UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

JOANNE HARRIS, et al,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil Action No.: 5:13-cv-77
	)	
ROBERT F. McDONNELL, et al,	)	
	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF DEFENDANT ROBERTS' MOTION TO DISMISS

Defendant Thomas E. Roberts, by counsel, files this memorandum in support of his motion to dismiss filed pursuant to Fed. R.Civ.P. Rules 12(b)(1) and 12(b)(6) and states as follows:

Plaintiffs Harris, Duff, Berghoff and Kidd filed a 42 U.S.C. §1983 action challenging the provisions of Va. Const. Art. 15-A, and Va. Code Ann. §§20-45.2-3 which prohibits recognition of same sex marriages in Virginia. Plaintiffs seek injunctive and declaratory relief from Robert F. McDonnell, Governor of Virginia, Janet Rainey, Virginia's State Registrar of Vital Records, and this Defendant, Thomas E. Roberts, the Clerk of Court for the Circuit Court of the City of Staunton. All claims are asserted against the Defendants in their official capacities only.

This motion to dismiss challenges the subject matter jurisdiction allegations in the Complaint asserted by Plaintiffs Berghoff and Kidd and it challenges the factual predicate to subject matter jurisdiction asserted by Plaintiffs Harris and Duff. All claims should be dismissed

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pursuant to Rule 12(b)(1). Additionally and alternatively, the claims of Plaintiffs Berghoff and Kidd against Roberts fail to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6).

ALLEGATIONS TO BE CONSIDERED ON THE MOTION TO DISMISS CLAIMS OF PLAINTIFFS BERGHOFF AND KIDD

The claims of Plaintiffs Berghoff and Kidd are distinguishable from the claims of Plaintiffs Harris and Duff. Plaintiffs Harris and Duff allege that they are both female and that their application for a marriage license was denied by Roberts, the Clerk of Court, who issues marriage licenses. (Complaint 45). On the other hand, Plaintiffs Berghoff and Kidd allege that they were lawfully married in the District of Columbia but that Virginia does not recognize their marriage because they are both female. (Complaint 46). Plaintiffs Berghoff and Kidd do not reside in the City of Staunton wherein Roberts is the Clerk of Court; rather they reside in the City of Winchester. (Complaint 18). Plaintiffs Berghoff and Kidd do NOT allege any acts or omission by Roberts which deprived them of their constitutional rights. Plaintiffs Berghoff and Kidd do NOT allege that they have suffered any deprivation of rights or actual or imminent injury as a result of any acts or omission of Roberts. It is for these reasons, Plaintiffs Berghoff and Kidd lack standing to bring their claims against Roberts and likewise have failed to state a claim against Roberts upon which relief can be granted.

ALLEGATIONS AND FACTS TO BE CONSIDERED ON THE MOTION TO DISMISS THE CLAIMS OF PLAINTIFFS HARRIS AND DUFF

Plaintiffs Harris and Duff allege that on July 29, 2013, Roberts refused their marriage license application because they are a same-sex couple. (Complaint 45). As a result of Roberts'

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"refusal" of their marriage license application, Plaintiffs Harris and Duff allege that they were denied their due process rights and equal protection.

In support of his motion to dismiss, Roberts submits the Affidavit of Laura Moran, a deputy clerk employed by Roberts, which is attached hereto and incorporated herein as **Exhibit A**. On or about July 29, 2013, two women, who Moran believes to be Joanne Harris and Jessica Duff, came into the Clerk's office. (Moran Aff. 2). Moran asked them if she could be of assistance. (Moran Aff. 2). One of the women stated to Moran words to the effect: "I think I already know the answer to this, but can same sex couples get married?" (Moran Aff. 3). Moran responded that she needed to check with Mr. Roberts. (Moran Aff. 3). She proceeded to Roberts' office and advised him of the question. (Moran Aff. 3). 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. (Moran Aff. 3). The women said "thank you," and walked out. (Moran Aff. 3).

Neither Joanne Harris nor Jessica Duff requested a marriage license. (Moran Aff. 4). Neither requested an application for a marriage license. (Moran Aff. 5). Neither submitted an application for a marriage license. (Moran Aff. 6). Neither asked about the tax for a marriage license. (Moran Aff. 7). Neither tendered the tax for a marriage license. (Moran Aff. 8).

Neither Joanne Harris nor Jessica Duff stated under oath, or by affidavit or affidavits filed before a person qualified to take acknowledgments or administer oaths, that they were more than 18 years of age. (Moran Aff. 9). Neither stated under oath, or by affidavit or affidavits filed before a person qualified to take acknowledgments or administer oaths, that they were legally

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competent. (Moran Aff. 10). Neither stated under oath, or by affidavit or affidavits filed before a person qualified to take acknowledgments or administer oaths, that they were not related to each other to a prohibited degree. (Moran Aff. 11). Neither provided proof of identification. (Moran Aff. 12).

No application for a marriage license submitted by Plaintiffs Harris and Duff was denied, as no application was submitted. (Moran Aff. 13). No request for access to an application for a marriage license was denied, as no request for an application was made. (Moran Aff. 14). No action was taken, adverse or otherwise, by Moran or Roberts, against Plaintiffs Harris or Duff. (Moran Aff. 15).

ARGUMENT

I. All claims against Roberts should be dismissed for lack of subject matter jurisdiction pursuant to 12(b)(1).

A. Standard of Review.

When a defendant makes a facial challenge to subject matter jurisdiction based upon the allegations in the complaint, the Rule 12(b)(6) standard applies: the facts alleged in the complaint are taken as true. Kerns v. United States, 585 F.3d 187,192 (4th Cir. 2009). However, if a defendant challenges the factual predicate of subject matter jurisdiction, the trial court may consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment. Adams v. Bain, 697 F.2d 1213 , 1219 (4th Cir. 1982). The burden of proving subject matter jurisdiction in this circumstance is on the plaintiff, the party asserting jurisdiction. Id. The presumption of truthfulness normally accorded a complaint's allegations

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does not apply, and the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction. Kerns, 585 F.3d at 192.

In this case, Roberts asserts a *facial challenge* to subject matter jurisdiction as to the claims asserted by Plaintiffs Berghoff and Kidd. Roberts challenges the *factual predicate* to subject matter jurisdiction asserted by Plaintiffs Harris and Duff. None of the Plaintiffs have standing to assert their claims against Roberts.

B. Standing and ripeness requirements.

The issue of standing is one of jurisdiction. The party invoking federal jurisdiction bears the burden of establishing the elements of jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992). Article III standing enures that a suit presents an actual case or controversy. For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013). That party must also have standing, which requires, among other things, that it have suffered a concrete and particularized injury. Id. To establish standing, the party must prove that he has suffered an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752, 177 L. Ed. 2d 461, 471 (2010); Lujan, 504 U. S. at 560-561. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is *certainly* impending." Lujan, 504 U.S. at 565, n. 2 (internal quotation marks omitted). Thus, Article III standing requires that the

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"threatened injury must be *certainly impending* to constitute injury in fact," and that "[a]llegations of *possible* future injury" are not sufficient. Whitmore v. Arkansas, 495 U.S.149, 158, 110 S.Ct. 1717, 109 L. Ed. 2d 135 (1990) (emphasis added; internal quotation marks omitted); see also, Lujan, 504 U.S. at 565, n. 2, 567, n. 3. Article III standing requires more than a desire to vindicate value interests. Diamond v. Charles, 476 U.S. 54, 66, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986). The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. Id. 476 U.S. at 62.

In addition to the Article III constitutional components, the standing doctrine also has prudential components. Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). These include "judicially self-imposed limits" on the exercise of federal jurisdiction such as: 1) the general prohibition on a litigant's raising another person's legal rights; 2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; and 3) the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. Id. These judicial limits are founded upon concerns about the properly limited role of courts in a democratic society. Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Additionally, principles of federalism and comity dictate special caution in evaluating the standing requirements where a party challenges a state's action. See Doe v. Virginia Department of State Police, 713 F.3d 745, 753 (4th Cir. 2013).

Standing and ripeness doctrines are closely related, as they are both "simply subsets of Article III's command that the courts resolve disputes, rather than emit random advice." Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991). In some cases, a determination that a case is unripe

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may also be viewed as failing the standing test requirement that the injury be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560. Though the justiciability concepts of "standing" and "ripeness" are theoretically distinct, the Fourth Circuit notes that: "little is gained from an attempt to identify the particular doctrine at work in an individual case. Plaintiff's personal stake in the outcome (standing) is directly limited by the maturity of the harm (ripeness). In any event, both doctrines require that those seeking a court's intervention face some actual or threatened injury to establish a case or controversy." Doe v. Duling, 782 F.2d 1202, 1206 n.2 (4th Cir. 1986). The ripeness doctrine preserves the case or controversy requirement by "preventing judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" Miller v. Brown, 462 F.3d 312, 318-19 (4th Cir. 2006).

A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact remains wholly speculative. Doe v. VDSP, 713 F.3d at 758 (citations omitted). A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties. Id. However, the fitness for judicial decision is balanced against any hardship caused to a plaintiff who would be compelled to act under threat of criminal enforcement of the challenged law. Id., 713 F.3d at 759.

The requirements of fitness and hardship contemplate that "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998). In the context of an administrative case, there must be an administrative decision that

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has been formalized and its effects felt in a concrete way by the challenging parties. Charter Fed Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208-09 (4th Cir. 1992)(dismissing for unripeness a claim against the FDIC who had taken no action or threatened action against the plaintiff and several statutory contingencies remained before the FDIC could take any action against the plaintiff).

C. Plaintiffs Berghoff and Kidd lack standing to bring their claim against Roberts. *(Facial challenge)*

Plaintiffs Berghoff and Kidd allege that they were lawfully married in the District of Columbia but that Virginia does not recognize their marriage because they are both female. (Complaint 46). Plaintiffs Berghoff and Kidd do NOT allege any acts or omission by Roberts, which deprived them of their constitutional rights. Plaintiffs Berghoff and Kidd do not allege any interaction between them and Roberts. They do not allege that they sought and were denied a marriage license or that they intend to seek a marriage license from Roberts. They do not allege that any such injury caused by Roberts would be redressable by a favorable ruling from this Court. Indeed, Plaintiffs Berghoff and Kidd allege that they were already married in the District of Columbia, and they do not even reside in the City of Staunton where Roberts is the Clerk of Court. (See Complaint 18). There is no remedy either sought or available against Roberts that would redress any perceived wrong to Plaintiffs Berghoff and Kidd.

Rather, Plaintiffs Berghoff and Kidd seek to assert against Roberts their generalized grievance about the respect and benefits allegedly denied them under Virginia law, none of which is related to or caused by any act or omission by Roberts. Absent allegations establishing an

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injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling, Plaintiffs Berghoff and Kidd do not have standing to bring their claims against Roberts. See Parker v. Euille, 2013 U.S.Dist. LEXIS 14128 *5, 1:12-cv-1152 (E.D. Va. 2013)(dismissing complaint for lack of standing that does not specify a single act against any of the defendants that has caused plaintiff a particular injury and no facts were pled to show actual or imminent injury is linked to the defendants).

For these reasons, Plaintiffs Berghoff and Kidd have failed to allege sufficient facts that if taken as true would establish that they have standing to assert their constitutional claims against Roberts, and their claims should be dismissed pursuant to Rule 12(b)(1) for lack of jurisdiction.

D. Plaintiffs Harris and Duff fail to meet the standing and ripeness requirements as to their claims against Roberts. (*Factual challenge*)

Roberts moves to dismiss the claims of Plaintiffs Harris and Duff as they 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. Alternatively, Roberts moves to dismiss the claims of Plaintiffs Harris and Duff as their claims are not ripe.

In order to obtain a marriage license in Virginia, several statutory predicates and conditions must be met. A marriage license tax must be paid to the Clerk of Court. Va. Code Ann. §20-15. The parties seeking a marriage license must state, under oath, the information necessary to complete the marriage record. Va. Code Ann. §20-16. The Clerk of Court must gather the information, including age, race, social security numbers, and facts of marriage. Va. Code §32.1-267.

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In this case, at most, Plaintiffs Harris and Duff had what amounts to an informal legal discussion about the state of the law with Roberts. Contrary to the allegations in the Complaint, neither Plaintiff Harris nor Duff requested a marriage license. Neither requested an application for a marriage license. Neither submitted an application for a marriage license. Neither asked about the tax for a marriage license. Neither tendered the tax for a marriage license. Consequently, no application for a marriage license submitted by Plaintiffs Harris or Duff was denied, as no application was submitted. No request for access to an application for a marriage license was denied, as no request for an application was made. Because no application was either requested or submitted, no action was taken, adverse or otherwise, by Moran or Roberts, against Plaintiffs Harris or Duff.

Under these facts, Plaintiffs Harris and Duff have not suffered a concrete, particularized, and actual or imminent injury that is fairly traceable to the acts or omissions of Roberts. In the case of Doe v. VDSP, supra, the Fourth Circuit dismissed claims on standing and ripeness grounds asserted by a plaintiff (who was classified in Virginia as a sexually violent offender) who asserted constitutional challenges to Virginia's law that prohibited her from entering the premises of her children's school where she failed first to make application to a Virginia Circuit Court for permission to enter school property as permitted by Virginia law. Similar to the case at bar, the plaintiff in that case had not sustained an injury in fact that was fairly traceable to the defendants' conduct where she failed to make application that resulted in some action by the defendant. In that case, the Fourth Circuit emphasized the strong concerns of federalism and comity which

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weighed against a finding of standing where the plaintiff sought federal jurisdiction before the state defendants had an opportunity to act. Id., 713 F.3d at 753.

Plaintiffs may argue that they should be granted standing as there is a likelihood that their application for a marriage license would be denied if they ever got around to applying for one AND they met all the other conditions for getting a marriage license. However, the U.S. Supreme Court recently rejected an "objectively reasonable likelihood" of injury standard that been used by the Second Circuit. Clapper v. Amnesty International, _ U.S. _, 133 S. Ct. 1138, 1147, 185 L.Ed. 2d 264 (2013). The Supreme Court found that the "objectively reasonable likelihood" standard was inconsistent with their requirement that "threatened injury must be certainly impending to constitute injury in fact." Id. (citations and quotations omitted). Standing cannot be based upon a chain of contingencies or based upon speculation as to whether the injury was traceable to the challenged law or conduct, or some other reason or act which is not subject to federal review. Id. 133 S. Ct. at 1148. Here, until Plaintiffs actually apply for a marriage license, the Court will not know whether there was some other basis to deny their license thus defeating federal jurisdiction. To hold otherwise is to require this Court to speculate or presume the future actions of Roberts based upon unknown facts and evidence.

In an even more recent case, the Eastern District of Virginia denied standing to a plaintiff who challenged the constitutionality of Virginia's voting reinstatement process for convicted felons where the plaintiff had not bothered to apply for reinstatement. Sa'ad El-Amin v. McDonnell et al, 2013 U.S. Dist. LEXIS 40461 *14-15 (E.D. Va. March 22, 2013). The court found that plaintiff did not suffer an injury in fact, and until he made application he had not

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suffered any denial or other injury that would allow him to challenge the reinstatement process. Id. Similarly here, Plaintiffs have not made application and have not suffered a denial of any right or other injury that gives them standing to invoke federal jurisdiction against Roberts.

In addition to lack of standing, the claims of Plaintiffs Harris and Duff fail to meet the ripeness requirement. This case is not fit for review as there has been no official determination by Roberts as to whether Plaintiff's Harris and Duff are otherwise entitled to a marriage license. Roberts has not been given the opportunity to consider all of the necessary facts and evidence to render a final decision. 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. Until a final decision is made, the case is not fit for review. In reviewing decisions of administrative agencies, the case is not ripe unless the agency determination is final and not dependent upon future uncertainties. Charter Fed. Sav. Bank, 976 F.2d at 208. If certain critical facts that would substantially assist the court in making its determination are contingent or unknown, the case is not ripe for judicial review. Arch Mineral Corp. v. Babbitt, 104 F.3d 660, 665-66 (4th Cir. 1997).

Likewise, to establish ripeness, Plaintiffs Harris and Duff have not shown the necessary hardship in applying for a marriage license, as they would not be subject to civil or criminal sanction if they were to actually apply for a marriage license. In a ripeness inquiry, hardship is established only where the threat of civil or criminal harm is immediate, direct and significant. West Virginia Highlands, v. Babbitt, 161 F.3d 797, 800 (4th Cir. 1998). Absent here is any showing of hardship if the Court were to require Plaintiffs to actually apply for a marriage license before granting Plaintiffs federal jurisdiction.

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Roberts took no action against Plaintiffs Harris and Duff. Plaintiffs Harris and Duff did not seek any benefit or right from Roberts which he denied. Given the state of these facts, this Court is without subject matter jurisdiction to hear these claims and the claims of Plaintiffs Harris and Duff against Roberts should be dismissed pursuant to Rule (12)(b)(1).

II. Plaintiffs Berghoff and Kidd fail to state a claim upon which relief can be granted. *(Rule 12(b)(6))*

In order for an official to be liable under a 42 U.S.C. §1983 claim, Plaintiff must allege personal involvement by the official in the deprivation of the protected right. Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985). In this case, the Complaint contains no allegations specific to Roberts that he was personally involved in depriving Plaintiffs Berghoff and Kidd of any federally protected right. Plaintiffs Berghoff and Kidd did not seek a marriage license from Roberts which was denied, as they already had one from the District of Columbia. Plaintiffs Berghoff and Kidd do not even reside within the jurisdiction in which Roberts serves as the Clerk of Court.

Absent allegations of actual personal involvement by Roberts, Plaintiffs Berghoff and Kidd have failed to state a claim against Roberts upon which relief can be granted, and their claims against Roberts should be dismissed pursuant to Rule 12 (b)(6).

CONCLUSION

The allegations asserted by Plaintiffs Berghoff and Kidd on their face fail to demonstrate that they have standing to bring this case against Roberts. Likewise, the facts as shown by the affidavit of Laura Moran, establish that the claims of Plaintiffs Harris and Duff against Roberts lack subject matter jurisdiction on standing and ripeness grounds. All claims against Roberts should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. Rule

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12(b)(1). In the alternative, claims of Plaintiffs Berghoff and Kidd against Roberts should be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. Rule 12(b)(6).

For these reasons, Defendant Roberts respectfully requests that this Court dismiss all claims against him for lack of subject matter jurisdiction, in the alternative, dismiss the claims of Plaintiffs Berghoff and Kidd against him for failure to state a claim upon which relief can be granted, and award him such other and further relief as this Court deems appropriate.

THOMAS E. ROBERTS,

By Counsel

By: /s/ Rosalie Pemberton Fessier

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I have electronically filed this document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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