UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, et al.,

Plaintiff,

v

Case No. 2:12-cv-10285-BAF-MJH
Hon. Bernard A. Friedman

RICHARD SNYDER, et al.,

Defendants.
_____/

DEFENDANT BROWN'S RESPONSE BRIEF IN SUPPORT OF SUMMARY JUDGMENT FOR PLAINTIFFS

QUESTIONS PRESENTED:

Does the Michigan Marriage Amendment violate the Fourteenth Amendment to the United States Constitution where it infringes upon the fundamental right of same-sex couples to marry?

Does the Michigan Marriage Amendment violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution where it irrationally disadvantages homosexuals for invidious reasons?

Plaintiffs Answer: Yes

Defendant Brown Answers: Yes

State Defendants Answer: No

MOST APPROPRIATE AUTHORITIES

United States v. Windsor, 133 S.Ct. 2675 (2013).

Lawrence v. Texas, 539 U.S. 558 (2003).

Romer v. Evans, 517 U.S. 620 (1996).

Hicks v. Miranda, 422 U.S. 332 (1975).

I. Introduction

Defendant Brown reiterates her support of Plaintiffs' Motion for Summary Judgment. For the reasons set out below and in Defendant Brown's previously filed Brief in Support of Plaintiffs, the State Defendants' Motion for Summary Judgment should be denied.

II. Defendant Brown Opposes the State Defendants' Motion for Summary Judgment

A. The Regulation of Marriage Is Not Purely a Matter of State Law

The State Defendants attempt to convince this Court that the definition of marriage "is entirely a creature of state law." State Def. Br. at 9. This, of course, is untrue. While marriage is generally "treated as being within the authority and realm of the separate States," *United States v. Windsor,* 133 S.Ct. 2675, 2690 (2013), "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id.* at 2691 (citing *Loving v. Virginia,* 388 US 1 (1967). This is because marriage is "one of the basic civil rights of man, fundamental to our very existence and survival." *Loving,* 388 US at 12.

While the *Windsor* court certainly discussed states' rights, it did not indicate that states have unfettered authority to trample constitutional rights. It did not hold that states' rights concerns determine constitutional challenges

to laws concerning marriage. To the contrary, *Windsor* was not a decision rooted in federalism. *Windsor, supra* at 2692.

The State has authority to define marriage only within constitutional limitations. This Court is not required to turn a blind eye to constitutional violations on the basis of states' rights.

B. *Baker v. Nelson* Does Not Control the Outcome of This Case

In *Baker v. Nelson,* 409 U.S. 810 (1971), the Supreme Court summarily dismissed a challenge to a ruling of the Minnesota Supreme Court that a same sex marriage ban did not violate the Fourteenth Amendment. The Supreme Court merely stated, without briefs or oral argument, that the appeal was "dismissed for want of a substantial federal question."

A summary dismissal for want of a substantial federal question "remains a decision on the merits of the precise questions presented except when doctrinal developments indicate otherwise." *Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (internal quotes omitted). The State Defendants argue that *Baker* controls the outcome of this case.

In the four decades since *Baker* was decided, there have been significant doctrinal shifts which indicate that *Baker* is not dispositive of the case currently before this Court. Most notably, those doctrinal shifts are

demonstrated by *Windsor, Lawrence v. Texas,* 539 U.S. 558 (2003), and *Romer v. Evans,* 517 U.S. 620 (1996).

At the time *Baker* was decided, states could constitutionally enact laws criminalizing consensual homosexual sodomy. *See Bowers v. Hardwick,* 478 U.S. 558, 574 (2003)(overturned by *Lawrence, supra*). At the time *Baker* was decided, it was not clear that states could not constitutionally enact laws merely to harm homosexuals. *See Windsor, supra; Romer, supra.* Moreover, when *Baker* was decided, equal protection jurisprudence was so insufficiently developed that intermediate scrutiny did not even exist and illegitimacy and gender based classifications were not quasi-suspect. *See Windsor v. United States,* 699 F.3d 169, (2012). Clearly, there has been considerable doctrinal development of equal protection jurisprudence.

Furthermore, a summary dismissal like *Baker* is binding only "on the precise issues presented and necessarily decided." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977)(emphasis added). Thus, after *Baker,* courts were not free to declare Minnesota's law prohibiting same sex marriage unconstitutional. However, it does not follow that every state law prohibiting same sex marriage is constitutional. Unlike the law in *Baker,* the MMA is a constitutional amendment which bans both marriage and "similar unions."

Baker does not control this case because it did not decide the precise issues before this Court and, in any case, significant doctrinal developments call *Baker* into question.

C. The MMA Cannot Withstand Even Rational Basis Review

Notably, the State Defendants fail to make any persuasive argument that the MMA was not enacted in an effort to harm homosexuals or that it does not demonstrate animus against homosexuals. Where a law is motivated by an improper purpose, such as the desire to harm a politically unpopular group, the law violates equal protection. *Windsor,* 133 S.Ct. at 2693; *Romer,* 517 U.S. at 634; *Stemler v. City of Florence,* 126 F.3d 856, 871 (6th Cir. 1997). The purpose of this amendment was to invidiously discriminate against homosexuals.[1] The Sixth Circuit holds that State action for the purpose of harming homosexuals is a violation of equal protection. *See Davis v. Prison Health Servs.,* 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty*

[1] Defendant Brown relies upon her previously filed brief and also adopts the arguments of the Michigan Law Professors as Amici Curiae in Support of Plaintiffs demonstrating that the MMA was motivated by discriminatory animus.

Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); *Stemler v. City of Florence,* 126 F.3d 856, 871 (6th Cir. 1997).

The MMA fails rational basis review.

D. The MMA Violates Due Process

The State Defendants argue that the MMA comports with Due Process because there is no fundamental right to same-sex marriage. Defendant Brown disagrees. Plaintiffs, and all others identifying as homosexual, are guaranteed the same constitutional right to intimate association as heterosexuals. As explained in Defendant Brown's previously filed Brief in Support of Plaintiffs, the fundamental right to intimate association encompasses the right to marry. There is no logically sound reason why homosexuals should be guaranteed each and every right under the umbrella of intimate association rights except for the right to marry. All individuals have the constitutional right to marry the person of their choosing, even if that person is of the same sex. The State may not select which intimate association rights homosexuals or same sex couples are entitled to under the Constitution.

Defendant Brown relies upon her previously filed Brief in Support of Plaintiffs' Motion for Summary Judgment to demonstrate that the MMA violates the Due Process Clause of the Fourteenth Amendment.

III. Conclusion

The MMA is unconstitutional and judgment should be granted in favor of the Plaintiffs.

PITT, McGEHEE, PALMER, RIVERS & GOLDEN, PC

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Dated: September 9, 2013

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above cause was served via the ECF filing system on September 9, 2013.

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