UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

SOPHIE ROGERS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case # 1:19-cv-1149 (RDA/IDD)
	)	
VIRGINIA STATE REGISTRAR, *et al.*,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Defendants, state officials sworn to enforce Virginia law requiring the racial labeling of applicants for marriage licenses in Virginia, have responded to plaintiffs' pending motions for summary judgment and a permanent injunction by submitting an opposition memorandum that incorporates by reference the arguments set forth in their motion to dismiss this case. [ECF 34.] Mounting strictly legal defenses, defendants have filed no opposition to plaintiffs' presentation of undisputed material facts, all presented under penalty of perjury, nor to any of plaintiffs' numerous exhibits attached to their complaint and their motions. All of plaintiffs' averments at issue thus stand before the court as admitted. L.R. 56 (B). The parties agree that no material facts are in dispute and that this case is ripe for adjudication as a matter of law.[1]

Defendants contend that the attorney general's post-complaint manufacturing of an "available interpretation" that purports to nullify what the statute at issue expressly says moots this case, as under that interpretation, none of the plaintiffs must label themselves racially to get a marriage license, which is what they complained about. Therefore, we are told, they have no claim. The contention is meritless, in each of the various forms it has been presented. Defendants misconstrue plaintiffs' claim, they ignore the English language, they side-step the separation-of-powers issue raised by the attorney general's purported nullification of a legislative mandate, and they ignore settled and dispositive law on mootness. Finally, they suppress the Commonwealth's recognition, in remarkably similar circustances, that only a court can nullify an existing statutory provision as unconstitutional, and that the state registrar is bound by her oath of office to follow the letter of the law until that occurs.

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[1]The parties being in agreement that this case can and should be argued, not to say decided, on October 4, 2019, plaintiffs have responded to defendants' September 26, 2019 filings as promptly as possible.

Background

Va. Code Ann. §20-16 provides: "The clerk issuing any marriage license shall require the parties contemplating marriage to state, under oath, the information required to complete the application for marriage license." This lawsuit seeks declaratory and injunctive relief from the requirement of Va. Code Ann. §32.1-267 that part of the "information required to complete the application for marriage license," *id.,* is the applicant's labeling of himself or herself by race.

The statutory requirement of racial labeling is clear:

> A. For each marriage performed in the Commonwealth, a record showing personal data, including but not limited to age and race of the married parties, the marriage license, and the certifying statement of the facts of marriage shall be filed with the State Registrar as provided in this section.
>
> B. The officer issuing a marriage license shall prepare the record based on the information obtained under oath or by affidavit from the parties to be married.

On a monthly basis, clerks of court "shall . . . forward to the State Registrar" the record of each marriage filed during the preceding month. Va. Code Ann. §32.1-267(D).. The contents of this record are not in doubt:

> The record of marriage to be used shall be the Marriage Return and Certificate, Commonwealth of Virginia, and shall contain the following items [for the bride and for the groom]: [itemization of other required data,] race, [itemization of other required data].

12 Va. Admin. Code §5-550-130.

Sophie Rogers and Brandyn Churchill, one of the plaintiff couples who initially sought a temporary restraining order, no longer need it for their October 19, 2019 wedding. But Ashley Ramkishun and Samuel Sarfo, and Amelia Spencer and Kendall Poole, who intend to get married in Virginia, have not set any marriage dates, and those dates will be determined as they see fit

depending on their circumstances – including this court's rulings in this lawsuit.[2]

The week after this lawsuit was filed on September 5, 2019, the attorney general sent a memorandum to the state registrar intended to address the "serious constitutional concerns" he discerned in the statutory mandate for racial labeling currently before this court. Declining to acknowledge the unconstitutionality of the statutory provisions at issue, he elected, rather, to create what he styled an "available interpretation" of the above-quoted statutory mandate that, he claimed, rendered the requirement of racial labeling optional, and thus constitutional. A copy of the attorney general's (undated) memorandum appears as Exhibit J to plaintiffs' memorandum in support of their motion for summary judgment and is attached hereto for the convenience of the court and counsel. The registrar's new marriage license application form, with the "optional" entry for race, is attached as Exhibit L.

The registrar forwarded the attorney general's memorandum to the Office of the Executive Secretary of the Supreme Court of Virginia, which then forwarded it to Virginia's circuit court clerks and deputy clerks with the advice that the memorandum was "not intended to be and should not be construed as providing legal advice." It was offered, rather, "for your consideration and use to the extent you decide it is helpful." Exhibit M (also Defendants' exhibit at ECF 31-1]. Both clerks have stated that they "intend" to use the revised form. ECF 31, 32.

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[2]While defendant Arlington Circuit Court Clerk avers that his office has "no record" of Ms. Ramkishun, Mr. Sarfo, Ms. Spencer and Mr. Poole applying for a marriage license, the clerk does not dispute their contentions, affirmed under penalty of perjury, that they intend to marry in Virginia and that when they attempted to apply for a marriage license in his court, the process was terminated by reason of the racial labeling requirement to which they declined to acquiesce. Nor does the clerk dispute the contention that his office used an electronic application form that required entry of "race" according to a prescribed drop-down menu appearing as Exhibit 1 to the complaint. *See*, the declarations of these plaintiffs submitted as Exhibit K to Plaintiffs' memorandum in support of their motion for summary judgment [ECF 18-2].

Defendants contend that plaintiffs' claims have been mooted by the attorney general's informal memorandum. In fact, the memorandum lacks foundation in the English language, logic, and law, lacks any force of law, guarantees nothing, and has mooted nothing. This lawsuit, challenging the terms of a statute that remains unaltered since suit was filed, remains in the same posture as it was when suit was filed. This court should proceed to adjudicate plaintiffs' pending motions for summary judgment and imposition of a permanent injunction, having summarily denied defendants' motion to dismiss.

I. The Statute is Unambiguous and Unconstitutional in Pertinent Part

A. The Attorney General Does Not Control the English Language

The statute says what it says, not what the attorney general says it says.

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."

Lewis Carroll, *Through the Looking Glass,* at 364, available at https://www.gutenberg.org/files/12/12-h/12-h.htm#link2HCH0006.

The attorney general's "available interpretation" of §32.1-267 must be rejected as untenable as a matter of plain English. Supported by the provisions of Va. Code Ann. §20-16 and 12 Va. Admin. Code §5-550-130, the statute *expressly requires* applicants for a marriage license in Virginia to label themselves by race. This state of affairs does not change because the attorney general says otherwise. In response to the question: "If you call a tail a leg, how many

legs does a sheep have?" Abraham Lincoln famously answered: "Four. My calling a tail a leg doesn't make it one." Without regard to learned law on the construction of statutes, on the separation of powers problems attendant on the attorney general's "available interpretation" nullifying a clear legislative command, and on settled mootness jurisprudence, all briefly addressed below, that should be the end of the story.

B. As a Matter of Statutory Construction, the Statute Means What it Says

Statutory analysis begins with the "specific language in dispute." *Murphy v. Smith*, 138 S.Ct. 784, 787 (2018). "The word 'shall' is ordinarily 'the language of command." *Escoe v. v. Zerbst*, 295 U.S. 490, 493(1935); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). "[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) . The Fourth Circuit follows suit, holding that the word "shall": "usually creates a mandate indicating that the district court has some nondiscretionary duty to perform." *S. C. v. United States*, 907 F.3d 742, 756 (4th Cir. 2018) (interpreting the Administrative Procedures Act). *See also Barr v. Town & Country Properties, Inc*., 240 Va. 292, 295 (1990): "[W]hen the legislature has used words of a clear and definite meaning, the courts cannot place on them a construction that amounts to holding that the legislature did not intend what it actually has expressed."

The United States attorney general has only recently been instructed on such matters by the Fourth Circuit. In *Romero v. Barr*, #18-1850, 2019 WL 4065596 (4th Cir. Aug. 29, 2019), the court considered the attorney general's formal opinion in *Matter of Castro-Tum,* 27 I. & N. Dec. 271 (A.G. 2018), which had concluded that immigration judges and the Bureau of

Immigration Appeals ("BIA") lacked authority to close immigration cases administratively. Mr. Romero's motion for administrative closure of his case was denied based on the attorney general's opinion in *Castro-Tum*, following which the BIA ordered him deported. On Mr. Romero's petition, the Fourth Circuit reversed, finding that the attorney general's interpretation of the relevant regulatory authority was not entitled to deference:

> As an initial matter, *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference "can arise only if a regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019); *see also Christensen v. Harris Cty*., 529 U.S. 576, 588 (2000). But a regulation can only be deemed "genuinely ambiguous" "[i]f uncertainty ... exist[s]" "even after a court has resorted to all the standard tools of interpretation," including consideration of "text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Kisor*, 139 S. Ct. at 2414–15. "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Id*. at 2415. Thus, our first task is to "determine whether the regulation itself is unambiguous; if so, its plain language controls." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., 556 F.3d 177, 193 (4th Cir. 2009). "There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them." *Kisor,* 139 S. Ct. at 2419.

Romero v. Barr, 2019 WL 4065596, at *4 (parallel citations omitted.)

These strictures apply here word for word – provided, however, that in the instant case, (1) what is at issue is a statute passed by the legislature, not an administrative regulation, and (2) the attorney general has not even pretended to promulgate an official opinion, but merely sent an undated memorandum to the state registrar. Exhibit J. His informal "available interpretation," flatly contrary to the plain words of the statute and regulation at issue, and understandably not presented as "legal advice," provides neither Virginia's clerks of court nor, obviously, this court any basis for pretending the law does not say what in fact it says.

Nor could it. For on the attorney general's "available interpretation" of the statute, if the racial identification required by black letter law is in fact optional, why should a different result obtain for the other categories of personal information required by the application? If it can be invented out of whole cloth that the requirement that race be entered is optional, on what principled basis of statutory construction can it be argued that the same does not apply to an applicant's name, age, date of birth, address, marital status, etc.?[3]

For these reasons, defendants' argument that all that remains before this court is what they style the "mere inquiry" issue – requesting race with the option not to answer – is a mere distraction. What remains before the court is what was presented to this court when suit was filed: the constitutionality of §32.1-267 in pertinent part. The resolution of that matter does not depend on how a highly placed goverment lawyer sees fit to construe the statute. As the attorney general's official webpage correctly emphasizes, even the formal opinions promulgated by his office – of which his memorandum in question is decidedly not one – "*are not rulings and do not create new law, nor do they change existing laws. Creating and amending laws are the responsibility of the General Assembly, not the attorney general*." <https://www/oag.state.va.us/citizen-resources/opinions/official-opinions > (emphasis in original.) The attorney general thereby confirms that §32.1-267 continues to mean what it meant the day before he issued his memorandum intended to moot this lawsuit. In this particular, he is right. Section 32.1-267 says what it says, and "It is emphatically the duty of the Judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137 (1803). "To say

[3]It is no response that the racial category alone implicates hightened scrutiny. Of course it does. The issue is how, as a matter of statutory construction, only one out of a list of required items may be deemed optional by fiat, with the others remaining mandatory. In such matters, sauce for the goose is sauce for the gander.

what the law is" here – what the statute means, and how it is to be assessed constitutionally – is squarely before this court.

II. The Attorney General's Memorandum Creates Separation-of-Powers Issues

The attorney general's informal "interpretation" of §32.1-267 to make it mean the opposite of what the General Assembly mandated represents an untoward intrusion into the co-equal legislative and judicial branches of the Virginia government. He has – apparently successfully – encouraged the registrar and at least two of Virginia's circuit court clerks to ignore the plain language of a legislative enactment. This is offensive to the legislature by purporting to overrule its mandate by executive fiat, and offensive to the judiciary as its representatives are being encouraged to violate the law.[4] The resulting dilemma is one that falls to this court to resolve, by taking the last step that the attorney general has avoided with his sleight-of-hand, and declaring the statutory provisions at issue unconstitutional.

III. The Attorney General's Memorandum Does Not Moot This Case

A. Defendants Conflate Title III Jurisdiction and Mootness

There is no issue of Title III jurisdiction in this case. Defendants concede that this court had jurisdiction over this lawsuit at the time it was filed. Def. memo. at 10. If jurisdiction was lost thereafter, this is, as defendants concede, only if the case became moot by reason of the attorney general's memorandum. The party claiming mootness – here, defendants – bears the burden of demonstrating same. *Friends of the Earth, Inc. v. Laidlaw Envir. Serv. (TOC), Inc.*,

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[4]*See* possible consequences of same, expressly recognized by the defense, *infra* at 10 n.5.

528 U.S. 167, 198-190 (2000). Plaintiffs bear no separate burden of establishing this court's jurisdiction over their claim.

B. Defendants Cannot Meet the Burden of Demonstrating Mootness

1. Defendants Cannot Show the Impossibility of Reversion

"The standard we have announced for determining whether a case has been mooted by the defendants' voluntary conduct is stringent." *Friends of the Earth*, 528 U.S. at 189. For a case to become moot in this manner, it must be "absolutely clear" that there will be no reversion to the disavowed practice. *Id.* at 190. Defendants state registrar and clerks of court cannot begin to meet this burden, and not only because the statute and implementing regulation require what they require, not what the attorney general now recommends as a substitute.

A defendant fails to meet the heavy burden of establishing mootness when it "retains the authority and capacity to repeat an alleged harm." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014); *see also Pashby v. Delia*, 709 F.3d 307, 316–17 (4th Cir. 2013) (change to challenged policy does not moot action where government retains authority to "reassess . . . at any time" and revert to the challenged policy). At present, the defendant registrar and clerks apparently accept the "available interpretation" of the current attorney general. But the attorney general's memorandum lacks all force of law. It has been submitted to the clerks for their "consideration," to be used "to the extent you decide it is helpful." Exhibit M. Since the defendants are being sued, they may imagine the new interpretation to be helpful indeed in the short run. But such a state of affairs offers no guarantees about the future. What if, confronted with their oath of office, the clerks or the registrar re-read the governing law and determine to enforce it as written,

consistent with their sworn obligations? This is not a speculative matter.[5] Nor can anyone speak for their successors. And as the current attorney general well knows, all it takes is a change of attorney general to change the state's position on a legal matter. In *Bostic v. McDonnell*, 2013 WL 4050615 (E.D. Va. 2013), plaintiffs challenged several Virginia constitutional and statutory prohibitions on same-sex marriage. Acting on behalf of a predecessor attorney general who was famously opposed to same-sex marriage, the former solicitor general moved to intervene on behalf of the Commonwealth of Virginia "for the purpose of defending the constitutionality of

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[5] In *Bostic v. McDonnell*, 2013 WL 9070574 and 2013 WL 4050615 (E.D. Va. 2013), both the Commonwealth of Virginia and an offended clerk of court filed a motion to intervene in and defend a marriage-license related lawsuit that a newly elected attorney general had determined not to oppose. The contentions of the Commonwealth and of the clerk supporting intervention are sobering and highly instructive:

> Each clerk of court is an elected, constitutional officer, see Va. Const. art. VII, § 4, who operates independently of other government officials. *See Sherman v. City of Richmond,* 543 F. Supp. 447, 449 (E.D. Va. 1982) (stating that a sheriff was a constitutional officer by virtue of Va. Const. art. VII, § 4, and holding that as a consequence he or she "serves independent of the municipal or county government and independent of the State government"). Thus, each clerk must, before taking office, swear an oath to support the laws of both the United States and the Commonwealth of Virginia. See Va. Const. art. II, § 7 ("I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as ___ according to the best of my ability (so help me God)."). The clerks of court, therefore, must enforce Virginia's Marriage Laws-indeed, if a clerk were to contravene his or her sworn duty in this regard, he or she would be subject to potential imprisonment and a fine, or even removal from office. *See* Va. Code § 20-33 ("If any clerk of a court knowingly issue a marriage license contrary to law, he shall be confined in jail not exceeding one year, and fined not exceeding $500."); Va. Code § 24.2-233 ("Upon petition, a circuit court may remove from office any elected officer or officer ... [f]or neglect of duty, misuse of office, or incompetence in the performance of duties ...").

Both Virginia and the clerk were allowed to intervene.

Virginia's marriage laws." Exhibit N at 2. During the pendency of the litigation, the current attorney general was elected, replacing his predecessor. Unlike his predecessor, the current attorney general did not oppose same-sex marriage. On behalf of the state registrar – the same who is a defendant here – a new solicitor general thereupon filed an amended answer to plaintiffs' amended complaint admitting "that the Virginia laws in question unconstitutionally discriminate against same-sex couples." Exhibit O at 4, ¶24.

While the attorney general may, as he sees fit, promulgate his informal "available interpretation" that the statute does not require what it says it requires, he thus cannot provide the requisite "unconditional and irrevocable commitment," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013), that the law will never again be enforced as plainly written. Indeed, his undated memorandum – not even taking the form of a formal opinion – has not been presented to the registrar, to the clerks of court, or now to this court, as any sort of binding legal declaration, just a suggestion in response to being sued. In her memorandum to court clerks covering the attorney general's memorandum, the Circuit Court Services Manager within the Office of the Executive Secretary at the Supreme Court of Virginia notes that it

> ... is not intended to be and should not be construed as providing legal advice. It is offered for your consideration and use to the extent you decide it is helpful. If you require legal advice, it is suggested that you consult with your designated legal advisor.

Exhibit M. This suggestion is far removed from the "unconditional and irrevocable commitment" required to moot a case.

In *Porter v. Clarke,* 852 F.3d 358 (4th Cir. 2017), the Fourth Circuit addressed a procedural scenario with instructive similarities to the one at bar. In November, 2014, the undersigned filed suit in this court challenging the placement of Virginia's death row inmates in

permanent solitary confinement for years on end. As soon as the court, per Brinkema, J., denied defendants' threshhold motion to dismiss the case, the Virginia Department of Corrections embarked on an expedited program of updating policies, facilities and procedures affecting death row inmates, spending almost two million dollars in the process. *Porter v. Clarke*, 2016 WL 3766301 *6-*7 (E.D. Va. July 8, 2016). It being conceded that the resulting conditions were constitutional, and the defendants having specified under oath that they had "no intent to reimpose the prior coditions of confinement," Exhibit P at ¶44, the court dismissed the case as moot. The plaintiff inmates appealed and the Fourth Circuit reversed:

> [A]s Plaintiffs contend, Defendants' voluntary cessation of the challenged practice has not yet mooted this action because Defendants failed to meet the Supreme Court's requirement of showing that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 190 (2000). Indeed, Defendants repeatedly have refused to rule out a return to the challenged policies. Accordingly, we must agree with Plaintiffs that the district court erred in dismissing Plaintiffs' action as moot.

Porter v. Clarke, 852 F.3d at 360.[6]

The instant case is *a fortiori* to *Porter.* In *Porter,* the objectionable conditions prescribed for death row were not required by statute. They were creations of officials of the Department of Corrections. Yet their alleged abandonment was insufficient to moot the case. In the case at hand, the objectionable provision is expressly required by unambiguous statutory and regulatory language, and enforced by threat of criminal sanction and loss of office. *See* n.5 at 10, *supra.* The attorney general can pretend that the law does not mean what it plainly says and offer his

[6]On remand, the district court granted plaintiffs' motion for summary judgment and permanently enjoined defendants from reinstituting the *status quo ante* on death row. *Porter v. Clarke,* 923 F.3d 348 (4th Cir. 2019), *reh. en banc denied* July 26, 2019 (unreported).

view to others – but the law remains the law unless and until declared unconstitutional by this court. No one, least of all this court, is bound by the attorney general's musings to the contrary.[7] Defendants' statement of intent to continue to abide by the attorney general's memorandum is even less consequential than was the parallel statement of intent by the director of the Virginia Department of Corrections and the department's chief correctional officer – the defendants in *Porter* – not to revert to the unconstitutional *status quo ante* on death row. The latter intent was insufficient in the eyes of the Fourth Circuit and also the district court on remand to moot the case. Even more insufficient is the statement of intent here, where continued action in accordance with this intent would violate the terms of the statute defendants are sworn to enforce.

Ironically, the incumbent attorney general has previously demonstrated a perfect understanding that his opinion that a statutory provision is unconstitutional requires judicial confirmation before the provision may be disregarded. His solicitor general so confirmed in so many words relative to Virginia's marriage laws at issue in *Bostic,* doing so on behalf of the defendant registrar in the instant suit:

> Defendant [registrar] admits that current Virginia law denies marital status to same-sex couples, a status that secures various state and federal benefits, and that she and her agents will continue faithfully to enforce the challenged state laws and constitutional provision unless and until it is declared unconstitutional by the judicial branch.

Exhibit P at 8, ¶¶49, 51.

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[7] The provision at issue could also be revoked by the legislature. Were that to happen, the revocation would not take effect before July 1, 2020, at the earliest. Va. Code Ann. §1-214.

The former solicitor general and the current state registrar have thus confirmed that the registrar is compelled to follow the law re marriage, even one believed to be unconstitutional, until such time as it is declared unconstitutional by the judicial branch. Plaintiffs respectfully submit that this candid avowal is conclusive of the need for judicial action in this case. This court should put the offending statutory provision to rest with a permanent injunction.

2. All Plaintiffs' Claims Have Not Been Mooted

Unlike plaintiffs Rogers and Churchill, whose long-planned marriage will now take place as planned on October 19, plaintiffs Ramkishun and Sarfo and plaintiffs Spencer and Poole have not yet set their wedding dates. As stated in their uncontested declarations under penalty of perjury (Plaintiffs' Exhibit K), they plan to marry, and to do so in Virginia so long as they are not required to comply with the statutory mandate that they label themselves by race.

The private decisions of these four plaintiffs as to their wedding dates are not to be dictated by the inventions of an attorney general, nor by the willingness or unwillingness of a registrar or clerk of court to accept his recommendations, or to reject them because they are in derogation of the law. Beyond that, while wishing all defendants long and happy professional and personal lives, plaintiffs are aware that these officials are not permanent occupants of the positions they hold, whether for electoral or private reasons. There is, however, one certain fact facing Mmes. Ramkishun and Spencer and Messrs. Sarfo and Poole: that the plain statutory and regulatory law of the state where they wish to marry requires them to label themselves by race in order to do so – something they decline to do. Their declining to do so as a matter of principle has and will continue to have implications not only for where they marry, but when, and how and where they will make their plans for their lives together. These self-evident consequences for

these plaintiffs give them an existing, concrete stake in the authoritative, *i.e.,* judicial, adjudication of the constitutionality of the provision to which they object. This is injury-in-fact under settled law as in real life.

The Supreme Court's jurisprudence on Article III standing excludes cases that are "conjectural or hypothetical," not ones simply delayed in time, as defendants urge. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Numerous courts have found standing under circumstances far less immediate than those alleged here: *Laidlaw,* 528 U.S. at 704 (standing to sue for abatement of river pollution based on plaintiffs' desire to return to fish and swim at some unspecified future date); *Duke Power Co. v. Carolina Envir. Study Group, Inc*., 438 U.S. 59, 74 (1978) (standing to challenge construction of a nearby nuclear power plant by reason of possible future health consequences from low-level radiation); *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1234–1235 (D.C.Cir. 1996) (standing to challenge limitations on timber harvesting threatening increased risk of possible future wildfires); *Nat'l Resources Def. Council v. E.P.A.*, 464 F.3d 1, 7 (D.Cir. 2006) (standing to challenge deregulation of certain chemicals threatening possible increased lifetime risk of cancer); *Sutton v. St. Jude Medical S.C., Inc*., 419 F.3d 568, 570–575 (6th Cir. 2005) (standing based on increased risk of possible future harm caused by implantation of defective medical device); *Johnson v. Allsteel, Inc*., 259 F.3d 885, 888–891 (7th Cir. 2001) (standing based on increased risk that Employee Retirement Income Security Act beneficiary might not be covered in the future due to increased amount of discretion given to ERISA administrator).

Indeed, plaintiffs Ramkishun and Sarfo and plaintiffs Spencer and Poole retain more of a direct, real-life, personal interest in the legal matter at issue than most "testers" have in ending the discrimination they undertake to unearth.[8] As Judge Posner noted:

> [Testers] are investigators; they suffer no harm other than that which they invite in order to make a case against the persons investigated. *** The idea that their legal rights have been invaded seems an arch-formalism. *Havens*, however, holds that a tester to whom a real estate agent makes a misrepresentation forbidden by 3604(d) has standing to complain about the misrepresentation, because the statute creates a right to be free from such misrepresentations. *** If the plaintiffs' evidence is believed, the testers were treated in a racially discriminatory fashion, even though they sustained no harm beyond the discrimination itself, just as testers are not fooled by the misrepresentations made to them.

Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1526, 1527 (7th Cir. 1990). *Cf.*, *Disabled Patriots of Am., Inc. v. Fu,* 2009 WL 1470687 (wheelchair bound Florida resident has standing to sue inaccessible Charlotte, North Carolina hotel since he alleges that he would like to move to North Carolina with his wife and has numerous business contacts in the state); *Betancourt v. Ingram Park Mall, L.P.*, 735 F. Supp. 2d 587 (W.D. Tex. 2010) (Kansas resident has standing to sue inaccessible Texas mall because she alleges that she plans to visit that mall again at some point).

Plaintiffs Ramkishun and Sarfo and plaintiffs Spencer and Poole are in a far stronger position than any tester, for they are not testers at all. They have all declared, in uncontested sworn declarations, that they wish to marry in Virginia, and wish to be able freely to plan on doing so without falling afoul of an obnoxious state law that remains on the books. Their injury is personal, direct, and concrete. These plaintiffs have standing to challenge the law that

[8] "'[T]esters' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373 (1982).

defendants appear prepared to flout in an effort to moot this case.[9] Nor does it make any sense for defendants to have to revisit this controversy in a new suit brought back into this court as a class action by other couples prepared to join plaintiffs in stating, of the attorney general's "available interpretation," that this emperor has no clothes.[10] Fed. R. Civ. P. 1, calling for the "just, speedy and inexpensive determination of every action" manifestly supports the adjudication of this controversy here and now.

3. Plaintiffs Were Not Required to Amend Their Complaint

The attorney general's distribution of his memorandum to the effect that the law does not require what it says it requires changed nothing about plaintiffs' request that this court declare unconstitutional the mandatory requirement of §32.1-267 that persons applying for a marriage license state their race. Plaintiffs stand on this request, and on their request set forth in their complaint that this court enter an order "enjoining defendants and all others acting in concert with them to prepare and henceforth make available marriage license applications without inquiry into race." [ECF 1 at 30]. This requested relief, essential to the vindication of the rights asserted by the plaintiffs here – including the rights of the three non-white plaintiffs (plaintiffs

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[9] Compare the concerns of the circuit clerk noted in n. 5 at 10, *supra.*

[10] There are 31 judicial circuits in Virginia and 120 circuit court clerks. *See,* http://courts.state.va.us/courts/circuit/home.html / Virginia's Court System / Circuit Court / Individual Circuit Court Homepages. Defendants do not purport to bind the 118 clerks not before this court in this suit – nor could they, for the myriad reasons addressed above. In Fairfax County, the largest county in Virginia, the discretionary option for racial labeling is not in use even today, and all applicants are required to label themselves by race, as the law demands. *See*, Exhibit Q. A rapid random check this day of on-line availability of marriage license applications reveals that of 29 circuit courts surveyed, eight had on-line forms, of which four afforded applicants no opportunity to decline to state their race. *See*, Exhibit R.

Aramkishun, Sarfo and Poole) to be free from the badges and incidents of slavery (complaint ¶77) – remains squarely before the court, where it was placed in plaintiffs' complaint. Whatever effect the attorney general's memorandum may have had, one was not to require plaintiffs to depart from their initial complaint in order to accommodate a palpable legal fiction.

4. This Court Should Not Facilitate Tactical Mooting of Civil Rights Cases by Defendants Facing Loss in Court

A defendant's cessation of a challenged practice only after litigation has begun has been aptly described by the Fourth Circuit as "tactical mooting." *Goldstein v. Moatz*, 445 F.3d 747, 752 (4th Cir. 2006). In civil rights cases, tactical mooting often arises where a defendant, facing imminent loss, "voluntarily" agrees to the plaintiff's requested relief in order to avoid the prospect of an award of fees and costs. *Id*. at 752, n.4. This tactic arises out of the Supreme Court's decision in *Buckhannon Bd. and Care Home, Inc. v. W.V. Dep't of Health and Human Resources*, 532 U.S. 598 (2001), to the effect that an award of fees and costs may be unavailable if a case is dismissed without affirmative relief having been ordered by the court.

The *Buckhannon* majority was cognizant that where, as here, the plaintiff seeks equitable relief alone, "mischievous defendants" might seek to "unilaterally moot[] an action before judgment in an effort to avoid attorney's fees," *id.* at 608-09.[11] Accordingly, the court

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[11] Our legal system "depends largely on the efforts of private citizens" to ensure "[t]he effective enforcement of Federal civil rights statutes." H.R. Rep. 94-1558, at 1 (1976); *see* Admin. Office of the U.S. Courts, 2015 Annual Report of the Director, *Judicial Business of the United States Courts*, tbl. C-2 (2015) (reporting that the United States brought fewer than 1% of the civil rights suits in federal court in 2015). Because it is difficult to attract competent counsel to bring lawsuits with a low pecuniary value, civil rights litigants left to rely on private-sector fee arrangements "might well [be] unable to obtain redress for their grievances." *City of Riverside v. Rivera*, 477 U.S. 561, 579-80 (1986) (plurality). Recognizing these challenges Congress passed 42 U.S.C. §1988 "to ensure 'effective access to the judicial process' for persons with civil rights

emphasized that the applicable mootness doctrine is narrow, permitting dismissal only where it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 609 (quoting *Friends of the Earth, Inc.*, *supra).* The fee-limiting rule of *Buckhannon* was predicated, then, on an express understanding that a strict mootness doctrine would preserve the ability of counsel to bring successful suits in the public interest without regard to the plaintiff's financial ability to seek judicial relief.

A defendant seeking dismissal as moot of a civil rights case for injunctive relief bears a "heavy burden" to show that it is "absolutely clear" that a challenged practice "has been terminated once and for all." *Wall v. Wade*, *supra*, 741 F.3d at 497. Any other standard would be inadequate, as it would compel "the courts . . . to leave '[t]he defendant . . . free to return to his old ways.'" *Laidlaw*, *supra*, 528 U.S. at 189. This "formidable burden," *id.* at 170, was most recently not met by the Virginia Department of Corrections, notwithstanding the protestations of the department's director and chief of corrections that they "did not intend" to return to an unconstitutional *status quo ante* and the department's expenditure of almost two million dollars to effectuate the changes. *See* discussion of *Porter, supra* at 12-14. As noted earlier, the instant case is *a fortiori* to *Porter* on the issue of reversion, as in this case all defendants are under an affirmative obligation by reason of their oath of office to enforce the clear legislative mandate obscured by the attorney general's sleight-of-hand, and to do so notwithstanding the registrar's and solicitor general's candid avowal in *Bostic*, *supra* at 13-14, that a judicial order of

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grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), by authorizing a "reasonable attorney's fee" award to a plaintiff prevailing in a civil rights case. 42 U.S.C. §1988(b) (2012). As intended, §1988 became a "powerful weapon" for the victims of civil rights violations by improving their ability "to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights." *Evans v. Jeff D.*, 475 U.S. 717, 741 (1986).

unconstitutionality is required before a legislative command can be ignored. This court should not permit the "mischievous" tactical mooting of this case.

Conclusion

Notwithstanding the attorney general's acknowledgment of the "severe constitutional challenges" presented by the statutory provisions at issue, and his accommodating gesture toward plaintiffs Rogers and Churchill, which is appreciated, his "interpretation" of §32.1-267 to mean the opposite of what it says leaves it to this court to address the constitutional burdens imposed by the statute and to grant relief appropriate and necessary to ensure the elimination of what may well be the last *de jure* holdover from Virginia's Jim Crow era. Plaintiffs Spencer, Poole, Ramkushun and Sarfo – and, indeed, all Virginians – are entitled to no less. The court should deny defendants' motion to dismiss this lawsuit and grant plaintiffs' factually uncontested motions for summary judgment and an injunction permanently removing reference to race in Virginia's marriage license applications.

Respectfully submitted,

SOPHIE ROGERS, *et al*.,

By counsel

Dated: September 30, 2019

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Certificate of Service

I, Victor M. Glasberg, hereby certify that on this 30th day of September 2019, I electronically filed the foregoing Reply Memorandum In Support of Plaintiffs' Motions for Summary Judgment and A Permanent Injunction and In Opposition To Defendants' Motion to Dismiss with the clerk of the court.

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