

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
Huntington Division

CASIE JO MCGEE and SARAH ELIZABETH
ADKINS; JUSTIN MURDOCK and WILLIAM
GLAVARIS; and NANCY ELIZABETH
MICHAEL and JANE LOUISE FENTON,
individually and as next friends of A.S.M.,
a minor child;

Plaintiffs,

v.

Civil Action No. 3:13-cv-24068

KAREN S. COLE, in her official capacity as
CABELL COUNTY CLERK; and VERA J.
MCCORMICK, in her official capacity as
KANAWHA COUNTY CLERK;

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiffs CASIE JO MCGEE and SARAH ELIZABETH ADKINS; JUSTIN MURDOCK and WILLIAM GLAVARIS; and, NANCY ELIZABETH MICHAEL and JANE LOUISE FENTON, individually and as next friends of A.S.M., a minor child, all by and through their attorneys, file this Complaint against Defendants KAREN S. COLE, in her official capacity as CABELL COUNTY CLERK, and VERA J. MCCORMICK, in her official capacity as KANAWHA COUNTY CLERK, and allege as follows:

INTRODUCTION

1. Plaintiffs are six lesbian and gay West Virginians who comprise three loving and committed same-sex couples (“adult Plaintiffs” or “Plaintiff couples”), and a child of one of the couples (“child Plaintiff”) (collectively, “all Plaintiffs”). All Plaintiffs bring this action pursuant

to 42 U.S.C. § 1983 to challenge Defendants' discriminatory denial to the Plaintiff couples of the freedom to marry in the State of West Virginia ("the State"), and Defendants' exclusion of the child Plaintiff from belonging to a family headed by married parents, solely because the members of each of the Plaintiff couples are of the same sex. All Plaintiffs seek declaratory and injunctive relief for the violation of their guarantees of liberty and equal protection under the Fourteenth Amendment to the United States Constitution as a result of West Virginia statutes that expressly deny same-sex couples, including Plaintiff couples, the freedom to marry and also deny respect to marriages of same-sex couples validly entered in other states, *see* W.Va. Code §§ 48-2-104, 48-2-401, and 48-2-603 (collectively hereinafter the "marriage ban" or "the ban").

2. The adult Plaintiffs seek the freedom to marry the one unique and irreplaceable person each loves, and thereby to assume the responsibilities and obtain the myriad protections, obligations and benefits conferred upon married couples and upon their children under state and federal law. Plaintiff A.S.M. seeks the protections, security, support, and benefits conferred upon the children of married parents, and to end the stigma, shame, and humiliation imposed upon children of lesbian and gay parents by the law's refusal to permit them to belong to families with married parents and designation of their families as inferior to others and unworthy of marriage.

3. The right to marry the person of one's choice, and to direct the course of one's life in this intimate realm without undue government interference is one of the fundamental liberty interests protected for all by the Due Process Clause of the United States Constitution. The State's exclusion of plaintiff couples and other same-sex couples from marriage violates their fundamental right to marry. The State also interferes with the constitutionally protected liberty and privacy interests in familial association and integrity of A.S.M. and other similarly-

situated children of same-sex couples without any compelling, important or even legitimate justification.

4. The State also has deprived all Plaintiffs of their guarantee of equality under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by denying Plaintiff couples and other lesbian and gay West Virginians the right to marry the person of their choice based solely on their sexual orientation and sex. Likewise, the State denies the child Plaintiff and other children of same-sex parents equal access to the dignity, legitimacy, protections, benefits, support, and security conferred on children of married parents under state and federal law.

5. Marriage plays a unique role in society as the universally recognized and celebrated hallmark of a couple's commitment to build family life together. It confers upon couples a dignity and status of immense import. Through the marriage ban and through Defendants' enforcement of the ban, the State and Defendants send a purposeful message that they view lesbians, gay men, and their children as second-class citizens who are undeserving of the legal sanction, respect, protections, and support that different-sex couples and their children receive automatically through marriage.

6. The marriage ban inflicts serious and irreparable harms upon the adult Plaintiffs and the child Plaintiff and other same-sex couples and their children across the State. The ban excludes them from the security and support available to married couples and their children, and from the myriad legal protections available to spouses and their children under state and federal law.

7. The marriage ban penalizes the adult Plaintiffs' self-determination in the most intimate sphere of their lives. The Supreme Court has stated that marriage is the most important

relation in life, as well as an expression of emotional support and public commitment and a far-reaching legal acknowledgement of the intimate relationship between two people. The marriage ban deprives the adult Plaintiffs and other same-sex couples of dignity, and humiliates plaintiff A.S.M. and other children of same-sex couples, by branding their families as inferior and unworthy of the legitimacy, recognition, and respect accorded to other families.

8. Because the freedom to marry is one of the vital personal rights essential to the orderly pursuit of happiness by free men and women, Plaintiffs seek equal access to the freedom to marry for same-sex couples as the only means to secure their rights to due process and equal protection of the law, and to eliminate the myriad serious harms inflicted on all Plaintiffs by the marriage ban and Defendants' enforcement of it.

JURISDICTION AND VENUE

9. All Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation under color of state law of rights secured by the United States Constitution.

10. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

11. Venue is proper in this Court under 28 U.S.C. § 1391(b) because all Defendants reside within the Southern District and State of West Virginia, and the events that gave rise to all Plaintiffs' claims took place within the Southern District of West Virginia. Further, a majority of the parties, namely, Plaintiffs Casie Jo McGee ("Casie"), Sarah Elizabeth Adkins ("Sarah"), Justin Murdock ("Justin"), and William Glavaris ("Will), and Defendant Karen S. Cole reside within the Huntington Division of the Southern District of West Virginia, and a substantial part of the events that gave rise to all Plaintiffs' claims took place within the Huntington Division.

12. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

13. This Court has personal jurisdiction over Defendants because they are domiciled in the State.

PARTIES

A. Plaintiffs

14. Plaintiffs CASIE, 30, and SARAH, 32, are a lesbian couple living in Huntington, Cabell County, within the Huntington Division of the Southern District of West Virginia. Casie and Sarah have been in a loving committed relationship for more than 3 years and wish to marry. Both life-long West-Virginians, Casie was raised in Ritchie County, West Virginia and is currently an Assistant Professor of Mathematics at Mountwest Community and Technical College in Huntington. She obtained her bachelor's degree in English and Mathematics and her master's degrees in Mathematics from Marshall University. Sarah has lived all her life in Cabell and Wayne Counties, West Virginia, and is currently an anthropology student at Marshall University. The marriage ban frustrates Casie's and Sarah's dreams of being able to marry each other before their friends and families in West Virginia. Additionally, the marriage ban strains the couple's finances and causes them to feel stress and uncertainty about the future. For example, if they were able to marry, Casie, a public employee, would be able to provide Sarah with spousal health insurance coverage on her employer-provided health plan. Because the couple is barred from marrying, Casie cannot add Sarah to her plan. Casie and Sarah cannot afford to buy separate health insurance for Sarah, who has diabetes. In the past, Sarah required treatment at an emergency room for elevated blood sugar. Because Sarah had no health insurance, she and Casie were required to pay for the services out of pocket. As well, Casie and

Sarah are planning to create a family together through the use of assisted reproductive technology (“ART”) and an anonymous sperm donor, and look forward to the day when they will have children. However, Casie’s inability to put Sarah on her health insurance affects the couple’s plans for bringing children into their family. For couples like Casie and Sarah who are exploring ART, the decision about who will carry the child is a complicated consideration of health issues, employment issues, and finances. Both Casie and Sarah have significant health concerns they must take into account before deciding to get pregnant. However, because Sarah cannot get health insurance as Casie’s spouse, the possibility of Sarah carrying their child has been completely taken off the table. In this way, the denial of marriage to Casie and Sarah directly impacts the couple’s private, intimate decision about how to bring children into their lives. Casie and Sarah wish to marry in order to safeguard their relationship to each other and to protect any children they may have.

15. Plaintiffs JUSTIN, 32, and WILL, 31, are a gay couple living in Huntington, Cabell County, within the Huntington Division of the Southern District of West Virginia. Justin and Will have been in a loving committed relationship for over two (2) years and wish to marry. Justin, who grew up in Wayne County, West Virginia, works for his family’s business, which supplies physically disabled persons with mobility products and home and vehicle modifications. Will grew up in Logan County, West Virginia, and moved to Huntington to become a student at Marshall University. Will is a network engineer. Justin has two children from a prior marriage he entered into before he had acknowledged to himself or to others that he is a gay man, and he now shares custody of his children with his former spouse. When Justin and Will first met a few months after Justin’s divorce became final, they each knew that there was something special about the other. On one of their first dates, Justin took Will to church with him to meet his

friends and local community. Last year, Justin asked Will to marry him and their friends cheered as Will said yes.

16. Plaintiffs NANCY, 43, and JANE, 45, are a lesbian couple living together with their six year-old son, Plaintiff A.S.M., in St. Albans, Kanawha County, West Virginia. Nancy and Jane have been in a loving committed relationship for 16 years and wish to marry. Nancy and Jane own an information technology consulting business together. Nancy was born in St. Albans, graduated from Marshall University, and has lived in the area for most of her life. Jane is a native of Oklahoma but relocated to St. Albans a number of years ago after she and Nancy decided to conceive a child. The couple conceived A.S.M. by assisted reproductive technology with an anonymous donor. Nancy and Jane decided to raise A.S.M. in St. Albans because they wanted to be near friends and family and because it was a community that they knew and loved. Nancy and Jane wish to marry both because they love each other, and for the sake of A.S.M. Although Jane has functioned as A.S.M.'s parent in every way since his birth, she is not A.S.M.'s legal parent, and only Nancy is listed on A.S.M.'s birth certificate. Jane and Nancy worry that in an emergency, Jane will not be recognized as A.S.M.'s parent or even family member, or otherwise as a person authorized to make medical decisions for him. Because Jane and Nancy have been unable to secure their family relationships through marriage, they have paid for alternate, but inadequate and inferior protections such as powers of attorney for health care and paperwork to make Jane a legal guardian to A.S.M. Jane and Nancy must remember to carry important legal documents wherever they go. Jane and Nancy also are concerned about the dignitary harm that A.S.M. may suffer from the couple's inability to marry, especially now that he already understands that West Virginia law relegates them to being, in his words, "just partners," and bars them from being a family with married parents. Nancy and Jane fear that he

will internalize the message he receives from his government that his family is not as worthy as other families and that he and his parents do not deserve the support for their relationships that other children and their parents receive. Additionally, because West Virginia law bars Nancy and Jane from marrying, Nancy and Jane lack the financial safety net available to married couples and their children. For example, because Nancy and Jane can neither get nor be recognized as married, Nancy and A.S.M. are not eligible to receive Jane's social security survivor benefits or the retirement benefits that Jane anticipates receiving from her former employer that would be available to Jane's legal spouse and child.

17. Plaintiff A.S.M., 6, sues through his parents and next friends NANCY ELIZABETH MICHAEL and JANE LOUISE FENTON. Nancy and Jane bring this action on behalf of A.S.M. because he is harmed by his parents' inability legally to marry. Because the State does not allow Nancy and Jane to marry, A.S.M. does not have the benefit of the rights, obligations, cost savings, and other benefits that accrue to the benefit of children of married parents under West Virginia law, nor of the rights and status conferred on children of married parents by West Virginia law that help and provide security to other West Virginia children in good times and bad. For example, the guardianship documents that the couple drew up to provide some limited protection to Jane's relationship to A.S.M. terminate upon his reaching adulthood, were costly, and Jane and Nancy would have preferred to put that money toward other child-centered expenses; A.S.M. is harmed by his and his parents lack of access to laws that establish and protect the parentage of children of married couples. A.S.M. also faces less dignity and legitimacy, in his own eyes, the eyes of many others and under law, from his parents not having the freedom to marry one another.

B. Defendants

18. KAREN S. COLE is sued in her official capacity as the Cabell County Clerk. Ms. Cole's duties include issuing marriage licenses and maintaining records relating to marriage licenses, including records of marriages that take place in states other than West Virginia where one or both parties to the marriage are West Virginia residents. Ms. Cole must ensure compliance through all of these functions with relevant West Virginia laws, including those that exclude same-sex couples from marriage, and forbid the filing of records relating to marriages of same-sex couples that take place in other states. Ms. Cole is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

19. VERA J. MCCORMICK is sued in her official capacity as the Kanawha County Clerk. Ms. McCormick's duties include issuing marriage licenses and maintaining records relating to marriage licenses, including records of marriages that take place in states other than West Virginia where one or both parties to the marriage are West Virginia residents. Ms. McCormick must ensure compliance through all of these functions with relevant West Virginia laws, including those that exclude same-sex couples from marriage, and forbid the filing of records relating to marriages of same-sex couples that take place in other states. Ms. McCormick is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

20. Both of the Defendants, and those subject to their supervision, direction, and control, intentionally performed, participated in, aided and/or abetted in some manner the acts alleged herein, proximately caused the harm alleged herein, and will continue to injure Plaintiffs irreparably if not enjoined.

STATEMENT OF FACTS

A. Adult Plaintiffs Attempted to Marry But Were Prevented From Doing So.

21. But for the fact that they are of the same sex, each Plaintiff couple is legally qualified to marry under the laws of West Virginia and wishes to marry in the State. Each adult Plaintiff is over the age of 18, and no adult Plaintiff is precluded from marriage as a result of having another spouse or being closely related to his or her life partner.

22. On or about September 18, 2013, Casie McGee and Sarah Adkins appeared in person at the office of Defendant Cole in Huntington, West Virginia, to seek a marriage license because they wish to marry each other. They both presented valid forms of identification, provided the required personal information, and were prepared to pay the required fee and complete a marriage application. When the couple requested a marriage license, an employee of Defendant Cole answered, "We can't do it because you're both female." Casie and Sarah accordingly were denied the opportunity to obtain a marriage license by Defendant Cole's office based solely on West Virginia's prohibition on marriage for same-sex couples and Plaintiffs' respective sex and sexual orientation.

23. On or about September 24, 2013, Justin Murdock and William Glavaris appeared in person at the office of Defendant Cole in Huntington, Cabell County, West Virginia, to seek a marriage license because they wish to marry each other. They both were prepared to present valid forms of identification, provide the required personal information, pay the required fee, and complete a marriage application. When Justin and Will requested a marriage license, an employee of Defendant Cole refused and handed them a copy of a letter prohibiting clerks from issuing marriage licenses to same-sex couples. Justin and Will accordingly were denied the opportunity to obtain a marriage license by Defendant Cole's office based solely on West

Virginia's prohibition on marriage for same-sex couples and Plaintiffs' respective sex and sexual orientation.

24. On or about September 19, 2013, Nancy Michael and Jane Fenton appeared in person at the office of Defendant McCormick in Charleston, Kanawha County, West Virginia, to seek a marriage license because they wish to marry each other. They both were prepared to present valid forms of identification, provide the required personal information, pay the required fee, and complete a marriage application. When the couple requested a marriage license, an employee of Defendant McCormick asked, "Where's your groom?" Nancy and Jane explained that they wished to marry each other. The employee responded, "That's not recognized in the State of West Virginia. There's nothing we can do here." Nancy and Jane accordingly were denied the opportunity to obtain a marriage license by Defendant McCormick's office based solely on West Virginia's prohibition on marriage for same-sex couples and Plaintiffs' respective sex and sexual orientation.

B. West Virginia's Marriage Ban Singles Out Same-Sex Couples and Excludes Them From Marriage.

25. West Virginia has enacted statutes that exclude same-sex couples from marriage. *See* W.Va. Code §§ 48-2-104 and 48-2-401. These statutes cannot be explained by reference to legitimate public policies that could justify the disadvantages the marriage bans impose on same-sex couples who wish to marry. Rather, the history of these enactments and their own text demonstrate that interference with the equal dignity of same-sex couples was more than a mere side effect of the various enactments – it was their essence.

26. Additionally, Defendants are authorized to record marriages entered by different-sex spouses in other jurisdictions when one or both of the spouses is a West Virginia resident, and the State regularly respects these out-of-state marriages as valid and legitimate under West

Virginia law. The State refuses, however, to recognize marriages entered by same-sex spouses in other jurisdictions. *See* W.Va. Code § 48-2-603. Thus, not only are the adult Plaintiffs and other same-sex couples denied the freedom to marry in West Virginia, but they are also denied the ability to have a valid marriage from another jurisdiction recorded or recognized in West Virginia.

C. All Plaintiffs Are Injured By The Marriage Ban.

27. Barring same-sex couples from marriage disqualifies them from critically important rights and responsibilities under state law that different-sex couples rely upon to secure their commitment to each other, and to safeguard their families. By way of example only, same-sex couples are denied:

- a. The benefit of the presumption that both spouses are parents to a child born during the marriage, including the automatic listing of the mother's spouse as a parent on a child's birth certificate, and the ability of a couple to confer legitimacy on their children by marrying;
- b. A streamlined and relatively inexpensive process for bringing children into the family through adoption, whether through joint adoption, or for one spouse to adopt another's child through a step-parent adoption;
- c. Family health insurance coverage including spousal health benefits, and retirement benefits, and surviving spouse annuity benefits for public employees;
- d. Family leave for a public employee to care for a spouse;
- e. Death benefits for surviving spouses of firefighters, law enforcement, military members, and emergency medical services personnel who die in the

line of duty, and additional death benefits to a surviving spouse for each dependent child;

- f. The ability to safeguard family resources under an array of laws that protect spousal finances, including for example, tax laws including different state tax rates for married individuals, the right to file jointly to reduce tax liability, spousal tax exemptions including exemptions for surviving spouses, and tax benefits when transferring or inheriting interests in real and personal property; the benefit of a homestead exemption and personal property exemption for a spouse's medical equipment, clothing, and other personal items; an exemption for a portion of a deceased spouse's personal estate from the deceased's debts or liabilities; the ability to file for workers compensation benefits on behalf of an incapacitated spouse and for the surviving spouse of a workers compensation beneficiary to receive compensation; and the ability for a spouse to receive unemployment compensation for a deceased claimant;
- g. The ability to make caretaking decisions for one another in times of death and serious illness, including priority to make medical decisions for an incapacitated spouse, the ability to authorize an autopsy, the automatic right to make burial decisions and other decisions concerning disposition and handling of remains of deceased spouses.
- h. The right to inheritance under the laws of intestacy and the right of a surviving spouse to an elective share;
- i. Tuition fee waivers to the spouses and dependent children of employees of public universities;

- j. Benefits for spouses and dependent children of members of the military and veterans;
- k. In the event that a couple separates, access to an orderly dissolution process for terminating the relationship, assuring an equitable division of the couple's assets and debts, and adjudication of issues relating to custody, visitation, and support with respect to any children the couple may have.

28. The marriage ban not only denies all Plaintiffs and other same-sex couples and their children access to protections, benefits, rights, and responsibilities afforded to married persons and their children under state law, it also denies them eligibility for a host of federal rights and responsibilities that span the entire United States Code and federal regulations. Unmarried couples are denied recognition for virtually all purposes throughout the more than 1,000 statutes and numerous federal regulations relating to marriage, including laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits. Couples validly married in another jurisdiction and living in West Virginia may qualify for some federal benefits and protections, but the language of certain statutes and regulations, such as veterans' spousal benefits and Social Security survivor benefits, references couples recognized as married under the law of their state of residence or domicile. Many of these deprivations drain family economic resources, causing financial harm not only to same-sex couples but to their children as well.

29. In addition to causing the tangible harms listed above, all Plaintiffs are denied the unique social recognition that marriage conveys. Without access to the familiar language and legal label of marriage, the Plaintiff couples are unable instantly or adequately to communicate to others the depth and permanence of their commitment, or to obtain respect for that

commitment as others do simply by invoking their married status. Likewise, without access to the familiar language and legal label of marriage, Plaintiff A.S.M. is unable instantly or adequately to communicate to others the depth and permanence of his parents' commitment, or to obtain respect for that commitment as others do simply by invoking their parents' married status.

30. Although the Plaintiff couples are all in committed relationships, they and other same-sex couples are denied the stabilizing effects of marriage, which helps keep couples together during times of crisis or conflict.

31. The substantive and dignitary inequities imposed on committed same-sex couples include particular harms for same-sex couples' children, who are equally deserving of the stability, permanence, and legitimacy that children of different-sex spouses enjoy. The marriage ban denies children of same-sex couples, including Plaintiff A.S.M., the dignity, legitimacy, rights, benefits, support, security, and obligations conferred on children whose parents are married. Plaintiff A.S.M. and other children of same-sex couples must combat the common assumption, reinforced by West Virginia law, that as members of a family headed by an unmarried couple their bonds are impermanent, insubstantial, and unworthy of equal dignity and legitimacy because the couple has not made a marital commitment and taken on the obligations of marriage. Civil marriage affords official sanctuary to the family unit, offering parents and children a familiar and public means of demonstrating to third parties a legal basis for the parent-child relationship. By denying same-sex couples access to marriage, the State reinforces the view held by some that the family bonds that tie same-sex parents and their children are less consequential, enduring, and meaningful than those of different-sex parents and their children. Plaintiff A.S.M.'s parents, Nancy and Jane, and other same-sex parents raising children in West

Virginia, cannot invoke their status as married in order to communicate to their own children and others the depth and permanence of the parents' commitment to each other in terms that society, and even young children, readily understand. Consequently, Plaintiff A.S.M. and other children of same-sex couples are left to grow up with the message that their parents and families are inferior to others and that they and their parents do not deserve the same societal recognition and respect.

32. Because same-sex parents and their children thus are deprived of the family security that inheres in a ready and familiar method of communicating to others the significance and permanence of their familial relationships, they must live with the vulnerability and stress inflicted by the ever-present possibility that others may question their familial relationships—in social, educational, and medical settings and in moments of crisis—in a way that spouses and their children can avoid by simple reference to being married.

33. Plaintiff A.S.M. and other children of same-sex couples are less legally secure and economically situated than children whose parents are able to marry, including because of expenses incurred in attempting to create legal protections that approximate some of those that are automatic through marriage, which protections are far inferior to the legal protections afforded through marriage, and because their families are denied the strengthening effect that marriage can provide to their parents' relationships.

34. Children from a young age understand that marriage signifies an enduring family unit, and likewise understand when the State has deemed a class of families as less worthy than other families, undeserving of marriage, and not entitled to the same societal recognition and support as other families. The State has no adequate interest to justify marking the children of

same-sex couples, including plaintiff A.S.M., with a badge of inferiority that invites disrespect in school, on the playground, and in every other sphere of their lives.

35. The government is a powerful teacher of discrimination to others. By decreeing that the relationships of same-sex couples must be ignored in West Virginia and enforcing that policy, the State and Defendants inform all persons with whom same-sex couples interact, including those couples' own children, that their relationships are less worthy than others. Bearing the imprimatur of the government, the State's marriage ban, which relegates same-sex couples and their children to a lesser status, encourages others to follow the government's example in discriminating against them.

36. The State's marriage ban, and Defendants' enforcement of it, causes many private entities such as banks, insurers, and even health clubs, to likewise define "family" for purposes of an array of benefits and protections in ways that exclude same-sex couples and their children from important safety nets such as private employer-provided health insurance for family members. The State also encourages disrespect of committed same-sex couples and their children, including Plaintiffs, by others in workplaces, schools, businesses, and other major arenas of life, in ways that would be less likely to occur and more readily corrected if marriage were available to same-sex couples.

D. The Marriage Ban Is Not Even Rationally Related to a Legitimate Government Purpose, Let Alone Substantially Related To An Important Government Purpose Or Narrowly Tailored To A Compelling Governmental Purpose.

37. No legitimate, let alone important or compelling, interest exists to exclude same-sex couples from marriage. An individual's capacity to establish a loving and enduring relationship does not depend upon sexual orientation or his or her sex in relation to his or her committed life partner, nor is there even any legitimate interest in preventing same-sex couples

and their children from belonging to families headed by a married couple, or in denying them the spousal protections marriage provides.

38. Neither history nor tradition can justify the marriage ban. Marriage has remained a vital and enduring institution despite undergoing significant changes over time to meet changing social and ethical needs, including by the elimination of many former requirements of marriage that we now recognize as discriminatory or otherwise impermissible -- such as race-based entry requirements, and gendered restrictions -- that historically were considered integral aspects of marriage. West Virginia is not confined to historic notions of equality, and no excuse for the State's discriminatory restriction can be found in the pedigree of such discrimination.

39. The Supreme Court has made clear that the law cannot, directly or indirectly, give effect to private biases and expressly rejected moral disapproval of lesbian and gay relationships as a legitimate justification for a law.

40. Excluding same-sex couples from marriage does nothing to protect or enhance the rights of different-sex couples. Different-sex couples will continue to enjoy the same rights and status conferred by marriage regardless of whether same-sex couples may marry.

41. Although the State has a valid interest in protecting the public fiscally, it may not pursue that interest by making invidious distinctions between classes of its citizens without adequate justification. Moreover, the State has no fiscal justification here for denying same-sex couples the freedom to marry because the State would generate additional revenues by allowing same-sex couples to marry, and be recognized as married.

42. The State's interest in child welfare is affirmatively harmed rather than furthered by the marriage ban. The marriage ban injures same-sex couples' children without offering any benefit to other children.

43. Barring same-sex couples from marriage does not prevent same-sex couples from raising children together. Same-sex couples in West Virginia can and do bear children through use of reproductive technology that is available to same-sex couples and different-sex couples alike, and bring children into their families through foster care and adoption. Procreation is not a requirement of marriage, and many married people choose not to have children, while many unmarried people procreate. West Virginia has never restricted marriage to those capable of or intending to procreate, nor would it be constitutionally permissible to do so.

44. There is no valid basis for the State to assert a preference for parenting by different-sex couples over same-sex couples. Based on more than 30 years of research, the scientific community has reached consensus that children raised by same-sex couples are just as well-adjusted as children raised by different-sex couples. This consensus has been recognized by every major professional organization dedicated to children's health and welfare including the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, the National Association of Social Workers, and the Child Welfare League of America.

45. Other courts have found, after trials involving expert testimony, that there is not even a rational basis for favoring parenting by heterosexual couples over gay and lesbian couples. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 980 (N.D. Cal. 2010) (finding that the research supporting the conclusion that “[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted” is “accepted beyond serious debate in the field of developmental psychology”), *aff’d sub nom, Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated for lack of standing sub nom, Hollingsworth v. Perry*, No. 12-144, 2013 WL 3196927 (U.S. June 26, 2013); *In re Adoption of*

Doe, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) (“[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption.”), *aff’d sub nom*, *Florida Dep’t of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that “there was no rational relationship between the [exclusion of gay people from becoming foster parents] and the health, safety, and welfare of the foster children.”), *aff’d sub nom*, *Dep’t of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

46. Excluding same-sex couples from marriage harms their children, including by branding their families as inferior and less deserving of respect, and by encouraging private bias and discrimination. Denying same-sex couples the equal dignity and status of marriage humiliates the children now being raised by same-sex couples, and makes it more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

47. Excluding same-sex couples from civil marriage will not make the children of different-sex spouses more secure. Different-sex spouses’ children will continue to enjoy the benefits that flow from their parents’ marriage, regardless of whether same-sex couples are permitted to marry. The marriage ban has no effect on the choices different-sex couples make about such profound issues as whether to marry, whether to have children, or whether to raise their children within marriage.

48. The State's interest in the welfare of children parented by same-sex couples is as great as its interest in the welfare of any other children. The family security that comes from the State's official recognition and support is no less important for same-sex parents and their children than it is for different-sex parents and their children.

49. Excluding same-sex couples from marriage does nothing to protect or enhance the rights of different-sex spouses. Different-sex spouses will continue to enjoy the same rights and status conferred by marriage regardless of whether same-sex couples may marry, unimpaired by the acknowledgment that this freedom belongs equally to lesbians and gay men.

CLAIMS FOR RELIEF

COUNT I: Deprivation of Due Process U.S. Const. Amend. XIV (42 U.S.C. § 1983)

50. All Plaintiffs incorporate by reference and reallege all of the preceding paragraphs of this Complaint as though fully set forth herein.

51. All Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

52. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

53. The right to marry the unique and irreplaceable person of one's choice and to direct the course of one's life in this intimate realm without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Indeed, the essence of the fundamental right to marry is freedom of personal choice in selecting one's spouse.

54. W.Va. Code §§ 48-2-104, 48-2-401, and 48-2-603, and all other sources of West Virginia law that preclude marriage for same-sex couples or prevent recognition of their marriages violate the due process guarantee of the Fourteenth Amendment both facially and as applied to all Plaintiffs. Defendants' actions to enforce the marriage ban directly and impermissibly infringe on the adult Plaintiffs' choice of whom to marry, interfering with a core, life-altering and intimate personal choice.

55. The Due Process Clause also protects choices central to personal dignity and autonomy, including each individual's rights to family integrity and association. Defendants' actions to enforce the marriage ban directly and impermissibly infringe adult Plaintiffs' deeply intimate, personal, and private decisions regarding family life, and preclude all Plaintiffs from obtaining full liberty, dignity, and security for themselves, their families, and their parent-child bonds.

56. As the Cabell and Kanawha County clerks, Defendants Cole's and McCormick's duties and actions to ensure compliance with West Virginia's discriminatory marriage ban by, for example, denying same-sex couples marriage licenses, violate adult Plaintiffs' fundamental right to marry, and the rights protected under the Fourteenth Amendment to the United States Constitution, to liberty, dignity, autonomy, family integrity, association, and due process of all Plaintiffs.

57. Defendants cannot satisfy the Due Process Clause's decree that government's denial of a fundamental right or substantial infringement of a liberty interest may be sustained only upon a showing that the burden is narrowly tailored to serve a compelling or even important governmental interest, as the marriage ban is not even tailored to further any legitimate interest at all.

58. Thus, Defendants, acting under color of state law, are depriving plaintiffs of rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

**COUNT II:
Deprivation of Equal Protection
U.S. Const. Amend. XIV
(42 U.S.C. § 1983)**

59. All Plaintiffs incorporate by reference and reallege all of the preceding paragraphs of this Complaint as though fully set forth herein.

60. All Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief.

61. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1.

62. W.Va. Code §§ 48-2-104, 48-2-401, and 48-2-603 and all other sources of West Virginia law that preclude marriage for same-sex couples or prevent recognition of marriages violate the equal protection guarantee of the Fourteenth Amendment both facially and as applied to Plaintiffs.

63. As the Cabell and Kanawha County clerks, Defendants Cole’s and McCormick’s duties and actions to ensure compliance with West Virginia’s discriminatory marriage ban by, for example, denying same-sex couples marriage licenses, violates the right of Plaintiffs to equal protection by discriminating impermissibly on the basis of the adult Plaintiffs’ sexual orientation and sex, and impermissibly classifying the children of same-sex couples, including Plaintiff A.S.M., on the basis of their parents’ sex, sexual orientation and marital status, and by

discriminating against all Plaintiffs in the enjoyment of equal liberties and equal exercise of fundamental rights.

64. Same-sex couples such as the Plaintiff couples are identical to different-sex couples in all of the characteristics relevant to marriage.

65. Same-sex couples make the same commitment to one another as different-sex couples. Like different-sex couples, same-sex couples fall in love, build their lives together, plan their futures together, and hope to grow old together. Like different-sex couples, same-sex couples support one another emotionally and financially and take care of one another physically when faced with injury or illness. Plaintiff couples seek to marry for the same emotional, romantic, and dignitary reasons and to provide the same legal shelter to their families, as different-sex spouses.

66. Like some different-sex couples, some same-sex couples are parents raising children together.

67. Plaintiffs are equally worthy of the tangible rights and responsibilities, as well as the respect, dignity, and legitimacy that access to marriage confers on different-sex couples and their children. For the many children being raised by same-sex couples, including Plaintiff A.S.M., the tangible resources and societal esteem that access to marriage confers is no less precious than for children of different-sex couples.

68. **Discrimination Based on Sexual Orientation.** The marriage ban targets lesbian and gay West Virginians as a class for exclusion from marriage and discriminates against each adult Plaintiff based on his or her sexual orientation, both facially and as applied, and against A.S.M. based on the sexual orientation of his parents, both facially and as applied.

69. The exclusion of Plaintiffs from families headed by married couples based on the adult Plaintiffs' sexual orientation subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand because the exclusion does not even serve any legitimate governmental interests, let alone any important or compelling interests, nor does it serve any such interests in an adequately tailored manner.

70. Lesbians and gay men have suffered a long and painful history of discrimination in West Virginia and the United States.

71. Sexual orientation bears no relation to an individual's ability to contribute to society.

72. Sexual orientation is a core, defining trait that is so fundamental to one's identity and conscience that a person may not legitimately be required to abandon it (even if that were possible) as a condition of equal treatment.

73. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention. No credible evidence supports the notion that such interventions are either effective or safe; indeed, they often are harmful and damaging. No mainstream mental health professional organization approves interventions that attempt to change sexual orientation, and virtually all of them have adopted policy statements cautioning professionals and the public about these treatments.

74. Lesbians and gay men are a discrete and insular minority, and ongoing prejudice against them continues seriously to curtail the operation of those political processes that might ordinarily be relied upon to protect minorities. Gay people have fewer civil rights protections at the state and federal level than racial minorities and women had when race- and sex-based classifications were declared to be suspect and quasi-suspect, respectively.

75. Lesbians and gay men lack express statutory protection against discrimination in employment, public accommodations, and housing at the federal level and in more than half the states, including West Virginia; are systematically underrepresented in federal, state, and local democratic bodies; have been stripped of the right to marry through 30 state constitutional amendments and are currently not permitted to marry in a total of 37 states; and have been targeted across the nation through the voter initiative process more than any other group.

76. **Discrimination Based on Sex.** West Virginia's marriage ban discriminates against adult Plaintiffs on the basis of their sex, both facially and as applied, barring adult Plaintiffs from marriage or from being recognized as validly married, solely because each of the adult Plaintiffs wishes to marry a life partner of the same sex. The marriage ban discriminates against Plaintiff A.S.M. based on the sex of his parents, both facially and as applied. The sex-based restriction is plain on the face of West Virginia's laws, which restrict marriage to "union[s] between a woman and a man," W.Va. Code § 48-2-104, and prohibit recognition of marriages in other states "between persons of the same sex," W.Va. Code § 48-2-603.

77. Because of these sex-based classifications, Casie, for example, is precluded from marrying Sarah because Casie is a woman and not a man; were Casie a man, she could marry Sarah.

78. West Virginia's marriage ban also impermissibly enforces conformity with sex stereotypes by excluding adult Plaintiffs from marrying the one person each Plaintiff loves, because Plaintiffs have failed to conform to the sex-based stereotypes that men should marry women, and that women should marry men.

79. The exclusion of adult Plaintiffs from marriage based on their sex, and the marriage ban's requirement that adult Plaintiffs behave in conformity with sex-based stereotypes

as a condition of being able to marry, cannot survive the heightened scrutiny required for sex-based classifications.

80. **Discrimination Based on Parental Status.** The marriage ban impermissibly classifies children, including Plaintiff A.S.M., on the basis of their parents' sex, sexual orientation and marital status, denying such children, including Plaintiff A.S.M., the dignity, legitimacy, security, support and protections available to children whose parents can marry. The State's differential treatment of children based upon their parents' status cannot survive the heightened scrutiny required for classifications based on parental status.

81. **Discrimination With Respect to Fundamental Rights and Liberty Interests Secured by the Due Process Clause.** The marriage ban discriminates against adult Plaintiffs based on sexual orientation and sex with respect to access to the fundamental right to marry, and against all Plaintiffs with respect to their liberty interests in dignity, autonomy, and family integrity and association. Differential treatment with respect to exercise of fundamental rights and liberty interests subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand.

DECLARATORY AND INJUNCTIVE RELIEF

**COUNT III:
Federal Rules of Civil Procedure, Rules 57 and 65
(28 U.S.C. §§ 2201 and 2202)**

82. All Plaintiffs incorporate by reference and reallege all of the preceding paragraphs of this Complaint as though fully set forth herein.

83. This case presents an actual controversy because Defendants' present and ongoing denial of equal treatment and liberty to all Plaintiffs subjects them to serious and immediate harms, warranting the issuance of a declaratory judgment.

84. All Plaintiffs seek preliminary and/or permanent injunctive relief to protect their constitutional rights and avoid the injuries described above. A favorable decision enjoining Defendants would redress and prevent the irreparable injuries to Plaintiffs identified herein, for which Plaintiffs have no adequate remedy at law or in equity.

85. The State will incur little to no burden in allowing same-sex couples to marry, whereas the hardship for all Plaintiffs of being denied equal protection and liberty is severe, subjecting them to an irreparable denial of their constitutional rights. The balance of hardships thus tips strongly in favor of all Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, all Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that the provisions and enforcement by Defendants of W.Va. Code §§ 48-2-104, 48-2-401, and 48-2-603 and any other sources of West Virginia law that exclude same-sex couples from marriage or from recognition of marriages entered into in another jurisdiction violate all Plaintiffs' rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

B. Permanently enjoining enforcement by Defendants of W.Va. Code §§ 48-2-104, 48-2-401, and 48-2-603 and any other sources of state law that exclude same-sex couples from marriage or refuse recognition to the marriages of same-sex couples entered into in another jurisdiction;

C. Requiring Defendants in their official capacities to accept applications and issue marriage licenses to same-sex couples on the same terms as different-sex couples, and to record the valid marriages of same-sex couples from other jurisdictions on the same terms as the valid marriages of different-sex couples from other jurisdictions;

D. Awarding all Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to, *inter alia*, 42 U.S.C. § 1988 and other applicable laws; and

E. Granting such other and further relief as the Court deems just and proper.

F. The declaratory and injunctive relief requested in this action is sought against each Defendant; each Defendant's officers, employees, and agents; and against all persons acting in cooperation with any Defendant, or under a Defendant's supervision, direction, or control.

DATED: October 1, 2013

Respectfully submitted,

CASIE JO MCGEE and SARAH ELIZABETH
ADKINS, et al.

By Counsel:

s/ John H. Tinney, Jr.

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