IN THE SUPREME COURT OF VIRGINIA

At Richmond

Record No. 041180

KATHERINE ANNE FISHER DAVENPORT, et al.

Plaintiffs - Appellants

v.

DEBORAH LITTLE-BOWSER, et al.

Defendants – Appellees

On Appeal from the Circuit Court of the City of Richmond

OPENING BRIEF OF APPELLANTS

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Dated: October 25, 2004

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v.	)	
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Defendants - Appellees	)	

I. Nature of the Case and Proceedings Below

The appellants are four children born in Virginia ("Plaintiff Children") and their respective sets of parents ("Plaintiff Parents")(collectively, "Plaintiffs").[1] Each of the children was born in Virginia and adopted pursuant to judgments issued by courts of competent jurisdiction in other states. None of the Plaintiffs reside in Virginia. Bill of Complaint, ¶¶ 6-16, 19-33, App. 3-4, 5-8. Plaintiffs seek birth certificates for the children that contain the names of both adoptive parents.

After each set of Plaintiff Parents unsuccessfully sought such birth certificates from the State Registrar of Vital Records and Health Statistics ("Registrar"), they filed a Bill of Complaint and Petition for Writ of Mandamus against the Registrar and the State Health Commissioner (collectively, "Defendants") on May 28, 2002. App. 1 (¶¶ 1-2). Plaintiffs contended in the court below that the Registrar's refusals violate Section 32.1-261(A) of the Virginia Code, the Full Faith and Credit Clause of the United States

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[1] Two of the children were adopted by the same set of parents.

Constitution (as well as 28 U.S.C. §1738 and Section 8.01-389 of the Virginia Code, which contain full and faith and credit obligations), and the Equal Protection Clause of the United States Constitution. Bill of Complaint, ¶ 3, App. 3. They sought a declaration that the Defendants' conduct was unlawful, and an injunction or writ of mandamus compelling the Defendants to issue new accurate birth certificates. They also sought nominal damages, and reasonable attorneys' fees and costs. *Id.* at 12, App. 12.

Defendants filed a Demurrer, which was denied, and then an Answer. App. 17-24. Following discovery, Plaintiffs moved for summary judgment, App. 25, and Defendants filed a cross-motion for summary judgment. App. 126. After the summary judgment motions were fully briefed, the Circuit Court held a hearing on February 4, 2004. *See* Transcript of February 4, 2004 Hearing (hereinafter "Tr."), App. 168-96. Ruling from the bench, the Circuit Court granted Defendants' motion for summary judgment and denied Plaintiffs motion for summary judgment. Tr. 26:10 – 29:7, App. 193-95. A final written order summarizing the Circuit Court's oral ruling was issued on February 24, 2004. App. 197-99.

Plaintiffs filed a petition for appeal to this Court on March 12, 2004, and on September 13, 2004, this Court granted the petition.

II. Assignments of Error

A. The Circuit Court's Grant of Defendants' Motion for Summary Judgment Violated the Full Faith and Credit Clause, Article 4, Section 1 of the United States Constitution, and Section 8.01-389 of the Virginia Code.

B. The Circuit Court's Grant of Defendants' Motion for Summary Judgment and Denial of Plaintiffs' Motion for Summary Judgment Was Contrary to Section 32.1-261(A) of the Virginia Code.

C. The Circuit Court's Denial of Plaintiff's Motion for Summary Judgment Interprets Virginia Law So As to Deny Plaintiffs the Equal Protection of the Laws.

III. Questions Presented

A. Full Faith and Credit (Assignment of Error A):

1. Whether the Commonwealth's Public Policy Prohibiting Adoption by an Unmarried Couple Permits the Commonwealth to Refuse, on the Basis that the Adoptive Parents Are Not Married, to Issue a New Birth Certificate When Presented with a Valid Order of Adoption from a Sister State Pursuant to Section 32.1-261(A) of the Virginia Code.

2. Whether the Commonwealth's Public Policy Prohibiting Same-Sex Marriage Permits the Commonwealth to Refuse, on the Basis that the Adoptive Parents Are of the Same Sex, to Issue a New Birth Certificate When Presented with a Valid Order of Adoption from a Sister State Pursuant to Va. Code Section 32.1-261(A) of the Virginia Code.

B. Section 32.1-261(A) of the Virginia Code (Assignment of Error B):

1. Whether Virginia Law Prohibits the Issuance of New Birth Certificates Bearing the Names of Both Adoptive Parents to Children Validly Adopted in Sister States by Unmarried Persons.

2. Whether Defendants' Refusal to Issue New Birth Certificates to Plaintiffs Is Contrary to Virginia Law.

C. Equal Protection (Assignment of Error C):

Whether Defendants' Refusal to Issue to Plaintiffs New Birth Certificates Bearing the Names of Both Adoptive Parents Deprives Plaintiffs of the Equal Protection of Laws –

1. In that, Without Rational Basis, It Treats Plaintiff Minors Differently from the Adoptive Children of Out-of-State Opposite-Sex Couples;

2. In that, Without Rational Basis, It Treats Plaintiff Minors Differently from the Adoptive Children of Out-of-State Married Couples;

3. In that, Without Rational Basis, It Treats Plaintiff Adoptive Parents Differently from Out-of-State Opposite-Sex Adoptive Parents; or

4. In that, Without Rational Basis, It Treats Plaintiff Adoptive Parents Differently from Out-of-State Married Adoptive Parents.

IV. Statement of Facts

This case involves four children who were born in Virginia and adopted in other jurisdictions. All of the children and their adoptive parents live outside the Commonwealth. When a child born in Virginia is adopted in another jurisdiction, the Division of Vital Records of the Department of Health ("Department")[2] normally issues upon request a new birth certificate that includes the names of the adoptive parents. In these cases, however, either because each of these children was adopted by two parents of the same sex or because each set of adoptive parents is an unmarried couple, the Department refused to issue accurate birth certificates. The specifics of each child's dilemma, which are set forth below, were not disputed in the circuit court.

Katherine Anne Fisher Davenport and Cameron Frederic Fisher Davenport

Plaintiff Katherine Anne Fisher Davenport ("Katherine") was born in Arlington, Virginia, on March 26, 1990, and was issued a Virginia birth certificate at birth. Exh.1 to Plaintiffs' Motion for Summary Judgment ("Plaintiff's Motion") at 77, App. 54. Plaintiff Timothy W. Fisher is Katherine's biological father and has never relinquished his parental rights. *Id.* at 46, App. 50.

On October 8, 1990, Plaintiff W. Scott Davenport filed a petition to adopt Katherine in the Superior Court for the District of Columbia ("D.C. Superior Court"). The D.C. Superior Court entered a Decree of Adoption on April 29, 1992, "establishing the relationship of natural parent and natural child for all purposes between W. Scott

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[2] Correspondence in the record has at various times come from the Division of Vital Records and the Department of Health. Plaintiffs will not distinguish between the Department and its Division in this Brief.

Davenport" and Katherine. *Id.* at 79-80, App. 55-56. Defendants do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion, No. 6, App. 63.

On February 11, 1993, after Messrs. Fisher and Davenport provided a certified copy of the adoption decree and requested a birth certificate reflecting their joint parental status, the Registrar issued a birth certificate that listed only Mr. Davenport (as Katherine's father). Exh. 1 to Plaintiffs' Motion at 74, App. 53. An attorney for Messrs. Fisher and Davenport returned the incorrect certificate on March 11, 1993, and requested a new certificate listing both men as Katherine's parents. *Id.* at 73, App. 52. On March 22, 1993, the Department responded, claiming that the incorrect birth certificate had been prepared based on the Report of Adoption submitted in connection with the request. *Id* at 72, App. 51. On November 28, 1995, Mr. Fisher wrote the Department to request a new birth certificate that reflected the names of both of Katherine's parents. Mr. Fisher sent the Department documents, including the D.C. Superior Court's Order, demonstrating his relationship as Katherine's father. *Id.* at 29, App. 39. On August 28, 1996, the Department wrote Mr. Fisher, summarily denying his request.[3] As a result, Katherine had a birth certificate that does not include the name of her biological father, even though he retains custody of her and has not relinquished his parental rights.

Plaintiff Cameron Frederic Fisher Davenport ("Cameron") was born on May 18, 1992, in Arlington, Virginia, at which time he was issued a Virginia birth certificate. Exh. 3 to Plaintiffs' Motion at 3, App. 79. Mr. Fisher is Cameron's biological father. *Id.* at 7, App. 81. The D.C. Superior Court on August 6, 1993, entered a Decree of Adoption

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[3] The Department explained only that "Virginia birth certification permits the listing of only one father or [sic] one mother." *Id.* at 11, App. 32. The Department did not provide any authority for that conclusion.

conferring on Mr. Davenport parental rights and status with regard to Cameron. *Id.* at 5, App. 80. This adoption decree did not modify Mr. Fisher's rights as Cameron's biological father. Defendants do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion, No. 7, App. 63-64.

On February 19, 2000, Mr. Davenport wrote to the Department seeking a birth certificate that identified him as Cameron's father. Exh. 3 to Plaintiffs' Motion at 2, App. 78. On March 16, 2000, the D.C. Superior Court issued Amended Final Decrees of Adoption for both Katherine and Cameron. Exh. 1 to Plaintiffs' Motion at 12-17, App. 33-38. In each decree, the court found that the child had been in the "legal care, custody and control of the natural father," and that adoption by Mr. Davenport would be "for the best interests of the adoptee." *Id.* at 12-13, 15-16, App. 33-34, 36-37. The next day, the Department issued new birth certificates for Cameron and Katherine, again indicating on each that Mr. Davenport was the sole father and omitting Mr. Fisher's name, even though Mr. Fisher is the biological father of both children and they are both in his custody. *Id.* at 9, App. 31.

On April 27, 2000, Messrs. Fisher and Davenport again attempted to obtain birth certificates accurately reflecting their joint parental status. In a letter to the Commissioner, an attorney for Messrs. Fisher and Davenport requested that the Commonwealth provide full faith and credit to the D.C. Superior Court's decrees and issue new birth certificates bearing both fathers' names. *Id.* at 7-8, App. 29-30. On June

12, 2000, Defendants refused to comply with this request.[4] *Id.* at 3, App. 28; *see also* Exh. 2 to Plantiffs' Motion, No. 2, App. 60-61.

Hillary Anne Dalton-Moffit

Plaintiff Hillary Anne Dalton-Moffit ("Hillary") was born in Arlington, Virginia, on August 15, 1991, at which time she was issued a Virginia birth certificate. Exh. 4 to Plaintiffs' Motion at 5, App. 83. On January 14, 1993, upon the petition of Plaintiff Bruce H. Moffit, the D.C. Superior Court entered a Decree of Adoption conferring a parental relationship between Mr. Moffit and Hillary. *Id.* at 7, App. 84. On May 25, 1993, the Department issued a new birth certificate, identifying Hillary as "Hillary Anne Moffit," identifying Mr. Moffit as the father, and listing no mother. *Id.* at 16, App. 89.

Mr. Moffit and Mark M. Dalton filed in the D.C. Superior Court a joint adoption petition seeking formal recognition of Mr. Dalton's parental relationship with Hillary. On September 19, 1995, that court entered a Final Decree of Adoption "establishing the relationship of parents and child *for all purposes*" between Mr. Dalton and Mr. Moffit as adoptors and Hillary as the adoptee. *Id.* at 14-15, App. 87-88 (emphasis added). Defendants do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion, No. 8, App. 64.

On May 16, 1996, Mr. Dalton wrote to the Department, providing a certified copy of the adoption decree and seeking for Hillary a new birth certificate "listing *both* Mr.

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[4] Although Plaintiffs sought a new birth certificate, as authorized under Section 32.1-261(A) of the Virginia Code, the Registrar contended that "*amendments* to birth certificates must be petitioned for in a court of the Commonwealth of Virginia" and directed the Plaintiffs to contact the Assistant Attorney General with future questions. *Id.* at 3, App. 28. Provisions regarding amended birth certificates are not relevant to this proceeding. See n. 12, *infra*.

Moffit and [him]self as the parents." Exh. 4 to Plaintiffs' Motion at 12, App. 86 (emphasis in original). On August 28, 1996, the Department wrote Mr. Dalton denying his request.[5] *Id.* at 11, App. 85.

John Doe[6]

Plaintiff John Doe was born on February 27, 1999, in Falls Church, Virginia, at which time he was issued a Virginia birth certificate. Exh. 5 to Plaintiffs' Motion at 37, App. 104. On December 23, 1999, Plaintiffs Jean and Jane Doe adopted John Doe and an appropriate Order was entered in the Family Court of Dutchess County in the State of New York. *Id.* at 35, App. 103. Defendants do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion No. 9, App. 64.

The New York State Department of Health forwarded the Report of Adoption to the Virginia Department of Health on March 3, 2000. Exh. 5 to Plaintiffs' Motion at 39, App. 106. On October 26, 2000, Jane Doe wrote to the Department requesting a copy of John Doe's birth certificate. *Id.* at 38, App. 105. Jane Doe subsequently completed and returned the necessary forms. On April 2, 2001, the Department denied Jane Doe's request for a birth certificate reflecting both mothers' joint parental status.[7]

Between April 2001 and July 2001, the Department repeatedly confirmed that it would not issue a birth certificate bearing both Doe parents' names. *See id.* at 20-27,

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5 The Department explained only that "Virginia birth certification permits the listing of only one father or [sic] one mother." *Id.* The Department cited no authority to support this conclusion.

6 The Doe Plaintiffs' factual history is described using pseudonyms pursuant to the Protective Order entered by the Circuit Court on July 3, 2002.

7 The Department explained only that "Virginia birth certificate [sic] permits the listing of only one father or [sic] one mother." *Id.* at 28, App. 102. The Department cited no authority for this assertion.

App. 94-101. On November 28, 2001, the Does, through counsel, attempted to obtain a factually correct birth certificate by letter to the Department, citing the Full Faith and Credit Clause of the U.S. Constitution. *Id.* at 17-19, App. 91-93. On January 10, 2002, an Assistant Attorney General responded to the Does' request and cited Section 32.1-269(F) of the Virginia Code and Title 12, Sections 5-550-100 and 5-550-330 of the Virginia Administrative Code ("VAC") for the refusal to issue a new birth certificate. *Id.* at 43-44, App. 107-108.

V. Argument

Contrary to the assertions of the Circuit Court, Tr. at 4:16 – 5:6, App. 171-172, this case is not about gay marriage. It is not about whether Virginia must permit adoption by unmarried persons. *See,* Tr. at 5:19 – 7:5, App. 172-174. It is simply about whether the Commonwealth must abide by the constitutional mandate that it give full faith and credit to the judicial decrees of sister states and whether it must afford Plaintiffs the rights to which, under the Commonwealth's own statutes, those decrees entitle them.

There is no dispute in this case that the adoptive parents of each of the Plaintiff Children presented the Registrar with the necessary proof of valid adoption decrees of the courts of sister states. There is also no dispute that Virginia law provides that, when presented with such decrees, the Registrar is to issue a new birth certificate reflecting the adoption. Yet, the Defendants have refused to provide Plaintiff Children with accurate new birth certificates and the Circuit Court has upheld their refusal. The Circuit Court's decision fundamentally misinterprets constitutional and state law; it endorses a flagrant disregard of the requirements of Full Faith and Credit and of Section 32.1-261(A) of the Virginia Code. The Circuit Court upheld Defendants' actions even though, if its interpretations of Virginia law were valid, the refusals would violate the Equal Protection

Clause of the U.S. Constitution. This Court must reverse the Circuit Court's errors and order that Plaintiffs receive the relief they requested.

A. Under the Full Faith and Credit Clause, Article 4, Section 1 of the United States Constitution, and Section 8.01-389 of the Virginia Code, the Commonwealth Must Issue a New Birth Certificate When Presented with a Valid Order of Adoption from a Sister State Regardless of Any Policy Against Adoptions By Unmarried or Same Sex Couples

The core of the Circuit Court's ruling was its insistence that Virginia's "public policy" precluded it from ordering the Division of Vital Records to issue accurate birth certificates to the Plaintiffs. The Circuit Court explained the primary basis of its ruling as follows:

> [W]hat the Court is being asked to do in directing the registrar to change the birth certificates, in spite of the language that the Plaintiffs try to couch their argument in, is asking the Court to recognize a status that Virginia does not accord to its own citizens, and that is to allow a person to adopt a child who still has a parent with parental rights still in existence, and the person seeking to adopt the child is not the spouse of that natural parent. That simply cannot be done in Virginia. And regardless of how the Plaintiffs seek to term their argument that this is just enforcing a judgment, it is much more than that. It is asking this Court to do something which the public policy of Virginia just simply does not allow. Whether that is right or whether that is wrong, is not for this Court to determine. It is something that needs to be addressed by the legislature, if it is addressed at all.

Tr. at 27:6 – 28:2, App. 194-195. The Circuit Court was wrong. Virginia's "public policy" cannot legitimate Defendants' actions.

1. There Is No Public Policy Exception to the Requirement that Virginia to Provide Full Faith and Credit to the Judgments of Sister States

What the Circuit Court concluded it cannot do—recognize the adoption in another state by a person not the spouse of an existing parent when the existing parent retains

parental rights—is *precisely* what the Full Faith and Credit Clause, Article 4, Section 1 of the United States Constitution and Section 8.01-389 of the Virginia Code, require the Circuit Court to do. Contrary to the Circuit Court's conclusion, the inability of Virginia residents to adopt under such circumstances and the policy of the Commonwealth against such adoptions are irrelevant. This Court must act to correct this fundamental error.

Adoptions are judgments. As the courts of the Commonwealth have recognized, there can be no public policy basis for a failure to recognize the judgments of the courts of sister states. In *Coghill v. Boardwalk Regency Corporation,* 240 Va. 230, 396 S.E.2d 838 (1990), Virginia was asked to enforce a judgment based upon a gambling debt. Though this Court acknowledged that "[t]he public policy of Virginia with respect to the legal enforcement of gambling debts could scarcely be more forcefully expressed," it concluded, "[T]he federal constitutional mandate requires each state to give a foreign judgment at least the *res judicata* effect it would be accorded in the state in which it was rendered . . . '*even though the sister state's judgment reflects policies hostile to those of the forum state.*'" *Id.* at 232, 234-35, 396 S.E.2d at 839-40 (citations omitted)(emphasis in original). Thus, even though Virginia courts might not have *awarded* a judgment based on a gambling debt, the court had no choice but to *enforce* a judgment already awarded by a sister state.[8]

The Constitutional mandate that this Court recognized in *Coghill,* that foreign judgments must prevail over local policies, extends to all judgments, including ones involving domestic relations. In *Estin v. Estin,* 334 U.S. 541, 545-546 (1948), which

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[8] A State is, of course, entitled to determined whether the Court issuing the judgment had appropriate jurisdiction. *Id.* at 234, 396 S.E.2d at 340. On the undisputed facts, however, each order of adoption was issued by a court with such jurisdiction.

concerned marital status, the U.S. Supreme Court explained, "The Full Faith and Credit Clause . . . substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. . . . It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system . . . demanded it." *See also Williams v. North Carolina,* 317 U.S. 287 (1942). Adoption decrees cannot be distinguished in this regard. *See, e.g., Delaney v. First National Bank*, 386 P.2d 711 (N.M. 1963); *In re Morris' Estate v. Riley*, 133 P.2d 452 (Cal. Dist. Ct. App. 1943).[9]

The fundamental error of the Circuit Court discussion lies in its failure to distinguish between the enforcement of another state's laws and the recognition of another state's decrees and judgments. *See generally* Tr. at 9:13-13:20, App. 176-180. A state may indeed decline to enforce another state's *laws* that are contrary to the forum state's public policies. Thus, although this Court in *Coghill* properly enforced a *judgment* based on a gambling debt, the U.S. District Court for the Eastern District of Virginia properly declined to entertain a diversity lawsuit in Virginia based on a New Jersey

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[9] In *Doulgeris v. Bambacus Adm'r*, 203 Va. 670, 673 (1962), cited by Defendants below, this Court stated that the Commonwealth's recognition of foreign adoption decrees is based upon comity, not upon the Full Faith and Credit clause. *Doulgeris*, however, involved an adoption decree entered in a foreign nation, not another state. The discussion of sister state adoptions is, therefore, at most *dicta.* The difference between sister states and foreign nations is critical and fundamental. As the Supreme Court of Pennsylvania has recognized, "Although we must give full faith and credit under the mandate of the United States Constitution to a decree of adoption by a court of a sister state if such court had jurisdiction over the parties and the subject matter, judicial decrees rendered in foreign countries depend for recognition . . . upon comity." *In re Christoff,* 411 Pa. 419, 192 A.2d 797 (1963) (citations omitted). The Pennsylvania decision is confirmed by settled U.S. Supreme Court precedent. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998). To the extent that this Court considers this *dicta* of continuing relevance, the Court should reconsider it in light of the U.S. Supreme Court's subsequent clarifications.

gambling debt. *Resorts International Hotel, Inc. v. Agresta,* 569 F.Supp. 24 (E.D. Va. 1983), *aff'd,* 725 F.2d 676 (4th Cir.1984). Similarly, (despite the Circuit Court's concerns, Tr. 12:5 – 13:1, App. 179-180) this Court has recognized that because a marriage contract is not a decree, Virginia may decline to recognize an out-of-state marriage that is contrary to public policy. *Toler v. Oakwood Smokeless Coal Corp.* 173 Va. 425, 435, 4 S.E. 2d 364, 368 (1939).[10]

The Circuit Court failed to recognize that these public policy exceptions to the enforcement of another state's laws are just not relevant here. This Court has explained, "[C]redit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded; . . . considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it." *Wallihan v. Hughes,* 196 Va. 117, 128, 82 S.E.2d 553, 560 (Va. 1954), *citing Milwaukee County v. White Co.,* 296 U.S. 268, 277 (1935) . As the U.S. Supreme Court has succinctly stated, the distinction is critical:

> A court may be guided by the forum State's "public policy" in determining the *law* applicable to a controversy. But our decisions support no roving "public policy exception" to the full faith and credit due *judgments*.

Baker, 522 U.S. at 233 (citations omitted) (emphasis in original). Thus, even if (contrary to Plaintiffs' argument below) Virginia regulations permit only the listing of both a

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[10] A state's ability to refuse to recognize a marriage or civil union between persons of the same sex is also reflected in the "Defense of Marriage Act," *see* 28 U.S.C. § 1738C, although many members of Congress noted that the legislation was superfluous because marriages were not judgments. *See* H.R. Conf. Rep. No. 104-664, at 37 (1996).

mother and father on a new birth certificate, the Commonwealth cannot apply those regulations to limit the legal effect under Virginia law of an adoption decree from another state – as Plaintiffs have done.[11]

2. Plaintiffs' Full Faith and Credit Claim Seeks Only the Legal Rights to Which an Out-of State Adoption Decree Entitles Plaintiffs Under Virginia Law.

Before the Circuit Court, Defendants argued:

> [I]f the Plaintiffs' motion is granted and a birth certificate is issued with two fathers or two mothers, any subsequent application from an unmarried Virginia couple would have to have the same consideration given.
>
> The adoption laws would be affected immediately on this basis.

Tr. 18:22 – 19:4, App. 185-186. Despite the fact that Virginia law, which would not be affected by the issuance of new birth certificates to Plaintiffs, prevents the existence of any unmarried Virginia adoptive couples who could make application, the Circuit Court ruled:

> [W]hat the Court is being asked to do . . . is . . . to allow a person to adopt a child who still has a parent with parental rights still in existence, and the person seeking to adopt the child is not the spouse of that natural parent. That simply cannot be done in Virginia.
>
> And regardless of how the Plaintiffs seek to term their argument that this is just enforcing a judgment, it is much more than that.

Tr. 27:6-21, App. 194.

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[11] Faced with a similar statute and a refusal by state authorities to issue new birth certificates identifying both same-sex adoptive parents, a Mississippi court has concluded that the refusal violated both the statute and the Full Faith and Credit requirement. A copy of the order and opinion in *Perdue v. Mississippi Board of Health* was provided to the Circuit Court as Exh. 7 to Plaintiffs' Motion, App. 119-125.

Despite these statements, Virginia has not been asked to abandon its laws or adopt any other state's statutes, but rather only to recognize the *judgments* of other states—that is, the Plaintiffs' decrees of adoption. Defendants will undoubtedly argue to this Court, as they did in their Brief in Opposition to Plaintiff's Petition for Appeal, that Plaintiffs are seeking greater rights than children adopted within the Commonwealth because a child adopted within the Commonwealth would not be able to change his or her birth certificate to name two parents of the same sex. Indeed, Defendants may again argue that granting the birth certificates to Plaintiffs under such circumstances would violate equal protection. To the contrary, if Plaintiffs prevail, Plaintiffs will simply vindicate the exact same right as any child adopted in Virginia – the right to a new, accurate birth certificate. Plaintiffs cannot have greater rights than children adopted in the Commonwealth by same-sex parents, because no such children exist. Defendants' specious reasoning could be extended to deny to Plaintiffs *any* of the incidents of adoption (above and beyond birth certificates), and actually underscores the violation of the Full Faith and Credit Clause at issue in this case.

The logical extension of Defendants' argument is that anytime a sister state provides a right broader than that granted by the Commonwealth, the Commonwealth need not recognize a judgment based on that right. For example, a couple in Virginia can receive a no-fault divorce only after a one-year waiting period. Va. Code § 20-91(A)(9)(a). Certainly this law reflects a public policy discouraging no-fault divorce. Yet, suppose that a resident of another state legally obtained a no-fault divorce in that state, with no waiting period, and subsequently sought to marry a Virginia resident in Virginia. Under Defendants' theory, the Commonwealth may not permit the marriage,

because a Virginia resident could not obtain such a no-fault divorce and subsequently marry in Virginia.

Of course, this Court would never condone such a result, and, of course, Defendants' theory is baseless. There is no issue of inequitable treatment in either case. In the hypothetical no fault divorce example, the Virginia resident is not similarly situated to the nonresident – the nonresident has a divorce, the Virginia resident does not. In this case, Plaintiff Children are not similarly situated to Virginia Children – Plaintiff Children have valid adoption decrees by unmarried adoptive parents, no Virginia children have such decrees from Virginia courts. Similarly, Plaintiff Parents are not similarly situated to heterosexual unmarried Virginia couples that wish to adopt – Defendants have legal adoption decrees, the Virginia couples do not and cannot obtain such decrees. The Full Faith and Credit Clause compels recognition of the divorce, *Williams v. North Carolina*, 317 U.S. 287 (1942); it also compels recognition of the adoptions here.

3. Conclusion

The Circuit Court's conclusion that it cannot recognize the Plaintiffs' adoptions is directly contrary to the requirements of the Full Faith and Credit Clause, Article 4, Section 1 of the United States Constitution, and Section 8.01-389 of the Virginia Code. This Court should reverse that conclusion and give those adoptions due recognition under Commonwealth law.

B. Virginia Law Does Not Prohibit the Issuance to Plaintiffs of New Birth Certificates Bearing the Name of Both Adoptive Parents

The Circuit Court also ruled:

> I agree with the Defendants' argument that under current Virginia law, birth certificates can only list the name of a mother and a father. Birth certificates cannot list the names of two mothers or the names of two fathers. It just cannot

> be done. So, as a technical matter in asking the Court to issue a writ of mandamus requiring the registrar to enter the name of two fathers, the Court is being asked to tell a state official to do something that the law does not allow to be done. So for that reason the motion for summary judgment has to be granted.

Tr. at 26:17 – 27:4, App. 193-194. It is unclear whether the court, in so ruling, found this result compelled by the statute or the Department's regulation. In either case, however, the ruling is without legal foundation. This Court should reverse this misguided interpretation of Virginia law and thereby avoid the constitutional issues that are discussed in sections V.A. and V.C. of this Brief.

1. There Is No Statutory Basis for Concluding that the Virginia Code Prohibits the Issuance to Plaintiffs of Birth Certificates Bearing the Names of Both Adoptive Parents

The Virginia Code provides clear direction for generating new birth certificates when a Virginia-born child is lawfully adopted in another state:

> The State Registrar shall establish a new certificate of birth for a person born in this Commonwealth upon receipt of . . . a report of adoption prepared and filed in accordance with the laws of another state or foreign country, or a certified copy of the decree of adoption together with the information necessary to identify the original certificate of birth and to establish a new certificate of birth . . .

Va. Code § 32.1-261(A) (emphasis added).[12]

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[12] New birth certificates are also to be issued when a person is legitimated or paternity is established. Va. Code § 32.1-261(A). A new birth certificate "shall be substituted for the original certificate of birth. Thereafter, the original certificate and the evidence of adoption, paternity or legitimation shall be sealed and filed and not be subject to inspection . . ." Va. Code § 32.1-261(B).

The Code also provides for an "amended" birth certificate in certain defined circumstances. Va. Code § 32.1-269. Defendants have attempted to conflate "new" and "amended" birth certificates, but the statute does not admit of such a reading. "New" and "amended" certificates are generated for different reasons. *Compare* Va.

Because each set of parents in this case has submitted either a report of adoption or a certified copy of an adoption decree along with any other information requested by the Registrar, and because Defendants have never alleged any deficiencies to the decrees of adoption, a new birth certificate must be furnished for each Plaintiff Child. At a minimum, however, it is apparent that the statute includes no requirement regarding the listing of "a mother and a father." The Circuit Court's decision is in conflict with the unambiguous statutory terms.

Nonetheless, the Circuit Court indicated it "agreed" with Defendants' arguments that new birth certificates issued following an adoption must list a mother and father. The "logic" of these arguments, as presented to this Court in the Brief in Opposition to Plaintiffs' Petition for Appeal, is that because under Section 32.1-261(A) the new certificate is to be "substituted" for the original certificate, the former must be on the same form as the latter. Inasmuch as Title 12, Section 5-550-100(1) of the VAC requires the identification of the mother and father, if married to the mother, on the original birth certificate, Defendants reason that both must so appear on new certificates following adoptions.

Defendants' characterization of this as logical does not make it so. To allow one document, item, commodity, or person to substitute for another is simply to allow it to serve *in the place* of the other. Black's Law Dictionary defines the verb "substitute" as

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Code § 32.1-261 (new certificates) *with* Va. Code § 32.1-269 (amended certificates). Further, "new" certificates are substituted for the old certificate, and the old certificate is sealed, Va. Code § 32.1-261(B), while an "amended" certificate is created by making changes on the face of the old certificate and marking it "amended." Va. Code § 32.1-269(B). *Compare also* 12 VAC 5-550-330 *with* 12 VAC 5-550-460.

follows: "To put in the place of another person or thing; to exchange." Allowing substitution does not in any manner imply that the document, item, commodity, or person to be substituted must be of an identical form. If it did, then the Virginia legislature would have consistently been misusing the term: the Commonwealth's legislature has in many instances determined that one thing may substitute for another without requiring that the new thing take the same form as the original. For example, letters of credit "may substitute" as security devices for surety bonds or securities in certain transactions, Va. Code § 6.1-32; an "appropriate motion" is the "substitute" for the abolished writ of scire facias, Va. Code § 8.01-24; eight hours of employment-related education and training "may substitute" for work experience employment under the Virginia Initiative for Employment Not Welfare, Va. Code § 63.2-608; insurance companies "may substitute" different language for the statutorily required language, Va. Code § 38.2-3503; and the Public Service Commission "may substitute" just and reasonable practices for those of a public utility it finds unjust and unreasonable, Va. Code § 56-247. In none of these cases is there any necessary qualitative identity between the original and the substitute. To the contrary, the substitute invariably departs in some manner from the form of that for which it substitutes. Defendants contended at oral argument in the Circuit Court (and, despite Plaintiffs' identification of the error in their Petition for Appeal, repeated the contention in their Opposition to the Petition) that the examples cited above are inapplicable because they all involved the use of "substitute" as noun, not a verb, Tr. at 22:21-24, App. 189. The error of that contention is patent. There is nothing in the statutory language from which one can infer a requirement that the new birth certificate look identical to the initial certificate.

This is not an instance where this Court should defer to an agency's interpretation. As a general rule, agency decisions are accorded little deference when the question is one of statutory interpretation. *See Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 468 S.E. 2d 905 (1996); *7-Eleven, Inc. v. Dept. of Environ. Quality*, 42 Va. App. 65, 590 S.E.2d 84 (Ct. App. Va. December 30, 2003); *Holtzman Oil. Corp. v. Commonwealth*, 32 Va. App. 532, 529 S.E. 2d 333 (Ct. App. Va. 2000). Although deference may be due when the issue concerns the application of the agency's special discretion and expertise, *see Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E. 2d 1 (Ct. App. Va. 1988), whether the agency administers the statute is not determinative. *7-Eleven,* 42 Va. App. 65, 590 S.E.2d 84 (no deference accorded regarding definition of cost in Petroleum Storage Tank Fund). There is no reason in this case to create an exception to the general rule. Nothing about the interpretation of section 32.1-261 entails specialized expertise.

2. The Virginia Administrative Code Cannot Properly Be Read to Prohibit the Issuance to Plaintiffs of New Birth Certificates Bearing the Names of Both Adoptive Parents

The plain language of the VAC also compels the Registrar to issue accurate birth certificates to Plaintiffs. Title 12, Section 5-550-330 of the VAC states that new birth certificates created because of adoptions must include "[t]he names and personal particulars of the adoptive parents." Section 5-550-330 makes no reference to a "mother and a father." There is, again, no basis for the Circuit Court's ruling that such a requirement exists in Virginia law.

Neither could such a basis be found in Defendants' explanations of their refusal to issue new birth certificates to Plaintiffs. Defendants have asserted that the denial of new, accurate birth certificates to Plaintiffs is compelled by two other portions of the VAC.

The first is Title 12, Section 5-550-100, requiring that an original birth certificate contain the name of the mother and the father. *See, e.g.,* Letter of Howard Casway to Rebecca Glenberg, January 10, 2002, App. 107-108. The section, however, applies on its face only to original certificates, not new certificates.[13]

The second is a portion of Title 12, Section 5-550-330, specifying that a certificate of birth prepared after adoption be on a form that is the same as the form at the time of birth.[14] *Id.* Defendants' literal interpretation of this regulation is contradicted by their need (and, in some cases, practice) to stray from an inflexible use of the form "in use" in order to implement their policies and to comply with certain state laws. For example, even though neither Section 5-550-100 nor the form used for birth certificates provides for any exceptions to the requirement that the mother be identified, Defendants readily issue new birth certificates – as they have to some Plaintiffs – that identify only the father. *See, e.g.,* Exh. 1 to Plaintiffs' Motion at 9, App. 31, and Exh. 4 to Plaintiffs' Motion at 16, App. 89. Also, even though Section 5-550-100 and the form provide for the identification of the father "if married to the mother," Defendants cannot fulfill their statutory responsibilities without issuing birth certificates that include fathers that are not married to the mother: Virginia law allows the father to be identified after a

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[13] Section 5-550-100(1) requires the identification of the mother and father, if married to the mother, and applies only to Certificates of Live Birth, for "current registrations," *i.e.*, those that are recorded contemporaneously with birth. Section 5-550-100(2) applies to Delayed Certificates of Birth, for "delayed registrations." New certificates, prepared after adoption, legitimation, or paternity determinations, fall into a third category – governed specifically by Section 5-550-330 – which does not specify the name of the mother or father, but requires only the names of the "adoptive parents."

[14] Defendants assert that the form that is used has space for only the name of a mother and a father. *See* Exh. 2 to Plaintiff's Motion at 4, App. 62; Tr. 21:19-23, App. 188.

determination of paternity, Va. Code § 32.1-261, and does not require amendment of the birth certificate if a marriage is nullified, Va. Code § 32.1-257(D).

Apparently, therefore, Defendants do not feel obligated to include all of the information required by the form and regulations, such as the name of a mother, but do consider themselves precluded from adding additional information, such as the name of a second mother or father.[15] This distinction is unsupportable. There is nothing in Section 5-550-330 that precludes the inclusion in the birth certificate of information – such as the name of a second mother or father – in addition to that specified on the form.

3. Conclusion

For the reasons discussed above, there is no statutory or regulatory basis for the Circuit Court's decision that "under current Virginia law, birth certificates can only list the name of a mother and a father." This Court should therefore reject the Circuit Court's interpretation of the statute and regulations in order to avoid the constitutional concerns presented in sections V.A and V.C of this Petition. If this Court were nonetheless to conclude that it is appropriate to defer to Defendants' interpretation of section 32.1-261 or the regulations, then, as discussed above and below, that statute and the regulations issued thereunder, so interpreted, would be in violation of the Full Faith and Credit and the Equal Protection Clauses of the U.S. Constitution.

C. As Interpreted by the Circuit Court, Virginia Law Violates the Equal Protection Clause, Either on its Face or as Applied

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[15] This preference for less information rather than more is especially peculiar in light of 12 VAC 5-550-330, which requires the inclusion of "such other information necessary to complete the certificate."

Although the Circuit Court did not directly address Plaintiffs' equal protection claims, its ruling inescapably implicated the Equal Protection Clause. The Circuit Court first stated its interpretation of current Virginia law as holding that "birth certificates can only list the name of a mother and a father." Tr. at 26:18-20, App. 193. Later, the Circuit Court observed that, in its view, Virginia law does not "allow a person to adopt a child who still has a parent with parental rights still in existence, and the person seeking to adopt the child is not the spouse of that natural parent. That simply cannot be done in Virginia." *Id.* at 27:12-17, App. 194 (emphasis added). If the Circuit Court correctly interpreted Virginia law, then such law is squarely in conflict with the Equal Protection Clause of the U.S. Constitution.

1. The Circuit Court's Ruling Endorsed Defendants' Assignment of Plaintiffs to a Class Distinct From and Treatment of Plaintiffs Differently Than Another Class.

Defendants admitted during discovery that they would refuse to issue a new, accurate birth certificate to a child adopted by a same-sex couple when, all other circumstances being equal, they would issue a new, accurate birth certificate to a child adopted by a married opposite-sex couple. Exh. 6 to Plaintiff's Motion, No. 17, App. 115. Moreover, although they claim that they also would refuse to issue a new, accurate birth certificate to a child adopted by an *unmarried* opposite-sex couple, Defendants do not obtain (and do not as a regular practice seek) information about the marital status of opposite-sex adoptive parents when issuing new birth certificates. Exh. 6 to Plaintiffs' Motion, No. 2. App. 111. In other words, Defendants will not issue new, accurate birth certificates to children adopted by same-sex parents even though they will issue them to children adopted by opposite-sex parents (whether married or unmarried).

Regardless of the basis upon which they rest their refusal to issue these new birth certificates, it is clear that Defendants are assigning the Plaintiff Children to a class distinct from another class and treating the Plaintiff Children differently than that other class. In particular, if the refusal is based on the fact that their adoptive parents are same-sex, then Defendants are treating the Plaintiff Children differently than the class of children adopted by opposite-sex parents. If the refusal is based on the fact that their adoptive parents are unmarried, then Defendants are treating the Plaintiff Children differently than the class of children adopted by married couples. For the same reasons, Defendants are assigning the adult Plaintiffs to a class distinct from another class and treating the adult Plaintiffs differently than that other class – that is, opposite-sex couples or married couples. Denying new, accurate birth certificates to any of these classes – whether it be same-sex couples, unmarried couples, or the children they adopt – is not rationally related to any valid state objective and therefore violates the Equal Protection Clause.[16]

2. There is No Rational Relationship Between the Discriminating Treatment Plaintiffs are Receiving and any Valid State Objective.

Differential treatment of classes is permissible only if rationally related to a valid state objective. As the U.S. Supreme Court has stated:

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[16] Although Plaintiffs have a right to accurate birth certificates under Virginia's statutes, the existence of a statutory right is not necessary to establish an Equal Protection violation. In order to establish a violation of the Equal Protection Clause, Plaintiff Children only have to show that the Commonwealth is treating them differently from children adopted by opposite-sex married or unmarried couples or from opposite-sex married or unmarried couples for no rationally related public policy reason. *See Eisenstadt*, 405 U.S. at 447. They have done this.

> The Equal Protection Clause . . . [denies a State] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Eisenstadt v. Baird, 405 U.S. 438, 447 (1972), *quoting Reed v. Reed*, 404 U.S. 71, 75-76 (1971). This test is applied with particular force when personal relationships are at the heart of the differential treatment: the Supreme Court is "most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring).

During the course of this litigation, Defendants have put forth a litany of purported state objectives that they claim are furthered by their refusal to issue new, accurate birth certificates to Plaintiffs. The list includes the following:

(1) the Commonwealth's policy against same-sex marriage;[17]
(2) the Commonwealth's prohibition of adoptions by unmarried couples;[18]
(3) the maintenance of a uniform vital records system;[19]
(3) shielding the Commonwealth's citizens from theoretical objections to being identified as a parent;[20]
(4) avoidance of theoretical costs of revising their database;[21] and
(5) the need to perpetuate the legal fiction established by adoptions.[22]

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17 *See* Exh. 6 to Plaintiffs' Motion, No. 1, App. 110-111.

18 *Id.*

19 *See* Tr. 19:9-14, App. 186; Exh. 10 to Defendants' Motion, App. 166.

20 *See* Exh. 10 to Defendants' Motion, App. 166.

21 *Id.*

22 Defendants have raised this alleged public policy in, for example, their Opposition to Plaintiff's Petition for Appeal.

None of these purported objectives, nor any that one might rationally propose, bears any rational relationship to the differential treatment that Defendants have afforded to Plaintiffs.

a. The Commonwealth's Policy Against Same-Sex Marriage is Not Rationally Related to the Discriminatory Treatment.[23]

There is no rational relationship between the issuance of new, accurate birth certificates and the Commonwealth's policy of prohibition and non-recognition of same-sex marriages. The issuance of new, accurate birth certificates to Plaintiff Children will neither recognize nor confer upon Plaintiff Parents marital status or any equivalent thereof. Plaintiff Parents have not even claimed the existence of any such status to be recognized or not recognized. The applications for new, accurate birth certificates did not indicate the existence of a same-sex marriage or union and did not involve a request for any rights that might inhere in such a marriage or union. Issuing new, accurate birth certificates will merely acknowledge the parent-child relationship already decreed by other jurisdictions.

Put another way, the only relationship reflected on a birth certificate is the parent-child relationship, not the parent-parent relationship.[24] The parents are treated as individuals, and the birth certificate reflects each parent's individual relationship to the

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[23] It is worth noting that this purported state objective applies only to children adopted by same-sex parents, not to children adopted by opposite-sex unmarried parents.

[24] Even under the Department's regulations, unmarried parents would appear on birth certificates following a determination of paternity, as required by Va. Code § 32.1-261(A), following a divorce, or following a determination that a marriage is null and void, as discussed *infra*.

child. The relationship between the parents is irrelevant for this purpose. It bears repeating that the existence of the parent-child relationship already has been established by another jurisdiction.

The Commonwealth's own statutes acknowledge the lack of any rational nexus between the information contained on a birth certificate and the state's approval or recognition of the marriage: Section 32.1-257(D) of the Virginia Code provides that "Children born of marriages . . . deemed null or void . . . shall nevertheless be legitimate and the birth certificate . . . shall contain full information concerning the father." In other words, the Commonwealth's own statutes require the identification of both parents even in circumstances where the Commonwealth's policy disapproves of the relationship between the parents. The Commonwealth cannot simultaneously claim that a rational relationship exists in one instance when, by statute, it expressly rejects that alleged relationship in another.

b. The Commonwealth's Prohibition of Adoption by Unmarried Couples Is Not Rationally Related to the Discriminatory Treatment.

The Commonwealth's prohibition of adoption by unmarried couples would not be impeded if Defendants were to issue the requested new, accurate birth certificates to Plaintiffs. The Commonwealth's statutes would not be affected; its power to preclude adoption by unmarried couples in Virginia would remain in force. Conversely, the Commonwealth's power over out-of-state adoptions would also be unaffected. The Commonwealth is powerless to disallow adoptions that have been granted or will be granted elsewhere and would remain so.

In other words, the Commonwealth's control over adoptions is just not implicated by this proceeding. Plaintiffs are not seeking adoptions in Virginia; they already have

adoptions. They are simply seeking birth certificates that reflect the parent-child relationship established by the adoption orders of other jurisdictions. Issuing these birth certificates will not in any way obligate any Virginia courts in the future to decree adoptions in a manner inconsistent with the existing law of the Commonwealth.

If Defendants intend to suggest by offering this public policy objective that the issuance of new, accurate birth certificates in this case would be contrary to Commonwealth policy because the mere act of officially *recognizing* such existing adoptions is contrary to Virginia's policy against adoptions by unmarried couples, then the public policy is simply impermissible.[25] As discussed above, the Full Faith and Credit Clause *mandates* that Virginia recognize the validity of adoption decrees of other states; the Commonwealth cannot cite its reluctance to recognize that validity, contrary to the constitutional mandate, as a valid state objective that justifies the discriminatory treatment of a class.

c. The Maintenance of a Uniform Vital Records System is Not Rationally Related to the Discriminatory Treatment

There is no rational relationship between the differential treatment afforded to Plaintiffs and Defendants' allegation that issuing new, accurate birth certificates to Plaintiffs would interfere with the Commonwealth's interest in the maintenance of a uniform vital records system by "inevitably" causing confusion and uncertainty. Exh. 10

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[25] It is also inconsistent with Defendants' practice, which makes no effort to determine the marital status of out-of-state opposite-sex adoptive parents seeking new birth certificates, or with Virginia's statutes, which draw an express distinction between a child's right to an accurate birth certificate and the Commonwealth's policy regarding the parents' union. *See* Va. Code § 32.1-257(D) (providing for full parental information on birth certificates of children born of marriages prohibited by law, deemed null or void, or dissolved by a court).

Defendants' Motion, App. 166. First, Defendants have offered no factual support, other than the Registrar's speculation, for their assertion that individuals, governments, and businesses receiving birth certificates *may* be confused about the validity of a certificate listing two parents instead of a mother and a father. Even if this were true, however, it still could not justify the differential treatment unless the Commonwealth applied this policy consistently. In order to do so, the Registrar of Vital Records could *never* change or update one of its forms. This certainly has not been the case. *Compare* Exh. 7 to Defendants' Motion (App. 159) *with* Exh. 9 to Defendants' Motion (App. 163).

Perhaps more importantly, logic would suggest that the Commonwealth's interests are best served by a vital records system that accurately reflects the existing parental relationships of children born in Virginia. If this were not the case, there would be no reason for the Registrar to issue new, accurate birth certificates to children adopted by married opposite-sex couples.

Neither is there any rational relationship between Defendants' refusal to issue new, accurate birth certificates to Plaintiffs and a need to maintain records relating to the circumstances surrounding a child's actual birth. The "original" certificate is not destroyed but rather sealed from public inspection; the Registrar can continue to inspect the sealed "original" for any valid purpose. *See* Va. Code § 32.1-261(B); *see also* Va. Code § 32.1-252(A)(7).

d. None of the Defendants' Other Proffered Justifications are Rationally Related to the Discriminatory Treatment.

There is no rational relationship between the differential treatment afforded to Plaintiffs and the possibility that some citizens of the Commonwealth may object to being listed as a parent instead of as a mother or a father. First, Defendants offer no basis

for this assertion other than a grossly deficient affidavit from the Registrar that is utterly devoid of factual support. Exh. 10 to Defendants Motion, App. 164-167. Defendant Little-Bowser does not identify any factual basis for her assertion that "many" citizens "would" voice objection, *id.* at ¶ 3c, and there is no indication that she possesses the necessary expertise to testify regarding her predictions of how citizens might react under hypothetical circumstances.

More importantly, even if these deficiencies were overlooked and Defendants' proffered justification deemed valid, a rational relationship would still be missing. Defendants do not seek any remedy that would require that all birth certificates list only "parents" and not "mothers" or "fathers." Plaintiffs seek only that an option exist whereby a birth certificate *could*, in appropriate circumstances, list two "parents," two "mothers," or two "fathers." Opposite-sex parents and their children (whether natural or adopted) need never be affected.

There is also no rational relationship between Defendants' desire to avoid the possibility that they might incur certain unspecified costs related to Plaintiffs' request and the differential treatment they have afforded Plaintiffs. This argument again is based on the Registrar's deficient affidavit. *Id.* That affidavit does not provide (1) any evidence that she possesses the necessary qualifications to estimate software costs; (2) any indication of the modifications that would be required to add one additional field to the database or to add one additional variable to two existing fields; (3) an actual cost estimate; or (4) the assumptions underlying a cost estimate. *See id.* Furthermore, there is no reason why an adequate remedy to Plaintiffs would require Defendants to alter any of their past records or change the way they handle the vast majority of their new records.

Accordingly, there is not competent evidence that financial costs that might be would be anything other than *de minimis*.[26]

Defendants' contention that an adoption reflects the legal fiction that the child's adoptive parents are his natural mother and father and that this purpose is unfulfilled by a birth certificate indicating the biological impossibility of two male or two female parents also cannot withstand scrutiny The legal fiction that Defendants postulate is just that – a legal fiction. A legal fiction exists to create a result, and it has the same operative legal effect regardless of whether a casual observer can determine that it is a fiction. The only impact of biological impossibility would be nonlegal – i.e., it would enhance the ability of the casual observer to recognize that any biological implications are a fiction. That recognition, however, can arise from many factors other than the presence of same-sex parents. For example, the age of elderly adoptive parents or the differing races of the parents and the child may, on the face of a birth certificate, belie the legal fiction. Yet no one would argue that age or race could justify a refusal to issue new birth certificates.

Indeed, Defendants' own practices refute any claim that their refusal to issue accurate new birth certificates to children adopted by same-sex or unmarried parents advances a fiction that the adoptive parents are the birth parents. Defendants issue new birth certificates naming only the father, and have done so in this case. Even though it is obvious to any observer that a man is not capable of giving birth to an infant, Defendants continue to issue these birth certificates, undeterred by biological impossibility.

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[26] It also offends established notions of equality that Defendants would cite cost savings – of a hypothetical, unspecified amount at that – as a basis for depriving one class of citizens of rights readily afforded to another class.

e. Conclusion

Despite ample opportunity, Defendants have been unable to articulate a valid state objective that is rationally related to the differential treatment they have afforded to Plaintiffs. Should this Court, in an effort to be comprehensive, endeavor to identify a valid state objective on its own, it must conclude that none exists.

For example, if Defendants' objective is to disapprove of raising children outside of the "traditional" married family, then there is no rational basis for treating Plaintiffs differently from single adoptive parents and their children, and Defendants' policy is impermissibly underinclusive. *See Eisenstadt v. Baird*, 405 U.S. at 454. Similarly, if Defendants' objective is to disapprove of the personal relationship between the adoptive couple based on an inference of extramarital sexual conduct, that objective also fails to withstand scrutiny. First, there is no rational basis for concluding that same-sex couples are more likely to engage in extramarital sexual relations then their opposite-sex counterparts. Second, there is no rational basis for distinguishing concerns about extramarital sexual conduct between unmarried persons and adulterous extramarital conduct by married persons.

Ultimately, Defendants' refusal to issue new, accurate birth certificates to Plaintiffs is not rationally related to the advancement of any valid state objective. Because the Circuit Court nevertheless endorsed Defendants' policies and practices, its ruling is in conflict with the Equal Protection Clause.

VI. Conclusion

For the reasons stated above, Plaintiffs respectfully request this Court reverse the decisions of the Circuit Court and direct it to grant Summary Judgment for Plaintiffs.

Respectfully submitted,

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Dated: October 25, 2004

RULE 5:26 CERTIFICATE

I, Steven J. Tave, hereby certify that on October 25, 2004, the foregoing Brief of Appellants was mailed, postage prepaid, by certified mail to the Clerk of the Supreme Court of Virginia. I further certify that on the 25th day of October, 2004, three true and correct copies were served by first class mail, in a properly sealed box, on counsel for appellees as follows.

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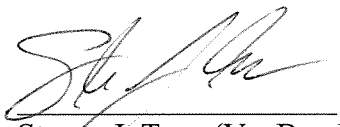

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