, Defendants.	**Civil Action** **No. 13-1861-JEJ**

PLAINTIFFS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OF DEFENDANTS THOMAS W. CORBETT AND MICHAEL WOLF

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INTRODUCTION

Plaintiffs – ten same-sex couples, one widow, and the two children of one of the plaintiff couples – filed this action to challenge Pennsylvania's exclusion of same-sex couples from marriage and its refusal to recognize in Pennsylvania the valid marriages entered into by same-sex couples in other states. The Complaint raises claims under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution against Defendant Thomas W. Corbett, in his official capacity as Governor of Pennsylvania; Michael Wolf, in his official capacity as Secretary of the Pennsylvania Department of Health; Kathleen Kane, in her official capacity as Attorney General of Pennsylvania; and two Registers of Wills who had denied Plaintiff couples marriage licenses.

Governor Corbett and Secretary Wolf together filed a Motion to Dismiss. They jointly argue that the United States Supreme Court's 1972 summary dismissal in *Baker v. Nelson* for lack of a "substantial federal question" controls this case 41 years later, requiring dismissal of this case in its entirety.[1] The

[1] Pursuant to the Court's October 18, 2013 order permitting incorporation of sections of Plaintiffs' opposition briefs into one another, the response to Defendants Corbett's and Wolf's *Baker v. Nelson* argument here applies equally to the similar argument made by Defendant Petrille in support of his own motion to dismiss. (Br. of Defs. Governor Thomas Corbett and Sec'y of Health Michael

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Governor separately argues that he must be dismissed on sovereign immunity grounds pursuant to the Eleventh Amendment to the United States Constitution.

Both of these arguments are without merit. *First*, *Baker v. Nelson* does not control this case. Major "doctrinal developments" since *Baker* render any applicability it may have had obsolete. Further, *Baker* did not involve the same questions of this case. *Second*, the Governor seeks to overextend the Eleventh Amendment to places it does not reach, and the Governor's Brief ignores both the Governor's legal powers and that his exercise of such powers is real and likely.

Therefore, the Motion to Dismiss by Governor Corbett and Secretary Wolf should be denied.

ARGUMENT

I. *BAKER V. NELSON* IS NOT CONTROLLING

The Supreme Court's 1972 summary dismissal of the appeal for want of a substantial federal question in *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed w/o op*., 409 U.S. 810 (1972), does not control here because of

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Wolf in Support of Mot. to Dismiss ("Corbett/Wolf Br."), at 19-24; Def. Petrille's Br. in Support of Mot. to Dismiss Pls.' Compl. ("Petrille Br."), at 11-16.)

significant doctrinal developments since *Baker* and because it did not involve the precise questions at issue in this case.

Defendants overstate the precedential value of a summary dismissal, which is not the same as that of an opinion of the Court addressing the issue. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Most critically, they ignore the Court's clear instruction in *Hicks v. Miranda*, 422 U.S. 332 (1975), that "if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*." *Id.* at 344 (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n. 3 (2d Cir. 1967)) (emphasis added). Lower courts, thus, must examine intervening doctrinal developments to determine whether the question presented in a summary dismissal remains unsubstantial. *See, e.g.*, *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 173-74 n.3 (3d Cir. 2002); *Lecates v. Justice of the Peace Court No. 4 of the State of Del.*, 637 F.2d 898, 904, 906 (3d Cir. 1980).

Both equal protection and substantive due process doctrine have undergone a sea change since 1972. In *Windsor*, the Second Circuit held that one of the reasons *Baker* did not control was that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012), *aff'd*, 133 S. Ct.

2675 (2013); *id.* at 179 ("These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case.").[2] As the Court explained:

> When Baker was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."

Id. (citations omitted).

Similarly, *Baker* could not and did not address how Plaintiffs' substantive due process claims should be evaluated in light of the Court's intervening decisions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor*, 133 S. Ct. 2675 (2013).

Baker did not and could not address how any of these doctrinal developments bear on Plaintiffs' equal protection or substantive due process claims. For this reason, a number of courts in addition to the Second Circuit have

[2] The other reason was that *Baker* involved a challenge to a state law and *Windsor* addressed the constitutionality of a federal law. Defendants erroneously suggest that this was the only basis for the court's conclusion that *Baker* did not control. (Corbett/Wolf Br., at 22 n.12; Petrille Br., at 15-16.)

held that *Baker* is not controlling precedent. *See Smelt v. County of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) ("Doctrinal developments show it is not reasonable to conclude the questions presented in the *Baker* jurisdictional statement would still be viewed by the Supreme Court as "'unsubstantial.'"), *vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (explaining that "*Baker* is not binding precedent" because of, among other things, "the possible impact of recent Supreme Court decisions, particularly as articulated in *Lawrence*"); *Garden State Equality v. Dow*, No. CIV.A. MER-L-1729-11, 2012 WL 540608, at *4 (N.J. Super. Ct. Feb. 21, 2012) ("The United States Supreme Court has decided several pertinent cases both contemporaneous with *Baker* and more recently which indicate that the issue of denying same-sex couples access to the institution of marriage would not be considered 'unsubstantial' today.").[3]

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[3] Defendants cite some out-of-circuit cases that held that *Baker* is controlling because it has not been explicitly overruled by the Supreme Court. That is not the standard established in *Hicks*. And in the Third Circuit, the law is clear that doctrinal developments that may remove the precedential value of a summary disposition are not limited to decisions from the Supreme Court explicitly overruling the summary disposition. *Tenafly Eruv Assoc., Inc.*, 309 F.3d at 173-74 n. 33; *Lecates*, 637 F.2d at 906.

Contrary to Defendants' suggestion, the Ninth Circuit never suggested in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), that *Baker* is controlling. Rather, it held that it did not need to reach the question of whether *Baker* applied because

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Baker also is not controlling here because it involved different issues than those presented in this case. Summary dispositions "prevent lower courts from coming to opposite conclusions on the *precise issues presented and necessarily decided* by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added); *see also Lecates*, 637 F.3d at 904. *Baker* addressed the constitutionality of a Minnesota marriage law passed at a time before there was any public discussion about marriage for same-sex couples. It did not consider the constitutionality of a law that specifically was enacted by a state in order to preclude marriage for same-sex couples[4] and whether such an enactment had the "purpose and effect to disparage and to injure" same-sex couples. *Windsor*, 133 S. Ct. at 2696. Nor did *Baker* consider the constitutionality of a law barring recognition of valid marriages of same-sex couples entered into in other jurisdictions.

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the constitutional amendment in California changed the California constitution to withdraw a right to marry that had already been granted. *See Perry*, 671 F.3d at 1082 n.14 ("Whether or not the constitutionality of any ban on same-sex marriage was 'presented and necessarily decided' in *Baker*, and whether or not *Baker* would govern that question in light of subsequent 'doctrinal developments,' we address no such question here.").

[4] (*See* Petrille Br., at 10 (noting that Pennsylvania's 1996 marriage amendment was a response to the issue of same-sex marriage being raised in Hawaii).)

For above reasons, *Baker* does not control. However, it also must be noted that the Governor's Brief arguing there is no "substantial federal question" presented in this action was filed just one business day after the Governor, while publicly discussing the debate over marriage for same-sex couples, acknowledged that "the constitutional question is now before a federal court," and stated that this is the "venue in which same-sex couples wishing to legally marry" may be heard regarding this "important issue." John L. Micek, *Corbett Apologizes For Remarks About Same-Sex Couples*, PennLive, Oct. 4, 2013, attached hereto as Exhibit A.

Just as the Governor himself essentially acknowledged one day before the filing of his Brief, Plaintiffs' Complaint does indeed present a substantial federal question. The Governor's and Secretary Wolf's Motion should be denied.

II. GOVERNOR CORBETT IS NOT IMMUNE FROM SUIT UNDER THE ELEVENTH AMENDMENT

The Eleventh Amendment does not immunize the Governor from this action. In claiming sovereign immunity, the Governor's Brief seeks to overextend the Eleventh Amendment. It ignores the Governor's legal powers both in his own capacity and as the chief policy maker of the executive branch of Pennsylvania. It ignores the fact that his exercise of those powers is real and likely. Quite tellingly, nowhere does the Governor's Brief assert that the Governor legally lacks the authority to enforce 23 Pa. C.S. §§ 1102 and 1704, and nowhere does his Brief

assert that he has not and will not enforce and direct his subordinates to enforce those statutes against same-sex couples.

Further, the Governor has made clear that he strongly supports the marriage bans, believes they are constitutional, and will not hesitate to enforce and direct his subordinates to enforce them. Since the filing of this action, the *Governor's* Office of General Counsel sought and obtained a court order enjoining the Montgomery County Register of Wills from continuing to issue marriage licenses to same-sex couples, and the Governor's Executive Deputy General Counsel successfully argued the matter before the Commonwealth Court.[5]

For the reasons set out below, the Governor is a proper defendant over whom this Court has subject matter jurisdiction.[6]

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[5] The Court may take judicial notice of this and other state-court lawsuits. *E.g.*, *In re Congoleum Corp.*, 426 F.3d 675, 679 n.2 (3d Cir. 2005). *See also infra* note 8 (regarding the Court's ability to look beyond the pleadings in connection with the Governor's Rule 12(b)(1) motion).

[6] The issue raised by Part V.I of the Governor's Brief, focusing on the Governor's power to enforce and enforcement of the challenged statutes, is more properly understood as a question of whether Article III's case-or-controversy requirement is met. To match the Governor's presentation to the Court, however, Plaintiffs frame their analysis in the context of the *Young* doctrine and show that the Eleventh Amendment does not immunize the Governor. Functionally, the two analyses are essentially the same because each focuses on the Governor's connection to the challenged statutes and his enforcement of the challenged statutes. Thus, for the same reasons that the Governor may not avail himself of sovereign immunity under the Eleventh Amendment, a case or controversy exists between Plaintiffs and him. Dismissing the Governor would, additionally, be

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A. The Governor Squarely Fits The *Young* Exception To Eleventh Amendment Immunity

The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), "rests on the premise – less delicately called a 'fiction,' – that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purpose." *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (citations omitted).

As the Third Circuit explained in *Koslow v. Pennsylvania*, *Young* is rooted in the necessity of vindicating federal rights.

> 'Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.' *Green v. Mansour*, 474 U.S. 64, 68 (1985).
>
> . . . The Eleventh Amendment has not been interpreted to bar a plaintiff's ability to seek prospective relief against state officials for violations of federal law. Official-capacity suits are an alternative way to plead actions against entities for which an officer is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985):

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contrary to numerous cases challenging state laws and constitutional amendments brought against governors in their official capacities, including those described in Part II.C, *infra*.

> Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State.

302 F.3d 161, 178 (3d Cir. 2002) (citations omitted).

On the "straightforward inquiry" mandated by Supreme Court precedent, this case squarely fits the *Young* exception. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.") (internal quotations and alterations omitted).

First, Plaintiffs seek only prospective injunctive and declaratory relief against the Governor. The relief sought by Plaintiffs would not "expend itself on the public treasury or domain, or interfere with public administration." *Va. Office for Prot. & Advocacy*, 131 S. Ct. at 1638.

Second, in contrast to the cases cited in the Governor's Brief, the Governor is far from a passive bystander to the enforcement of the statutes at issue. Here, the Governor (i) has the power to enforce 23 Pa. C.S. §§ 1102 and 1704, (ii) has the power to direct his subordinates to enforce the statutes, and (iii) has already

exercised this power, and is likely to continue to do so. Indeed, Third Circuit cases that the Governor's Brief relies upon acknowledge that "*Young* allows a party to be joined to a lawsuit based solely on his or her general obligation to uphold the law" where there is a "real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests." *1st Westco Corp. v. School District of Philadelphia*, 6 F.3d 108, 114 (3d Cir. 1993) (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988)).[7]

That the Governor has the power to enforce and direct the enforcement of 23 Pa. C.S. §§ 1102 and 1704's prohibitions on marriage for same-sex couples should be beyond dispute, and we do not understand the Governor's Brief to be contesting this fact. *See* Pa. Const. art. IV, § 2 ("The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed . . . ."); 71 P.S. § 241 ("The Governor shall have the power and it shall be his duty: (a) To take care that the laws of the Commonwealth shall be faithfully executed."). And, as this Court noted in *Matthew v. Elias*, state executive agencies are "[u]nder the Governor's jurisdiction." 2006 WL 3143914, at *3.

[7] In neither *1st Westco* nor *Rode* did the Third Circuit require a "special relationship" to the statute at issue. The "special relationship" test suggested by the Governor (Corbett/Wolf Br., at 7, 8) is not the law of this circuit.

This leaves only the question of whether there is a real, likely or realistic potential of enforcement. The Governor has not been silent, absent or unclear about the marriage laws. The Governor has been – and continues to this day to be – quite emphatic that he believes that 23 Pa. C.S. §§ 1102 and 1704 to be constitutional and that he and his administration acting pursuant to his policies will enforce the law until required by this Court to do otherwise. It is impossible to maintain with any plausibility that the Governor does not and will not use and continue to direct his subordinates to use state authority to enforce the marriage bans.[8] One need only look to the Governor's and his Office's conduct subsequent

[8] In evaluating a Rule 12(b)(1) motion attacking the court's jurisdiction, "the court need not confine its evaluation to the face of the pleadings, but may review or accept any evidence . . . ." Moore's § 12.30[2]; *see also Vodenichar v. Halcon Energy Properties, Inc.*, No. 13-2812, --- F.3d ----, 2013 WL 4268840 at *9, n.1 (3d Cir. Aug. 16, 2013) ("Courts may consider pleadings as well as evidence that the parties submit to determine whether subject matter jurisdiction exists or an exception thereto applies."). Although the Governor's Brief appears to be styled as a facial attack on the Court's jurisdiction, the Governor seeks dismissal with prejudice (*see* Proposed Order, Doc. No. 27) and argues that Plaintiffs "would have no viable claim to make against the Governor under any set of plausible facts" (Corbett/Wolf Br., at 16 n.7). Thus, the Governor's Brief actually raises a factual challenge to his amenability to suit in this Court. *See* Moore's § 12.30[4] (describing facial and factual challenges to jurisdiction). The Court may therefore examine evidence outside of the Complaint to resolve the jurisdictional question – in this case, the applicability of the *Young* doctrine. *See also Sitkoff v. BMW of N. Am., Inc.*, 846 F. Supp. 380, 383, 386 (E.D. Pa. 1994) (reviewing evidence outside of the complaint on 12(b)(1) motion to dismiss on Eleventh Amendment grounds, and then granting plaintiff leave to amend complaint consistent with its arguments).

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to the commencement of this action regarding *Secretary of Health v. Hanes,* No. 379 M.D. 2013 (Pa. Commw. Ct.):

- The Secretary of Health, who serves at the pleasure of the Governor, 71 P.S. § 1401, sued the Register of Wills of Montgomery County to compel his office to stop issuing marriage licenses to same-sex couples. *Id.*

- The Governor's "Executive Deputy General Counsel," who serves under the direction of the Governor, *see id.* § 732-301, on letterhead from the "Governor's Office of General Counsel," sought confirmation from Attorney General Kane that his office had authority "broad enough to encompass litigation necessary to enforce the Marriage Law." *See* Letter from the Office of the General Counsel to the Office of the Attorney General, at 1-2 (Aug. 30, 2013), attached hereto as Exhibit B.

- The Secretary of Health was not just represented by his staff lawyers – who themselves even serve under the direction of the Governor, *see id.* § 732-301(1)-(2) – but, rather, by very high-ranking counsel in the Governor's Office of General Counsel. *See* 71 P.S. § 732-301. Indeed, it was the Executive Deputy General Counsel who argued the matter before the Commonwealth Court.

- When a brief filed in that suit analogized marriages of same-sex couples to marriages by 12-year-old children, the Governor took ownership of the error and apologized – not the Secretary of Health.

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Verizon Maryland, Inc., 535 U.S. 635, cited by the Governor (Corbett/Wolf Br., at 17), is not to the contrary. There, quoting *Coeur D'Alene Tribe*, 521 U.S. at 296, the Court focused on the "straightforward inquiry" into whether the complaint sought prospective relief from a government official sued in his official capacity – not on the form of evidence of the official's "connection" to the challenged law. *See Verizon*, 535 U.S. at 645 ("The prayer for injunctive relief – that state officials be restrained from enforcing an order in contravention of controlling federal law – clearly satisfies our 'straightforward inquiry.'").

See Angela Couloumbis, *Corbett: Lawyers Used "Inappropriate Analogy" On Gay Marriage*, Philadelphia Inquirer (Aug. 30, 2013), attached hereto as Exhibit C.[9]

Beyond the actions taken by the Governor to enforce the marriage bans through the suit against the Montgomery County Register of Wills, other past and present conduct by him further indicates that he is likely to continue to enforce 23 Pa. C.S. §§ 1102 and 1704.

- As Attorney General, the Governor invoked similar powers to voluntarily intervene in *Kern v. Taney*, No. 09-10738 (C.P. Berks County), to stop a same-sex couple from even divorcing in this state. *See* Notice of Intervention and Transcript, Memorandum of Law, and Transcript Proceedings, attached hereto as Exhibit D.

- During his 2010 gubernatorial campaign, the Governor stated, in support of an amendment to the Pennsylvania Constitution to define marriage as the union between one man and one woman, that: "Constitutional amendment would help safeguard marriage against an alternative agenda." *See Pennsylvania. Primary Election*, 25 Viewpoint Newsletter of the Pa. Catholic Conference 1, at 5 (May 18, 2010), attached hereto as Exhibit E.

- One day after the Supreme Court decided *Windsor*, the Governor's Office reiterated his support for Pennsylvania's definition of marriage excluding same-sex couples and its refusal to recognize the marriages of same-sex couples entered into outside of Pennsylvania. *See* Gary Joseph Wilson, *Marriage Equality Is "Still a Heavy Lift" in*

[9] These matters of public record sufficiently show the Governor's actual exercise and likely continued exercise of his powers of enforcement. But, Plaintiffs also note that they served discovery on Defendants seeking communications with the Office of the Governor regarding the enforcement of 23 Pa. C.S. §§ 1102 and 1704, including any communications regarding the *Hanes* action.

Pennsylvania, PA Independent (June 27, 2013), attached hereto as Exhibit F.

- In connection with this suit, where the Governor and the Secretary of Health were the only named state defendants, the Governor's Office of General Counsel wrote to the Attorney General that "OGC and its public official clients" – *i.e.*, the Governor and Secretary of Health – "have decided to defend the constitutionality of the Marriage Law." Letter from James D. Schultz, General Counsel, to Adrian R. King, Jr., First Deputy Attorney General, at 4 (July 30, 2013), attached hereto hereto as Exhibit G.

The Governor has the power to enforce 23 Pa. C.S. §§ 1102 and 1704. He has stated his support for and defense of the marriage bans. His counsel has already taken action to enforce the bans. He therefore is a proper party to this suit.

B. *1st Westco* Supports The Governor Being A Defendant In This Action

The Governor's Brief relies upon *1st Westco Corp.*, 6 F.3d 108, as the main authority for why the Governor supposedly should be dismissed from this action on sovereign immunity grounds. Far from letting the Governor walk away from this action, *1st Westco* highlights why the Governor is a proper party here.

1st Westco concerned a Pennsylvania regulation authorizing the Philadelphia School District to refuse to pay for labor if a construction contractor allowed citizens of a state other than Pennsylvania to work on the school construction project. *Id.* at 112.[10] A New Jersey contractor and its New Jersey resident

[10] The statute, 24 P.S. § 7-754 (Purdon's 1992), provided:

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employees sued the Philadelphia School District and the Commonwealth of Pennsylvania, alleging the statute's unconstitutionality, and the School District filed a third-party complaint against Pennsylvania's Secretary of Education and Attorney General. *Id.* at 111.

The Third Circuit found that the Secretary of Education and the Attorney General were not proper parties because of a lack of a case or controversy between the plaintiffs and these Commonwealth officials; neither official actually "was authorized to enforce, or had threatened to enforce," the statute at issue. *Id.* at 111. Per the statute at issue, it was the Philadelphia School District that had the final decision-making authority to "ultimately pay[], or refuse[] to pay, the contractor,"

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> The specifications upon which contracts are entered into by any school district for the construction, alteration, or repair of any public works, shall contain the provision that laborers and mechanics employed on such public works shall have been residents of the Commonwealth for at least ninety days prior to their employment. Failure to keep and comply with such provision shall be sufficient legal reason to refuse payment of the contract price to the contractor.

1st Westco, 6 F.3d at 111. Further, the Secretary of Education's authority to review and approve specifications for construction was limited to second, third, and fourth class school districts – it was not applicable to the Philadelphia School District. *Id.* at 112, 113. While the Attorney General issued an opinion to the Secretary regarding the constitutionality of the statute, that opinion could not compel the school district one way or the other. *Id.*

id., and there was "no evidence in the record" to demonstrate that the Secretary or Attorney General had any reason or desire to enforce the statute, *id.* at 114-15.[11]

1st Westco did not set forth any remarkable proposition, and the Third Circuit made clear that it was not limiting *Young* in any way. While acknowledging that a state official who has *no* enforcement power could not be a proper defendant under *Young*, it stated in no uncertain terms that "*Young* allows a party to be joined to a lawsuit based solely on his or her general obligation to

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[11] Rather than arguing that the Governor has *no* enforcement powers and would not use any enforcement powers that he does have – as the Secretary and Attorney General argued and showed in *1st Westco* – the Governor's Brief appears to argue that there are numerous other state officials, serving at his pleasure, that he would prefer to answer for 23 Pa. C.S. §§ 1102 and 1704. (Corbett/Wolf Br., at 11-16 (identifying the Department of Revenue, Department of Health, Department of Labor and Industry and its Workers' Compensation Appeals Board, the Adjutant General and Department of Military and Veterans' Affairs, Department of General Services, and the Department of Transportation). The Governor's preference is not the law.

The requirement of *Young* is that the named defendants have "some connection"; it is not that they be the only defendants who have a connection to enforcement. *Young*, 209 U.S. at 157; *see also Finberg v. Sullivan*, 634 F.2d 50, 53 (3d Cir. 1980) ("Arguably, other state officials would have defended the constitutionality of the postjudgment garnishment procedures more vigorously. Our function, of course, is not to determine the most suitable defendants but to decide whether the complaint has named defendants who meet the prerequisites to adjudication in a federal court."). Thus, rather than supporting the Governor's Motion, this argument bolsters Plaintiffs' position that the Governor, who has the *authority* to enforce the many laws affected by 23 Pa. C.S. §§ 1102 and 1704 and who directs their enforcement through Cabinet members and other state officials appointed by him, *see* 71 P.S. § 67.1(d), should not be dismissed on Eleventh Amendment grounds.

uphold the law." *Id.* at 114. And, as set forth above, the Governor does have the "general obligation to uphold the law," does have enforcement powers regarding Pennsylvania's marriage laws, and has invoked and continues to invoke those enforcement powers.[12]

Similarly, just as the Third Circuit was clear in *1st Westco* that the case did not limit *Young*, in the decade and a half since that decision, the Supreme Court has emphasized and reemphasized that the function of enforcing the supremacy of federal constitutional rights dictates a "straightforward inquiry" as the touchstone of *Young*: relief that seeks to prevent or bring constitutional violations to a halt fall within the fiction of *Young*. *Va. Office for Prot. & Advocacy t*, 131 S. Ct. at 1639; *Verizon Md., Inc.*, 535 U.S. at 645.

[12] This Court's analysis in *Matthews v. Elias* (*see* Corbett/Wolf Br. at 7), does not hold otherwise either. In connection with the request in that case for declaratory and injunctive relief against the Attorney General, the court dismissed the Attorney General because the "Attorney General does not oversee the administration of the subject [statute]," which was enforced by the Pennsylvania State Police, an entity under the jurisdiction of the governor rather than the attorney general. *Matthews v. Elias*, No. 06-1769, 2006 WL 3143914, at *2-3 (M.D. Pa. Oct. 31, 2006) (Jones, J.). Here, the Governor oversees the administration and enforcement of the challenged statutes as chief executive officer of the Commonwealth, with many relevant agencies and departments under his jurisdiction.

C. Other Courts Have Permitted Suits Against Similarly Situated Governors And The Authorities Cited By The Governor's Brief Are Inapposite

The Governor's Brief misstates the law, asserting that "[g]eneral authority to enforce the laws of the state . . . has never been deemed sufficient to allow suit to be brought against the government official in federal court." (Corbett/Wolf Br., at 8.) To the contrary, numerous federal courts – in the Third Circuit and beyond – have specifically found the general authority of a governor or other state official to enforce the state's laws to be sufficient.

As explained in detail above, *1st Westco* reinforced that the general authority of a state official to enforce the law is sufficient when combined with the fact that the state official is likely to use that authority. *1st Westco*, 6 F.3d at 114. The *1st Westco* court drew authority for this proposition from *Rode*, 845 F.2d at 1208, which in turn relied on *Allied Artists Picture Corp. v. Rhodes*, 473 F. Supp. 560, 568 (S.D. Ohio 1979). In *Allied Artists*, the district court denied the Ohio governor's motion to dismiss, finding the governor's general power to enforce the law to be sufficient in the factual context of that case. *Id.* at 568-69, *aff'd*, 679 F.2d at 665 n.5 ("Even in the absence of specific state enforcement provisions, the substantial public interest in enforcing the trade practices legislation involved here places a significant obligation upon the [g]overnor to use his general authority to see that state laws are enforced. We thus find that the [g]overnor has sufficient

connection with the enforcement of the Act . . . .").[13] Nor is there anything out of the ordinary in joining governors as defendants in attacking the constitutionality of the state statutes their administrations enforce. *See, e.g.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *see also Romer v. Evans*, 517 U.S. 620 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

The Governor is an especially appropriate defendant in a case like this one where, as Defendants have acknowledged, in many contexts the challenged statutes are self-enforcing. (Corbett/Wolf Br., at 8 n.4, 11-16.) This was the case in *Finstuen v. Edmonson*, No. 04-1152, slip op. at 1 (W.D. Okla. Dec. 7, 2004), attached hereto as Exhibit C. There, the district court specifically rejected an attempt by the Oklahoma governor and attorney general to rely on *1st Westco* and claim Eleventh Amendment immunity from a suit challenging constitutionality of Oklahoma's amendment to its Adoption Code preventing the state from

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[13] The *Allied Artists* court also addressed whether Article III's case-or-controversy requirement was satisfied, holding that it was because:

> [T]he Act is drafted to be self-enforcing; thus the alleged impact upon plaintiffs is immediate and occurs without the active participation of or enforcement by state officers. In such a context a concrete case or controversy may exist, even absent overt adverse action by named defendants.

473 F. Supp. at 570.

recognizing "an adoption by more than one individual of the same sex from any other state or foreign jurisdiction." The court reasoned that the governor and the attorney general were proper defendants because (1) "the modified statute does not provide any means for enforcement, but is directed to the state itself," so the enforcement fell "squarely on the shoulders of these defendants," and (2) as to the governor, he had "both the authority and the duty to enforce the statute." *Id.*[14]

Similarly, in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006), the Eighth Circuit Court of Appeals noted that the challenged constitutional provision, which denied recognition of marriages between same-sex couples, "does not require affirmative enforcement by any state official; it

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[14] As *Finstuen* correctly reasoned regarding *1st Westco* and similar cases:

> Although the dicta in these other courts of appeals' cases suggest an expansive reading of Ex Parte Young, the actual holdings are fairly narrow and appear inapposite to this case. To the extent these cases purport to expand the holding of *Ex Parte Young*, the Court finds that they are unpersuasive. The holdings merely reinforce the rather unremarkable rule that you may not name the attorney general or governor as a party to challenge a statute enforced exclusively by either (1) other state officials, or (2) private parties through a private cause of action – or, put another way, when the state officials do not have any enforcement connection to the statute.

Slip op. at 5, *reaffirmed at* 497 F. Supp. 2d 1295, 1303 (W.D. Okla. 2006) ("The Court's December 7, 2004, Order determined that Defendants are the persons charged with enforcement of the Amendment, thus satisfying the second element" of the Article III standing inquiry.), *rev'd in part on other grounds sub nom. Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

functions as a barrier to government action that Appellees desire." The court then found no Eleventh Amendment bar to suing the governor and attorney general – as those parties had conceded. *Id.*

The cases dismissing governors that the Governor principally relies upon are inapposite to this action. In *Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009), the Tenth Circuit reasoned that the governor and attorney general were not proper defendants because, *inter alia*, under Oklahoma law, "recognition of marriages is within the administration of the judiciary, the executive branch of Oklahoma's government has no authority to issue a marriage license or record a marriage." *Id.* at 365. Here, Plaintiffs seek relief from executive branch officials who oversee the implementation and enforcement of 23 Pa. C.S. §§ 1102 and 1704 in Pennsylvania, making them – including the Governor – proper defendants.

In another case relied on by the Governor's Brief, *Lewis v. Rendell*, 501 F. Supp. 2d 671, 682 (E.D. Pa. 2007), the court found no case or controversy between the plaintiff and the governor and various other executive officials because the statute at issue – relating to Medicaid and Pennsylvania's Medical Assistance Program – was entirely administered and enforced by the Department of Public Welfare. Here, however, as outlined in the Governor's own Brief, there is no single government official who administers and enforces every aspect of 23 Pa. C.S. §§ 1102 and 1704 against Plaintiffs, including some aspects of the statute that

are wholly self-enforcing. (*See* Corbett/Wolf Br., at 8 n.4, 11-16.) Further, unlike in *Lewis*, the Governor is likely to enforce and direct the enforcement of the marriage bans, and he already has done so..

As these cases show, *Young* has been interpreted in analogous contexts to allow suits against governors to proceed when, as in this case, the governor has enforcement authority and there is no other state official with authority to enforce the entire breadth of the statutes at issue.

For all of the foregoing reasons, the Governor is a proper defendant and he should remain in this action.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss filed by Defendants Corbett and Wolf should be denied in its entirety. Alternatively, Plaintiffs should be granted leave to amend their Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2013, I caused the foregoing Plaintiffs' Brief in Opposition to the Motion to Dismiss of Defendants Thomas W. Corbett and Michael Wolf 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.

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