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.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

//s// Victor M. Glasberg
Victor M. Glasberg, #16184
Bernadette E. Valdellon, *pro hac vice*
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
703.684.1100 / Fax: 703.684.1104
vmg@robinhoodesq.com
bev@robinhoodesq.com

Counsel for Plaintiffs

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Plaintiffs Sophie Rogers and Brandyn Churchill have moved this court for a temporary restraining order ("TRO") or a preliminary injunction. For the following reasons this motion should be granted.

Procedural Note

While each of the six plaintiff wish to get married in Virginia, it is only Ms. Rogers and Mr. Churchill whose wedding is already set – for October 19, 2019, in Fincastle, Virginia. Because the other plaintiffs are not facing such a short deadline, they do not have occasion to request temporary or preliminary relief and thus are not moving parties on this motion. Ms. Rogers and Mr. Churchill having only recently joined this legal effort, the undersigned counsel has proceeded as promptly as possible to complete the work required for the proper presentation of the case and this motion, in time to give fair notice thereof to the defendants should they determine to defend the case. While, in an abundance of caution, counsel has styled this motion as one for a TRO or a preliminary injunction, as a practical matter it seems properly considered as a motion for preliminary injunction, as four weeks' notice is being given to defendants of the date at which the motion is being set for a hearing. The motion is thus being briefed as one for an injunction rather than an *ex parte* TRO.

For ease of reference, in this motion Ms. Rogers and Mr. Churchill will be referred to as "plaintiffs."

Introduction

This lawsuit challenges what may be the last vestige of *de jure* Jim Crow in Virginia: the requirement, set forth in Va. Code Ann. §32.1-267(A) that parties wishing to marry identify themselves by race as a condition of obtaining a marriage license in Virginia. Virginia joins seven other states in imposing this requirement on those wishing to marry. To avoid this offensive and impermissible burden, plaintiffs ask this court to order that their marriage license application be processed without their having to affix racial labels to themselves, so that they might get married as planned within a few weeks following the scheduled hearing on this motion.[1]

Standard for Issuing a Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Each of these factors weighs in the plaintiffs' favor in each of their constitutional claims.

[1]Marriage licenses are issued promptly upon submission of a completed application. Plaintiffs anticipate no problems in receiving their license in timely fashion following the court's adjudication of this motion. Plaintiffs also wish to make clear their conviction that none of the defendants, sued by title in their official capacity alone, professes or seeks to advance the offensive purposes associated with the statutory scheme here at issue. Their appearance as defendants reflects their official roles relative to the statutory scheme they are charged to effectuate.

I. Likelihood of Success on The Merits

Plaintiffs have brought several constitutional challenges to the requirement that they label themselves racially in order to exercise their right to marry. Their likelihood of success on each is substantial.

A. The Right to Marry is Fundamental and Can Be Infringed Only For Compelling Reasons

"The right to marry is fundamental as a matter of history and tradition." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); *Zablocki v. Redhail*, 434 U.S. 374 (1978) ("decisions of this Court confirm that the right to marry is of fundamental importance for all individuals"). *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause). As the Supreme Court observed unanimously in a decision serving as an appropriate backdrop to the instant case: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Va.,* 388 U.S. 1, 12 (1967).

Statutes that impinge upon fundamental rights are subject to critical examination by the courts and must be justified by compelling state interests. *See, Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (right to marry is "so rooted in the traditions and conscience of our people as to be ranked as fundamental,' and therefore cannot be deprived without compelling justification"); *Zablocki*, 434 U.S. at 383 ("the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required").

B. Plaintiffs Have Presented a Compelling Case Establishing The Discriminatory History and Functional Disutility of The Race Question On the Marriage Application, and its Resulting Unconstitutionality

The complaint, supported by nineteen exhibits as well as declarations from three historians, two prominent human geneticists, and a former director of the United States Census Bureau, lays out in detail the sorry history of Va. Code Ann. § 32.1-267(A), as well as its functional disutility. Given the expansive presentation of demonstrably supported facts in the complaint, rather than revisiting them in the instant memorandum, counsel respectfully refers the court and the defense to the complaint, the supporting documentary evidence, and the declarations under penalty of perjury made by plaintiffs' experts. Plaintiffs respectfully submit that this body of evidence well justifies the introductory paragraph of the complaint:

> In this lawsuit for declaratory and injunctive relief, plaintiffs ask this court to declare unconstitutional and enjoin defendants' enforcement of Va. Code Ann. §32.1-267(A), requiring that persons seeking a license to marry, under threat of prosecution for perjury, label themselves according to "race," using unscientific, highly controversial, misleading, useless, and tainted categories reflecting Virginia's historical repression of non-white persons. Virginia is one of eight states that impose this requirement by statute. In Virginia, the requirement reflects a regulatory scheme embodied in the Virginia Racial Integrity Act of 1924, originally called "An Act to Preserve the Integrity of the White Race." The requirement to identify by "race" uses terms grounded in ignorance and bigotry, not in science. The statutory scheme is implemented by the clerks of the circuit courts of Virginia as they see fit, using inappropriate categories duly made available by the Virginia Department of Health and Human Resources, and other, more offensive, categories as well. Fifty-two years after the Supreme Court struck down laws preventing the marriage of white and non-white persons, the Commonwealth of Virginia continues to require its residents, including plaintiffs, affirmatively to label themselves, against their will, according to categories rooted in a malignant statutory scheme working to the detriment of non-white persons.

In the face of the history and practical operation of the statute in question, its interference with the right to marry cannot survive the heightened scrutiny that a challenge like this requires. The statute breathes the very racial bias giving rise to *Loving v. Virginia.* It should be struck

down as possibly the last remaining *de jure* vestige of that shameful legislative preoccupation. It is in equal measures astounding and appalling to have to contend with state action in 2019 requiring, or permitting, individuals to label themselves as "Octoroon," "Quadroon," "Mulatto," "Aryan," or "White American" as a condition of exercising their right to marry. *See* Exh. 2 to the complaint.

Nor can the statute be defended on grounds not associated with its unseemly origins. As is clear from the verified averments in the complaint and the various exhibits thereto, particularly exhibits 1, 2, and 12-19, as well as from the Declaration of Kenneth Prewitt, former Director of the United States Census Bureau, from any practical standpoint the requirement to assign oneself a race fails to generate information that might be – or has been – put to use. Simply a comparison of the divergent racial categories designated by numerous Northern Virginia jurisdictions (Exhibits 1, 17 and 18), the 230 racial classifications designated by Rockbridge County (Exhibit 2), and a comparison of all the above with the "black, white and other" statistics published by the Commonwealth's Division of Vital Statistics (Exhibit 19), yields the ready conclusion that nothing of consequence is emerging from Virginia's racial inquiry on its marriage license applications. The declarations of two prominent human geneticists (Marcus Feldman and Sarah Tishkoff) reach the same conclusion from a scientific standpoint, although it is not apparent that such in-depth scrutiny need even be made here, where there is no pretense of scientific use of the collected data. And for good reason, as the federal Office of Management and Budget – the font of current racial classification in the United States – cautioned, for a second time, in 1997, that its own racial categories "should not be interpreted as being scientific or anthropological in nature," having "no scientific basis for legitimacy." Compl. ¶¶63-64. This

is presumably why Virginia is in the small minority of states with statutory requirements of this sort – a total of eight – and why the National Conference of Commissioners on Uniform State Laws did not include such an inquiry in its Model (formerly Uniform) Marriage and Divorce Act.

The view that racial classifications and separation were necessary governmental objectives did not die easily in Virginia. As late as 1955, Virginia's Supreme Court reaffirmed that laws banning marriage between blacks and whites were required in order that the Commonwealth not end up with "a mongrel breed of citizens." Comp. ¶26.) And it took the United States Supreme Court to repudiate, in 1967, a ruling affirmed by the Virginia Supreme Court to the effect that "Almighty God created the races white, black, yellow, malay and red, and placed them on separate continents. *** The fact that he separated the races shows that he did not intend for them to mix." (Quoted in *Loving v. Virginia*, *supra*, 388 U.S. at 3 (reversing 206 Va. 924 (1966)).

The racial classifications here at issue drag us back to this bygone era. They exemplify the racist underpinning of laws requiring racial identification relative to all walks of life, including but hardly limited to marriage, whether in the form of §32.1-267(A) or its predecessors and cognates in the days of Jim Crow. Section 32.1-267 cannot be separated from its unconstitutional origins, nor can it be shown to serve any useful purpose sufficient to justify its maintenance in 2013. We do not need the state requesting and receiving the identification of races of "Octoroons," "Quadroons," "Mulattoes," "Aryans," or "White Americans" in 2019. Given the demise of Virginia's miscegenation laws, the statute here at issue cannot be justified.

1. The Requirement of Mandatory Racial Identification Denies Plaintiffs Substantive Due Process of Law

Virginia requires persons who wish to marry to label themselves by racial categories that are redolent of racism and serve no articulable – to say nothing of compelling – governmental purpose. Given especially the long-established fundamental right to marry, this requirement is flatly unconstitutional. *Obergefell, Zablocki, Griswold, supra* at 3. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving,* 388 U.S. at 12 (famously addressing the unconstitutionality of prohibitions effectuated by means of racial identification). Under settled law, plaintiffs have a strong likelihood of succeeding on the merits of their substantive due process claim brought under the Fourteenth Amendment.

2. The Requirement of Mandatory Racial Identification Violates Plaintiffs' Right to Freedom of Speech

The First Amendment protects an individual's "right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The government may not compel individuals to partake in affirmative acts that constitute speech utterances. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 209-10, 221 (2013); *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-42 (1943). Government regulations that compel speech are subject to heightened scrutiny. *Wooley*, 430 U.S. at 716-17.

Va. Code Ann. § 32.1-267 is a compelled speech statute. It requires individuals affirmatively to label themselves racially as a pre-requisite for exercising their constitutionally

protected right to marry. This compulsion is constitutionally impermissible both because of its malignant origins and past uses, and because the categories, including (beyond the absurd ones provided by the Rockbridge Circuit Court), "mixed" and "other," can and do provide no data on the basis of which policy makers, social scientists or medical researchers can rely for any useful purpose. *See*, the declarations of Kenneth Prewitt, Marcus Feldman and Sarah Tishkoff submitted herewith. The child of Chinese and Bolivian parents can end up – and probably would end up – in the same catch-all category as the child of Nigerian and Eskimo parents. And since anyone can claim to be "mixed" or "other," persons who might qualify as "Aryan" or "White Americans" pursuant to such Rockbridge County's categories could join as well. What useful policies can arise out of such "data"?

According to the State Registrar, the Vital Records Division provides only the number of Virginia marriages to the National Center for Health Statistics, not any racial data. It appears that no study has been conducted by the Virginia Department of Health regarding the racial data collected from Virginia marriage records. Nor has this racial data been the subject of data sharing requests directed to the Division by third parties. There is no evidence of racial information presented on marriage license applications being used to offer any benefits or protections to any marriage applicant or any other person or group, or otherwise to serve any useful governmental function, to say nothing of a compelling one. The requirement of stating one's race on a marriage application emerges as no more than a retrograde repetition of the provisions of Virginia's 1924 Racial Integrity Act.[2]

[2]Neither this motion nor this lawsuit challenges the acquisition of data to address the fact and consequences of the victimization of non-white people. One cannot contend with the fact and consequences of racism without being aware of race. Terminology aside, what is solely at issue

Beyond the general proscription on compelling speech absent a compelling government need for same, the state is barred from compelling the dissemination of information that is factually disputed, controversial, or a matter of opinion. *See, Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Kimberly-Clark Corp. v. D.C.*, 286 F. Supp. 3d 128, 143 (D.D.C. 2017). The state simply "may not compel affirmance of a belief with which the speaker disagrees." *Harley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

In the matter at hand, apart from the multiplicity of racial definitions purporting to effectuate Va. Code Ann. §32.1-267(A), authorities from every sphere have noted the uncertain, capricious and unreliable nature of the racial divisions nevertheless employed. Thus:

* With regard to the 1790 restriction of naturalization to "white persons," a restriction charitably characterized as being "most uncertain, ambiguous, and difficult both of construction and application.... There have been a number of decisions in which the question has been treated, and the conclusions arrived at in them are as unsatisfactory as they are varying." *Ex Parte Shahid*, 205 F. 812, 813 (E.D.S.C. 1913) (Syrian not white, notwithstanding that "such a construction would exclude persons coming from the very cradle of the Jewish and Christian religions as professed by the nations of Europe whose descendants form the great bulk of citizens of the United States." *Id*. at 816).

* "'[T]he innumerable varieties of mankind run into one another by insensible

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here is whether Virginia, like a handful of other states, can require people to label themselves racially as a condition of permitting them to marry. That is all.

degrees,' and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible." *United States v. Thind,* 261 U.S. 204, 211 (1923). *See,* in this connection, the photographs of Angelica Dass portraying the shades and hues of humanity blending into one another (Exhibit 10), and the photographs of the Biggs Twins, fraternal twins, one black and one white. Complaint ¶43 and Exhibit 11.

* The Office of Management and Budget ("OMB"), whose Directive No. 15 is the template of conventional racial classification in the United States, cautioned at the outset that "These classifications should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program." Complaint ¶¶ 53-55, Exhibit 13.

* The National Academy of Sciences elaborated on the problems with Dir. No. 15:

> [T]he current classification *** lacks a consistent logic. Some of the categories are racial, some are geographic, some are cultural. *** The categories now represent a combination of historical, legal, and sociological factors, but that is not explicitly acknowledged. Much of the difficulty in the creation of a consistent, rational classification system lies in the fluid nature of what race and ethnicity are. Race and ethnicity are inherently complex concepts, with multiple sources of definition. There is no scientific basis for the legitimacy of race or ethnicity as taxonomic categories.

* OMB did nothing to fix the identified problems, but it did subsequently restate its caution: "The categories represent a social-political construct designed for collecting data on the race and ethnicity of broad population groups in this country, and are not anthropologically or scientifically based." Exhibit 15 at 3.

It is thus no surprise that Virginia finds itself among a handful of states with statutory mandates for racial identification on marriage license applications, and that the authors of the Model Marriage & Divorce Act included no such provision. *See* complaint at ¶50.

Given that even the propounders and defenders, or effectuators, of conventional racial classification are in accord that the scheme is inexact, not scientifically based, and fluid – increasingly so as social norms change and increasing numbers of younger persons are partnering with persons from "other" groups – and without regard to the riot of classifications that is available solely in Virginia, it is even more constitutionally suspect for the state to require racial identification according to pre-existing, unstable and sometimes absurd categories, thereby compelling dissemination of information that is factually disputed, controversial, or a matter of opinion. Plaintiffs enjoy a substantial likelihood of prevailing on their First Amendment claim.

3. Code of Va. Ann. §32.1-267(A) Violates Plaintiffs' Right to Privacy

By statute, all the data to be provided on a marriage license application, including the racial identification, is deemed material. An applicant swears to the responses and may be prosecuted for perjury, as a felony, for providing false information, and if convicted be adjudged "forever incapable of holding any office of honor, profit or trust under the Constitution of Virginia, or of serving as a juror." Va. Code Ann. §18.2-434. As a result, persons who, for

private reasons, may not wish to reveal their racial or ethnic heritage and provide an inaccurate answer are at risk of being convicted of a felony if found out. Doubtless, the situation is not dire, as it was when, in 1937, Walter Plecker wrote as follows to the Boutetort County Circuit Court clerk after having been advised by an "informant" of a wedding between one Mohler and one Branham:

> This family of Mohlers *** belongs to the class of respectable white people.... These Branhams *** are unquestionably mixed bloods, negroid in every appearance, speech and behavior. *** [T]hese mixed breeds *** go around to other counties where they are not known and in their [marriage license] applications swear that they are white. These people are usually well known in their own counties and their clerks will not issue licenses for them to marry white people. *** We are sending a copy of this letter to the Commonwealth's Attorney.

Exhibit 6. Regardless of the unlikelihood of criminal prosecution as a practical matter, issues of personal pride, family heritage, and the need for candor with one's spouse-to-be are matters properly left to the discretion of the person at issue, and not forced upon such person by the state. The state has no business requiring an individual to make revelations about his or her ancestry as a condition of getting married. To do so is an unwarranted invasion of privacy. The First Amendment affords protection to an individual's identity, and the United States Supreme Court has routinely struck down laws that require exposing aspects of one's identity as a pre-requisite for engaging in speech. *See Watchtower Bible & Tract Soc'y of New York v. Vill. of Stratton*, 536 U.S. 150, 165-68 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 353 (1995).[3]

[3]It is no response that Ms. Rogers and Mr. Churchill concede that if the court does not grant them relief they will select a race from Rockbridge County's 230 choices and get married on schedule. Someone forced to sit in the back of the bus does not lose his or her claim to discriminatory treatment simply by being willing to sit there if necessary to commute. Beyond that, Ms. Rogers and Mr. Churchill may assert the rights of others uniquely hampered from

On each of their constitutional claims, then, plaintiffs are likely to prevail on the merits.

II. Ms. Rogers and Mr. Churchill Will Suffer Irreparable Harm Absent Preliminary Relief

Ms. Rogers and Mr. Churchill are getting married on October 19, 2019, two weeks following the hearing date for the instant motion. This date was set long before they became aware of what was at issue relative to their marriage license application and determined to join this lawsuit.[4] They will be getting married whether or not they receive the requested relief. The question at bar is whether this court should support Virginia's right to condition their getting married on abiding by the state's requirement that they label themselves, against their will, according to racial terms with a malign past and a useless present as regards marriage license applications.

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bringing suit by reason of the very privacy concerns that would drive the litigation. Even "Doe" plaintiffs can be deposed, and while pseudonyms can protect litigants from public exposure, it is well-nigh impossible to keep pending litigation a secret from close friends and relatives. Normally, one may not claim standing to vindicate the constitutional rights of some third party. *Barrows v. Jackson*, 346 U.S. 249, 255 (1952). This limitation is not constitutionally mandated, however, but a rule of self-restraint justified by a prudential concern that courts should not adjudicate constitutional rights unnecessarily, and a belief that rights are most effectively asserted by those who can personally claim them. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In cases where these justifications are inapplicable, the general rule should be excepted and assertion of third party rights permitted. *Id*. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 333 (5th Cir. 1981). This is such a case so far as the privacy claim is concerned.

[4]Marriage licenses in Virginia are good for sixty days from issuance, and are normally issued on the spot upon proper completion of the application. It is commonplace for couples to plan their wedding dates long in advance of getting their license, as occurred here.

For all the reasons set forth above, Ms. Rogers and Mr. Churchill have a constitutional right not to label themselves racially against their will, even pursuant to their local circuit court's absurd itemization of 230 available racial identities. They have a substantive due process right not to have their constitutionally protected right to marry burdened by subscribing to Virginia's scheme that smacks of the era of Jim Crow even as it confers no benefit on anyone. They have a First Amendment right not to be compelled to engage in unwanted speech, and particularly when no compelling purpose can be stated for the compulsion, and the speech at issue is a matter of doubt, conjecture and opinion.[5] And they can invoke a right to keep private details of their personal ancestry that the state has no business demanding them to publicize as a condition of getting married.

It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law. *Elrod v. Burns,* 427 U.S. 347, 373–374 (1976); *Ross v. Meese,* 818 F.2d 1132, 1135 (4 Cir.1987); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981); *Milwaukee County Pavers Assn. v. Fiedler,* 707 F.Supp. 1016, 1031–1032 (W.D. Wis.1989); *Albro v. County of Onondaga, New York*, 627 F.Supp. 1280, 1287 (ND N.Y.1986); *Walters v. Thompson*, 615 F.Supp. 330, 341 (N.D. Ill.1985); *Cohen v. Coahoma Cty., Miss*., 805 F. Supp. 398, 406 (N.D. Miss. 1992). Wright & Miller summarize the law in their treatise: "When an alleged deprivation of a

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[5]*See, e.g.,* Curry, "Who Were The First Europeans," *National Geographic,* August, 2019, at 100-13: "New genetic testing of ancient settlers' remains is revealing that Europe has long been a melting pot made up of immigrant bloodlines from Africa, the Middle East, and the grassy plains of today's Russia." "'To me, the new results from DNA are undermining the nationalist paradigm that we have always lived here and not mixed with other people. *** There's no such thing as a Dane or a Swede or a German.' Instead, 'we're all Russians, all Africans.'"

constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary." 11A Wright & Miller, *Federal Practice and Procedure* 11A (3d ed.). It is clear, then, that plaintiffs Rogers and Churchill will suffer irreparable harm if they do not receive the preliminary relief for which they here apply.

III. The Balance of Equities Favors the Plaintiffs

Ms. Rogers' and Mr. Churchill's substantial interest in receiving the relief they request is clear from the complaint. What, then, is the harm that befalls the Commonwealth if these two can marry without having labeled themselves with unscientific names of malignant origin which as a practical matter cannot be shown to serve any useful purpose?[6]

No interest of the Commonwealth is harmed if the requested relief is forthcoming. The current racial classification system provides no meaningful or useful data to the state, nor has the state used this to any useful purpose. As exemplified by the racial categories embraced by the circuits at issue in this case, there is no uniformity among Virginia's judicial circuits for racial terminology. Beyond that, the catch-all "other" or "mixed"

[6]As noted in the complaint, this case in no way addresses or adversely impacts governmental efforts to address ongoing discrimination or the consequences of past racialization. The lawsuit does not reach how the state may identify and reach such victims. That said, it is not necessary to racialize groups victimized by discrimination in order to address its consequences, e.g., as in the case of Jews racialized by the Nazis. *See Shaarei Tefilla Congregation v. Cobb,* 481 U.S. 615 (1987) and *St. Francis College v. Al-Kazraji,* 481 U.S. 604 (1987) (Jews and Arabs can avail themselves of statutory remedies protecting persons from race discrimination notwithstanding that they do not constitute races).

categories, in particular, provide meaningless data that is useless for genetic, medical, or scientific purposes. *See*, declarations of Prewitt, Tishkoff and Feldman.

The preliminary relief here at issue, while a great boon to the plaintiffs, thus yields no cognizable harm to the Commonwealth. Much to the contrary, "a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such injunction." *Centro Tepeyac v. Montgomery County*., 722 F.3d 184, 191 (4th Cir. 2013). The equities of the matter lie clearly with Ms. Rogers and Mr. Churchill.

IV. Preliminary Relief is in the Public Interest

Courts have repeatedly recognized that "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002); *see also Chabad of Southern Ohio v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) ("[T]he public interest is served by preventing the violation of constitutional rights."); *Christian Legal Society v. Walker*, 453, F.3d 853, 859 (7th Cir. 2006) ("[I]njunctions protecting First Amendment freedoms are always in the public interest."). These strictures apply here word for word, and support the relief plaintiffs request.

Conclusion

For these reasons, the court should issue a temporary restraining order or preliminary injunction enjoining the defendants from enforcing the provision Va. Code Ann. §32.1-267(A) as to them, thereby permitting them to obtain a timely marriage license without having to label themselves by race.

Respectfully submitted,

SOPHIE ROGERS *et al.,*

By counsel

Dated: September 5, 2019

Counsel for Plaintiffs:

//s// Victor M. Glasberg
Victor M. Glasberg, #16184
Bernadette E. Valdellon, *pro hac vice*
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
703.684.1100 / Fax: 703.684.1104
vmg@robinhoodesq.com
bev@robinhoodesq.com
RaceCase\Pleadings\MemTRO

Certificate of Service

I, Victor M. Glasberg, hereby certify that the foregoing Memorandum in Support of Motion for Temporary Restraining Order or Preliminary Injunction will be served on the following defendants by hand together with the complaint on the 6th day of September 2019:

Virginia State Registrar
c/o Janet Rainey, State Registrar, or authorized recipient of process
Virginia Department of Health
OIM - Division of Vital Records
2001 Maywill Street
Richmond, VA 23218

Clerk, Arlington Circuit Court
c/o Paul F. Ferguson, Clerk, or authorized recipient of process
Arlington Circuit Court
1425 North Courthouse Road, #6700
Arlington, VA 22201

Clerk, Rockbridge Circuit Court
c/o Michelle M. Trout, Clerk, or authorized recipient of process
Rockbridge Circuit Court
20 South Randolph Street, #101
Lexington, VA 24450-2552

//s// Victor M. Glasberg
Victor M. Glasberg, #16184
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
703.684.1100 / Fax: 703.684.1104
vmg@robinhoodesq.com

Counsel for Plaintiff