IN THE SUPREME COURT OF VIRGINIA

At Richmond

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

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I. 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 Appellants the Equal Protection of the Laws.

II. 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 Appellees' Refusal to Issue New Birth Certificates to Appellants Is Contrary to Virginia Law.

C. Equal Protection (Assignment of Error C):

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

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

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

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

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

III. Nature of the Case and Proceedings Below

The appellants are four children born in Virginia and their respective sets of parents, who adopted them out of state.[1] They filed a Bill of Complaint and Petition for Writ of Mandamus against the State Registrar of Vital Records and Health Statistics and the State Health Commissioner on May 28, 2002, because the appellees refused to issue the appellant children new birth certificates properly reflecting the names of their adopted parents. Appellants contended that this refusal violates Va. Code § 32.1-261(A) as well as the Full Faith and Credit and Equal Protection Clauses of the United States

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

Constitution. They sought a declaration that the appellees' conduct was unlawful, an injunction or writ of mandamus compelling the appellees to issue new birth certificates, nominal damages, and reasonable attorneys' fees and costs.

The Appellees filed a Demurrer to Petition for Writ of Mandamus and Bill of Complaint on June 26, 2002. Appellants filed an Opposition to Demurrer on August 21, 2002 and Appellees filed a Response to Plaintiffs' Opposition to Demurrer on September 11, 2002. The Demurrer was argued and denied on September 18, 2002. Following discovery, Appellants filed a Motion for Summary Judgment, accompanied by a Brief in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "Plaintiffs' Motion"), on September 23, 2003. Appellees responded with a Cross Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (hereinafter "Defendants' Motion") on November 25, 2003. Appellants then filed an Opposition to Defendants' Cross Motion for Summary Judgment and Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (hereinafter "Plaintiffs' Opposition") on January 16, 2004. The Circuit Court held a hearing on these motions on February 4, 2004. Ruling from the bench, the Honorable Randall G. Johnson granted Appellees' motion for summary judgment and denied Appellants' motion for summary judgment. A final written order was issued on February 24, 2004.

Appellants timely filed their Notice of Appeal on March 12, 2004.

IV. Statement of Facts

This case is about four children who were born in Virginia and adopted in other jurisdictions, where they now live with their adopted families. When a child born in Virginia is adopted in another jurisdiction, the Division of Vital Records normally issues

upon request a new birth certificate stating 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 Division refused to issue accurate birth certificates. The specifics of each child's dilemma, as set forth below, were not in dispute.

Katherine Anne Fisher Davenport and Cameron Frederic Fisher Davenport

Appellant 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 at 77. Appellant Timothy W. Fisher is Katherine's biological father and has never relinquished his parental rights. *Id.* at 46. On October 8, 1990, Appellant 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 Davenport" and Katherine. *Id.* at 79-80. Appellees do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion, No. 6.

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. 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. 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. 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. On August 28, 1996, the Department wrote Mr. Fisher, summarily denying his request.[2]

Appellant 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. Mr. Fisher is Cameron's biological father. *Id.* at 7. The D.C. Superior Court on August 6, 1993, entered a Decree of Adoption conferring on Mr. Davenport parental rights and status with regard to Cameron. *Id.* at 5. This adoption decree did not modify Mr. Fisher's rights as Cameron's biological father. Appellees do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion, No. 7.

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. 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. 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. 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. *Id.* at 9.

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

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. On June 12, 2000, Appellees refused to comply with this request.[3] *Id.* at 3; *see also* Plaintiffs' Exh.2 No. 2.

Hillary Anne Dalton-Moffit

Appellant 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, 8. On January 14, 1993, upon the petition of Appellant 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. 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.

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 (emphasis added). Appellees do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion, No. 8.

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[3] 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. Provisions regarding amended birth certificates are not relevant to this proceeding. See n. 11, *infra*.

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

<u>John Doe</u>[5]

Appellant 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. On December 23, 1999, 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. Appellees do not contest the validity of this adoption. *See* Exh. 2 to Plaintiffs' Motion No. 9.

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. On October 26, 2000, Jane Doe wrote to the Department requesting a copy of John Doe's birth certificate. *Id.* at 38. 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.[6]

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. On

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[4] 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.

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

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

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. 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.

V. Argument

This Court should accept this petition because the judgment of the Circuit Court contains constitutional errors as well as misinterpretations of state law. Each of the Circuit Court's errors, and the reasons for granting the petition, are discussed below in greater detail.

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, Virginia's Policy Against Adoptions By Unmarried or Same Sex Couples Cannot Provide a Valid Basis for the Commonwealth to Refuse to Issue a New Birth Certificate When Presented with a Valid Order of Adoption from a Sister State

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.

Transcript of February 4, 2004 Hearing (hereinafter "Tr.") at 27:6 – 28:2. The Circuit Court was wrong. Virginia's "public policy" cannot legitimate Appellees' actions.

1. The Circuit Court's Reasoning Fundamentally Misconstrues the Requirements of Full Faith and Credit

What the Circuit Court concluded it cannot do—recognize the adoption in another state by a person not the spouse of a natural parent when the natural 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 Court's conclusion, the inability of Virginia residents to so adopt 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 policy bases 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 the Supreme 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). 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.

That foreign judgments must prevail over local policies, including in the case of domestic relations, is well established.[7] In *Estin v. Estin,* 334 U.S. 541, 545-466 (1948), which 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).

The fundamental error of the Circuit Court is 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. As the U.S. Supreme Court has succinctly stated:

> 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 by Thomas v. General Motors Corp., 522 U.S. 222, 233 (1998) (citations omitted) (emphasis in original). Thus, even if (contrary to Appellants' argument below) Virginia

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[7] A state's ability to refuse to recognize a marriage or civil union between persons of the same sex, as reflected in the "Defense of Marriage Act," *see* 28 U.S.C. § 1738C, is not to the contrary. A marriage is not a judgment; the state merely licenses marriages, it does not decree them. *See* H.R. Conf. Rep. No. 104-664, at 37 (1996). As judgments, however, adoptions are entitled to full faith and credit.

regulations do require the listing of both a mother and father on a new birth certificate,[8] the Commonwealth cannot apply those regulations to limit the legal effect of an adoption decree from another state – as Appellees have done.[9]

2. The Adoption Decrees at Issue Are Not Subject to Any of the "Exceptions" to the Requirements of Full Faith and Credit

To the extent that the Circuit Court relied upon Appellees' contentions that it need not honor out-of-state adoption decrees, it was misled. Although Appellees correctly argued that Virginia is permitted to ensure that an out-of-state court had jurisdiction to enter the judgment at issue, Defendants' Motion at 8, that argument was irrelevant to the proceeding below. On the undisputed facts, each order of adoption was issued by a court with jurisdiction. Appellees have never disputed this.

Appellees' arguments that a state is not required to substitute another state's laws for its own, Defendants' Motion at 9, were similarly inapposite. Virginia has not been asked to adopt any other state's statute, but rather only to recognize their *judgments*—that is, the decrees of adoption entered in other states. Appellees nonetheless cited *Hood v. McGehee*, 235 U.S. 611 (1915) in support of their assertion that Appellants are seeking to force the Commonwealth to act in violation of its statutes. Defendants' Motion at 10. In *Hood,* Alabama refused to allow children adopted in Louisiana to inherit property because Alabama law did not allow any adopted children to inherit property in Alabama. The U.S. Supreme Court ruled that this was not a violation of Full Faith and Credit because it did not involve a refusal to recognize the adoption itself. Appellees contended

[8] See note 13 and accompanying text, *infra*.

[9] 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.

that *Hood* is similar to this case because allowing the children adopted in Louisiana to inherit would have provided benefits to adopted children in Louisiana that were not available to adopted children in Alabama.

Appellees' argument proceeded from a fundamental misreading of *Hood.* The reasoning of *Hood* is quite simple and demonstrates that the decision does not support the Appellees' position: Alabama had an inheritance statute; the statute referred to adopted children; *and Alabama applied it to all adopted children, regardless of the state of adoption*. In other words, Alabama recognized the adoptions. In contrast, when that reasoning is applied to the present case, the result is different: Virginia has a birth certificate statute; the statute refers to adoptions; yet where Alabama *applied* its law to out-of-state adoptions, the Commonwealth selectively *refuses to apply* its law to certain adoptions from outside of Virginia. In other words, Virginia refuses to recognize those adoptions.

Appellees' averments that Appellants "are not entitled to receive greater rights than children adopted within the Commonwealth" and that "a child adopted within the Commonwealth would not be able to change his or her birth certificate to reflect two parents of the same sex because it is against public policy . . . to permit same sex marriages or adoption by unmarried couples," Defendants' Motion at 10, do not support the Circuit Court's ruling. If Appellants prevail, Appellants would have the exact same right as any child adopted in Virginia – the right to a new, accurate birth certificate. Appellants cannot have greater rights than children adopted in the Commonwealth by same-sex parents because no such children exist. Appellees' specious reasoning could be extended to deny to Appellants *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.[10]

Appellees also sought support in *Doulgeris v. Bambacus Adm'r*, 203 Va. 670, 673 (1962), a forty-year-old case in which this Court stated that the Commonwealth's recognition of foreign adoption decrees is based upon comity, not upon the Full Faith and Credit clause. Defendants' Motion at 10. *Doulgeris*, however, involved an adoption decree entered in a foreign nation, not another state. The discussion of sister state adoptions therefore is, 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*, 522 U.S. at 233. 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.

3. Conclusion

The Circuit Court's conclusion that it cannot recognize the Appellants' 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.

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[10] If, on the other hand, the Commonwealth permitted sam- sex adoptions, and had a statute that specifically prohibited new birth certificates in the case of same-sex adoptions, the situation might be more analogous to *Hood*. Again, however, that is not the case. If it were, the statute would likely violate the Equal Protection Clause, as discussed *infra.*

This Court should accept this appeal, to correct the ruling by the court below, which seriously undermines harmonious relations between the judicial systems of sister states.

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

The Circuit Court also ruled:

> The first reason is 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 26:19 – 27:4. 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 accept this appeal in order to avoid the Circuit Court's misguided interpretation of Virginia law and thereby avoid the constitutional issues that are discussed in sections V.A. and V.C. of this Petition.

1. There Is No Statutory Basis for Concluding that the Virginia Code Prohibits the Issuance to Appellants 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).[11]

As Appellants argued below, 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 Appellees have never alleged any procedural deficiencies, a new birth certificate must be furnished for each Appellant 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.

Appellees' arguments, with which the Circuit Court indicated it "agreed," do not support any other conclusion. Prior to filing Defendants' Motion, Appellees did not assert a statutory prohibition, but instead relied upon their own regulations for their asserted inability to issue accurate birth certificates. *See* Defendants' Response to Plaintiffs' Opposition to Demurrer at 2-5. In Defendants' Motion, however, Appellees did not merely contend that their regulations were consistent with the statute; rather, they contended that the statute must be read to *require* their regulations. Appellees offered as the "cornerstone" of their interpretation of Section 32.1-261(A) the contention that

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[11] 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. In their Demurrer, Defendants attempted to equate "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. 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.

“[s]ince the new certificate is to be ‘substituted’ for the original certificate, the former must logically be on the same form as the latter . . . .” Defendants’ Motion at 5.

Appellees’ 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 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.[12]

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 (1998); *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 Appellants of New Birth Certificates Bearing the Names of Both Adoptive Parents

As Appellants argued below, Plaintiffs' Motion at 7-9, the plain language of the VAC also compels the Registrar to issue accurate birth certificates to Appellants. 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."

[12] Appellees' contention at oral argument that the examples cited above (each of which was included in Plaintiffs' Opposition at 4) all involved the use of "substitute" as noun, not a verb, Tr. at 22:21-24, is patently wrong.

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 can such a basis be found in Appellees' arguments. Appellees asserted that the denial of new, accurate birth certificates to Appellants is compelled by two other portions of the VAC: Title 12, Section 5-550-100, requiring that an original birth certificate contain the name of the mother and the father; and a portion of 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.[13] The former, however, applies on its face only to original certificates, not new certificates.[14]

With regard to the latter, Appellees' literal interpretation of their 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, Appellees readily issue new birth certificates – as they have to some Appellants – that identify only the father. *See, e.g.,* Exh. 1 to Plaintiffs' Motion at at 9, and Exh. 4 to Plaintiffs' Motion at 16. Also, even though Section 5-550-100 and the form provide for the identification of the father "if married to the mother," Appellees cannot fulfill their statutory responsibilities without issuing birth certificates that include fathers that are not

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[13] Defendants assert that the form that is used has space for only the name of a mother and a father.

[14] 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."

married to the mother: Virginia law allows the father to be identified after a 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, Appellees 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 were appropriate to defer to Appellees' interpretation of section 32.1-261, then, as discussed above and below, Appellees' interpretation and the regulations issued thereunder are in violation of the Full Faith and Credit and the Equal Protection Clauses of the U.S. Constitution. The same would be true of section 32.1-261 itself if it did, in fact, compel Appellees' regulations. In either event, it is imperative that this Court accept this appeal in order to address these statutory and regulatory issues.

[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."

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

Although the Circuit Court did not directly address Appellants' 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. 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 27:11-17 (emphasis added). If the Circuit Court correctly interpreted Virginia law, then that law is squarely in conflict with the Equal Protection Clause of the U.S. Constitution.

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

Appellees 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. 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, Appellees 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. In other words, Appellees 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 Appellees are assigning the minor Appellants to a class distinct from and treating the minor Appellants differently than another class. In particular, if the refusal is based on the fact that their adoptive parents are same-sex, then Appellees are treating the minor Appellants 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 Appellees are treating the minor Appellants differently than the class of children adopted by married couples. For the same reasons, Appellees are assigning the adult Appellants to a class distinct from and treating the adult Appellants differently than another class – that is, opposite-sex couples and/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.

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

It is well-established that differential treatment of classes is permissible only if rationally related to a valid state objective. As the U.S. Supreme Court has stated:

> 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, Appellees have put forth a litany of purported state objectives that they claim are furthered by their refusal to issue new, accurate birth certificates to Appellants.[16] The list includes the following:

(1) the Commonwealth's policy against same-sex marriage;
(2) the Commonwealth's prohibition of adoptions by unmarried couples;
(3) the maintenance of a uniform vital records system;
(3) shielding the Commonwealth's citizens from theoretical objections to being identified as a parent;
(4) avoidance of theoretical costs of revising their database; and
(5) the lack of a right to accurate information on a birth certificate.

Neither these purported objectives, nor any that might be conceived of, bear any rational relationship to the differential treatment that Appellees have afforded to Appellants.

a. The Commonwealth's Policy Against Same-Sex Marriage is Not Rationally Related to the Discriminatory Treatment.[17]

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-

[16] The sheer number of different reasons and the lack of consistency with which Defendants have asserted them suggests that they all are post-hoc attempts to justify the discrimination.

[17] 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.

sex marriages. The issuance of new, accurate birth certificates to minor Appellants will not recognize or confer on the Appellant parents either marital or any other status. Accordingly, the Appellant parents have not 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 reflect the parent-child relationship already decreed by other jurisdictions.

Put another way, the critical relationship involved in a birth certificate is the parent-child relationship, not the parent-parent relationship. The parents are treated as individuals, and the birth certificate reflects each parent's individual relationship to the 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 relationship between the parents identified on the certificate: 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 Appellees were to issue new, accurate birth certificates to Appellants. Nothing would happen that would require the Commonwealth to "allow" this type of adoption, if for no other reason than that the Commonwealth is powerless to *disallow* adoptions that have been granted elsewhere. The Appellants are not seeking an adoption 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 Appellees mean by putting forth this objective that the issuance of new, accurate birth certificates in this case would be contrary to the Commonwealth's policy against adoptions by unmarried couples because it would constitute recognition of the adoptions, then the objective is simply not valid.[18] As discussed above, the Full Faith and Credit Clause mandates that Virginia recognize the adoption decrees of other states; the

[18] It also is not consistent 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).

Commonwealth cannot cite its reluctance to grant full faith and credit 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 Appellants and Appellees' allegation that issuing new, accurate birth certificates to Appellants would interfere with the Commonwealth's interest in the maintenance of a uniform vital records system by "inevitably" causing confusion and uncertainty. Defendants' Motion at 14, 19. First, Appellees have offered no factual support 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. *Id.* at 14 n.2. 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 *with* Exh. 9 to Defendants' Motion.

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. Nor is there any rational relationship between Appellees' refusal to issue new, accurate birth certificates to Appellants 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 Appellants 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, Appellees offer no basis for this assertion other than a grossly deficient affidavit from Appellee Little-Bowser that is utterly devoid of factual support. Defendants' Motion at 14 n.2. Appellee Little-Bowser does not identify any factual basis for her assertion that "many" citizens "would" voice objection, Aff. Attached to Defendants' Motion at 3.c., 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 are overlooked and Appellees' proffered justification is valid, a rational relationship is still missing. Appellants do not seek any remedy that would require that all birth certificates list only "parents" and not "mothers" or "fathers." Appellants 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 Appellees' desire to avoid the possibility that they might incur certain unspecified costs and the differential treatment they have afforded Appellants. This argument again is based on Appellee Little-Bowser's deficient affidavit. Defendants' Motion at 19. That affidavit does not provide

either (1) any evidence that Appellee Little-Bowser 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* Aff. To Defendants' Motion. Furthermore, there is no reason why an adequate remedy to Appellants would require Appellees to alter any of their past records or change the way they handle the vast majority of their new records. Accordingly, whatever costs might be incurred could certainly be limited to a virtually negligible amount.[19]

Finally, although Appellees assert that there can be no deprivation of a right to have information on a birth certificate when no such right exists, Defendants' Motion at 14, 19, this assertion, whatever it means, is flatly inapposite. As discussed in Section V.B of this Petition, Appellants do have a right to accurate birth certificates; Virginia's statutes grant that to them. It is possible that Appellees here are confusing Equal Protection concerns with Due Process concerns. In order to establish a violation of the Equal Protection Clause, however, Appellants 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.

[19] 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, Appellees have been unable to articulate a valid state objective that is rationally related to the differential treatment they have afforded to Appellants. 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 Appellees' objective is to disapprove of raising children outside of the "traditional" married family, then there is no rational basis for treating Appellants differently from single adoptive parents and their children, and Appellees' policy is impermissibly underinclusive. *See Eisenstadt v. Baird*, 405 U.S. at 454. Similarly, if Appellees' 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, Appellees' refusal to issue new, accurate birth certificates to Appellants is not rationally related to the advancement of any valid state objective. Because the Circuit Court nevertheless endorsed Appellees' policies and practices, its ruling is in conflict with the Equal Protection Clause, and this Court should grant the appeal.

VI. Conclusion

For the reasons stated above, Appellants respectfully request this Court to grant this petition for appeal and reverse the decisions of the Circuit Court.

Respectfully submitted,

____

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Dated: May 21, 2004

RULE 5:17 CERTIFICATE

I, Steven J. Tave, hereby certify that the names of appellants and appellees and the names, addresses, and telephone numbers of counsel for each party are as follows.

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I further certify that on the 21st day of May, 2004, a true and correct copy of the petition for appeal has been served by first class mail, in a properly sealed envelope, on counsel for Defendants and Appellees in the cases.

Appellants respectfully intend to file a reply in lieu of seeking oral argument regarding the reasons that this Court should grant this petition for appeal.

____
Steven J. Tave (Va. Bar. No. 45917)