IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SOPHIE ROGERS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:19-cv-01149 (RDA/IDD)
	)	
VIRGINIA STATE REGISTRAR, *et al.*,	)	
	)	
Defendants.	)	

Order

This matter comes before the Court on several motions: Plaintiffs' Motion for a Temporary Restraining Order, Plaintiffs' Motion for Summary Judgment, and Defendants' Motion to Dismiss. Dkt. Nos. 6, 17, and 29. For the reasons stated below, the Court DENIES Plaintiffs' Motion for a Temporary Restraining Order as well as Defendants' Motion to Dismiss, and GRANTS Plaintiffs' Motion for Summary Judgment.

A. Procedural History

The following factual recitation is uncontested. In anticipation of their October 19, 2019, wedding, Plaintiffs Sophie Rogers and Brandyn Churchill sought a marriage license from the Clerk of Rockbridge County Circuit Court. In the process of completing the application for a marriage license, Plaintiffs Rogers and Churchill declined to provide their races as the application required.

Plaintiffs Ashley Ramkishun, Samuel Sarfo, Amelia Spencer, and Kendall Poole sought marriage licenses from the Clerk of Arlington County Circuit Court. Plaintiffs Ramkishun, Sarfo, Spencer, and Poole also declined to provide their races as the application required.

Consequently, none of the Plaintiffs were issued a marriage license. While it has been suggested that a reason for the denial was circumstances regarding data entry, the bottom-line is that, at a minimum, the marriage licenses could not be issued.

A Complaint was filed against the Clerk of Rockbridge County Circuit Court, the Clerk of Arlington Circuit Court, as well as the Virginia State Registrar on September 5, 2019. In light of their impending marriage, Plaintiffs Rogers and Churchill requested immediate relief via a Motion for Temporary Restraining Order.

All Plaintiffs argue that Va. Code Ann. § 32.1-267(A) is facially unconstitutional as it burdens their fundamental right to marry, constitutes compelled speech, and violates their right to privacy. Plaintiffs Ramkishun, Sarfo, and Poole also argue the statute is unconstitutional as applied as it burdens their right to be free from the badges and incidents of slavery. Consequently, Plaintiffs request that this Court deem the statute unconstitutional to the extent the statute "requires persons seeking to obtain a license to marry to state their 'race.'" Dkt. 1. Plaintiffs also request that this Court enjoin Defendants and all others acting in concert with them or at their direction from enforcing the statute at issue, direct that otherwise proper marriage licenses be processed, and that a revised application without the racial inquiry be disseminated. Dkt. 1.

Subsequently, Attorney General Mark R. Herring ("General Herring") circulated a "memorandum" regarding Virginia Code Ann. §32.1-267 (A). Dkt. 31-2. General Herring concluded that the statute "does not require a clerk to refuse to issue a marriage license when the applicant declines to identify his or her race, and that clerks should issue a license regardless of an applicant's answer or non-answer to that inquiry." Relying on the interpretive canon of constitutional avoidance, General Herring concluded that applicants "may decline to provide an

answer about race, and an officer issuing a marriage license may accept a marriage license from a couple who declines to answer a question about race." On September 13, 2019, an electronic communication from Defendant Virginia State Registrar, Janet Rainey, was forwarded to all Clerks of Court. Defendant Rainey advised that, based on General Herring's construction of the statute, she revised the application "so it is clear that applicants for a marriage license may decline [to] answer[] the question regarding their race." She then requested that the Clerks of Court use the attached revised application immediately.

Plaintiffs filed a Motion for Summary Judgment. Dkt. 17. Defendants then filed their Motion to Dismiss requesting that this Court dispose of the case on procedural grounds. Dkt. 29.

B. Historical Background

Before proceeding to the disposition of the case, it is appropriate to provide the historical underpinnings of the so called "racial classification methodology" which cause this case to be before this Court.

The origins of racial classification begin with Swedish botanist, zoologist, and physician, Carl Linnaeus. In *Systema Natura*, Linnaeus attempted to classify all living things by genus name and species name. Humans were divided into four taxa,[1] differentiated by skin color and traits: "Americanus, Asiaticus, Africanus, and Europeanus." Discussions of traits particular to each taxa revealed that more favorable traits belonged to the Europeanus taxa. The racial classification of "Caucasian" emerged in 1775, developed by German physician and naturalist, Johann Friedrich Blumenbach. He posited that Caucasians represented the ideal form of humanity.

[1] "Taxa" is defined as "group" in the Complaint. Dkt. 1.

These European-based concepts transferred across the Atlantic as evidenced by racialization[2] in the administration of the United States census and passage of naturalization laws. The first census was held in 1790. Racial classifications included free white persons, taxed American Indians, and other free persons. In 1820, the categories of slaves and free blacks merged into a single category: "Slaves and Free Colored Persons." After the Emancipation Proclamation was issued, the former slaves and descendants category was revised to include "Black, Mulatto." In 1890, that again changed into "Black, Mulatto, Quadroon or Octoroon." And in 1900, the category became "Black (Negro or of Negro Descent)."

In addition, as of 1790, only "free white persons" and "aliens of African nativity and to persons of African descent" could become naturalized. Several individuals brought suit contesting this "white requirement." This remained law until the passage of the Immigration and Naturalization Act of 1952.

Legal opinions contextualized the societal sentiment towards racialization. In *Scott v. Sanford*, 60 U.S. 393, 410 (1857), Chief Justice Taney penned:

> Yet the men who framed this declaration were great men – high in literary acquirements – high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; *and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery.* They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. *The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.*

[2] This term was defined to mean "the process of imposing a discrete racial identity on given peoples and dealing with them accordingly." Dkt. 1.

Turning to racialization in Virginia, this so-called separatist mindset pervaded. *See, e.g.*, *Kinney v. Commonwealth*, 71 Va. 858, 869 (1878). The Bureau of Vital Statistics ("Bureau") was established, and a subset of the data recorded included tracking marriage licenses. Prior to the abolition of slavery, marriages between white people and African Americans were deemed void. 31 Va. Code Ann. 109 § 1 (1849). In 1919, the General Assembly enacted § 5074, which required the Clerk of Court to record "whether [the applicant for the marriage license was] white or colored." Then, the Virginia Racial Integrity Act was enacted in 1924

> during the period of extreme nativisim which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a 'white person' marrying other than another 'white person, a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of 'racial composition' to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.'

Loving v. Virginia, 388 U.S. 1, 6 (1967).

The Bureau promulgated applications for marriage licenses, requiring applicants to swear that the race selected was truly theirs and referenced the Racial Integrity Act of 1924. Walter Plecker served as the initial registrar of the Bureau. Plecker openly supported the Racial Integrity Act of 1924. When suspicious that applicants for marriage licenses were not forthright in disclosing their race, Plecker challenged their marriages and sought to have those individuals prosecuted. Accordingly, "race mixing" or miscegenation was not only unfavored in the Commonwealth of Virginia, it was and could be the subject of criminal prosecution.

Virginia's anti miscegenation law was challenged in *Loving v. Virginia*, 206 Va. 924 (1966). Relying on *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, 755-56 (Va. 1955), *remanded* 350 U.S. 890, *aff'd* 197 Va. 734, *appeal dismissed* 350 U.S. 985, the Virginia Supreme Court cited to

Plessy v. Ferguson, 163 U.S. 537, 545 (1896): "[l]aws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." The Virginia Supreme Court further noted that the reversal of the "separate but equal" doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954), did not support the invalidation of anti miscegenation laws as *Brown* was a case within the sphere of education, and upheld the statute. The Supreme Court of the United States reversed, asserting that

> [t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Loving v. Virginia, 388 U.S. 1, 12 (1967).

C. Statutory Scheme

It is not challenged that to the extent that applicants must disclose their race in order to receive a marriage license, the statutory scheme is a vestige of the nation's and of Virginia's history of codified racialization.

Pursuant to Va. Code. Ann. § 20-13, "[e]very marriage in this commonwealth shall be under a license and solemnized in the manner herein provided." The authority to issue marriage licenses lies with Clerks of Court. Va. Code Ann. § 20-14.

Va. Code. Ann. § 32.1-267 (A) dictates that "[f]or 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." A prior iteration of subsection A

stated "[f]or each marriage performed in this Commonwealth, a record showing personal data for 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. *Such record shall be prepared without statements indicating racial designation.*" 2003 Va. Acts 504 (emphasis added). The italicized language was stricken in 2004. 2004 Va. Acts 88.

Subpart B specifies in pertinent part that "[t]he 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." Va. Code Ann. § 32.1-267(B). Subpart D directs the "officer issuing marriage licenses [to] on or before the tenth day of each calendar month forward to the State Registrar a record of each marriage filed with him during the preceding calendar month." Then, the "State Registrar shall furnish forms for the marriage license, marriage certificate, and application for marriage license used in the Commonwealth." Va. Code Ann. § 32.1-267.

Applications for marriage licenses vary widely across the Commonwealth and it appears that Clerks of Court throughout the Commonwealth have developed different approaches to assist applicants to meet the statutory mandate. In Rockbridge County, for instance, pages of racial categories are provided, including such categories as "Octaroon" and "Quadroon," whereas in Arlington, applicants may only select "American Indian/Alaskan Native, African American/Black, Asian, Caucasian, Hispanic/Latino, Pacific Islander, [or] Other."

Va. Code Ann. § 20-14.1 provides that a marriage license constitutes "authority for a period of only sixty days from the date of issuance for the solemnization of a marriage of the licensees."

D. Analysis

Plaintiffs Rogers and Churchill conceded that they no longer require immediate injunctive relief. *See, e.g. Real Truth About Obama, Inc. v. Federal Election Comm'n*, 796

F.Supp.2d 736, 743 (E.D. Va. 2011) ("Preliminary relief is not appropriate where permanent relief will issue simultaneously and will immediately bind the parties."). Accordingly, the Motion for Temporary Restraining Order as sought by Plaintiffs Rogers and Churchill is DENIED.

Thus, only Plaintiffs' Motion for Summary Judgment and Defendants' Motion to Dismiss, predicated on 12(b)(1) and 12(b)(6), are currently before the Court.

Plaintiffs request that the Court grant their Motion for Summary Judgment.

> Summary judgment shall be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (internal quotation marks omitted). A district court should grant summary judgment unless a reasonable jury could return a verdict for the nonmoving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). An otherwise properly supported motion for summary judgment will not be defeated by the existence of any factual dispute; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of" the nonmoving party's case. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir.2002) (internal quotation marks omitted).

Germain v. Metheny, 539 Fed.App'x 108, 109 (4th Cir. 2013).

With respect to Defendants' Motion to Dismiss, a 12(b)(1) motion may be presented in two forms.

> First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. Second, it may be contended that the jurisdictional

> allegations of the complaint were not true. A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.

Adams v. Bain, 697 F.2d 1213, 1219 (1982).

And "[t]o survive a Rule 12(b)(6) motion, a complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level,' with 'enough facts to state a claim to relief that is plausible on its face.'" *Evans v. Napolitano*, 466 Fed. App'x. 190, 190 (4th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Generally, the Court must "accept as true all of the factual allegations contained in the complaint." *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

i. Justiciability

Before proceeding to the merits, the Court will address Defendants arguments regarding whether or not the case is justiciable. "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both our standing and our mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so we address them separately." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

a. Standing

It appears that Defendants attack Plaintiffs' standing to bring suit. "Article III of the Constitution confers on federal courts the power to resolve only 'cases' and 'controversies.'" *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267-68 (4th Cir. 2011) (quoting *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 132, 133 (2011)). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from

being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 492-93 (2009)).

"'One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.'" *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017) (quoting *Clapper*, 133 S.Ct. at 1146)). "Unlike questions of mootness and ripeness, the standing inquiry asks whether a plaintiff had the requisite stake in the outcome of a case 'at the outset of the litigation.'" *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) (citing *Laidlaw*, 528 U.S. at 180)). The burden of establishing standing lies with "the party invoking federal jurisdiction," Plaintiffs in this case. *Clapper*, 568 U.S. at 411-412 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Generally, "[t]o have standing, a plaintiff must show [that]:"

> (1) he suffered an injury, which means "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical;" (2) the injury was caused by the person sued; and (3) a court can likely redress the injury.

McBurney v. Cuccinelli, 780 F.Supp.2d 439, 445 (E.D. Va. 2011) (quoting *Lujan*, 504 U.S. at 560).

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 565, n.2). "Thus, we have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Plaintiffs possessed standing when the suit was initiated. All Plaintiffs sought marriage licenses. A state law mandated that they disclose their race. All declined. Consequently, no marriage licenses were issued when requested. *See Bostic v. Schaefer*, 760 F.3d 352, 371 (4th Cir. 2014) (noting that a license denial constitutes an injury for standing purposes). They were all injured at the outset.

Defendants also contend that there is a lack of adversity. "[T]he opposing party also must have an ongoing interest in the dispute, so that the case features 'that concrete adverseness which sharpens the presentation of issues.'" *Camreta v. Green*, 563 U.S. 692, 701 (2011) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)).

The parties appear to agree that requiring individuals applying for a marriage license in the Commonwealth of Virginia to disclose their race has constitutional implications. Upon a closer reading of Defendants' arguments, because General Herring interpreted the statute to *not* contain such a requirement, Defendants do not (and quite frankly could not) argue that the statute is unconstitutional and therefore adopt General Herring's reading of it. On the other hand, Plaintiffs request that the Court not defer to General Herring's interpretation, find that the plain meaning of the statute requires applicants to label their races, and deem it unconstitutional. Thus, Defendants take a position that is adverse to Plaintiffs.

b. Injunctive Relief

Defendants argue that Plaintiffs are not entitled to injunctive relief. To be entitled to injunctive relief, Plaintiffs must demonstrate that they are likely to succeed on the merits, that they will suffer irreparable harm in the absence of injunctive relief, that the balance of the equities weighs in their favor, and that granting such relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Court notes that "[a]n injunction is a

drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-312 (1982)). Defendants specifically contend that Plaintiffs cannot demonstrate irreparable harm because Plaintiffs cannot show "any real or immediate threat that [the Plaintiffs] will be wronged again."

Only after Plaintiffs filed their Complaint did the temporary relief result. Thus, all Plaintiffs may seek marriage licenses from only these Clerks, without having to disclose their race, at least and until General Herring's term expires and/or the Clerk of Courts who have been sued as Defendants in their official capacities also leave office. This relief is not permanent and only resolves the injuries of Plaintiffs Rogers and Churchill.[3] Turning to the other two Plaintiff-couples, although General Herring advanced an interpretation via memorandum that may well be favorable to them, that interpretation does not have the force of law, *infra* page 11. Moreover, and most critically, the statute at issue has yet to be repealed. And considering past failed legislative amendments to the statute at issue, it may not be repealed for quite some time. Further, the two Plaintiff-couples may decide to apply for a marriage license within General Herring's term, but that license would be valid for only 60 days; thus, the two Plaintiff-couples may not have their solemnization ceremonies in time. Va. Code Ann. § 20-14.1. Moreover, the two Plaintiff-couples may decide to marry after General Herring's term expires. All Plaintiffs memorialized their intention to marry in signed declarations for this suit.

c. Mootness

[3] Plaintiffs Rogers and Churchill will be married October 19, 2019, thus necessitating a marriage license.

"Mootness principles derive from the requirement in Article III of the Constitution that federal courts may adjudicate only disputes involving 'a case or controversy.'" *Williams v. Ozmint*, 716 F.3d 801, 808 (4th Cir. 2013) (quoting *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 370 (4th Cir. 2012)). "[A]n actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the [suit] is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). "When a case or controversy ceases to exist—either due to a change in the facts or the law—'the litigation is moot, and the court's subject matter jurisdiction ceases to exist also.'" *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *S.C. Coastal Conservation League*, 789 F.3d 475, 482 (4th Cir. 2015). "Put differently, 'a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Id.* (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), the Supreme Court noted that

> [t]he underlying concern is that, when the challenged conduct ceases such that "'there is no reasonable expectation that the wrong will be repeated,'" *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), then it becomes impossible for the court to grant "'any effectual relief whatever' to [the] prevailing party," *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). In that case, any opinion as to the legality of the challenged action would be advisory.

In *Windsor*, the Court found that Windsor established the requisite controversy because although there was agreement that Windsor should be refunded her taxes, the Government would not do so absent a Court order. *United States v. Windsor*, 570 U.S. 744 (2013). Thus, Windsor possessed "a real and immediate economic injury." *Id.* at 745. The Court noted that "[i]t would be a different case if the Executive had taken the further step of paying Windsor the refund to

which she was entitled under the District Court's ruling." *Id.* In addition, General Herring's interpretation, Defendant Rainey's revision of the application, and the Defendant Clerks' declarations that they will uphold General Herring's interpretation of the statute at issue do not constitute the "extra step" contemplated in *Windsor*. Although these actions were well-measured and obviously in good faith, they were merely temporary. While this suffices for Plaintiffs Rogers and Churchill, it does not suffice for the two other Plaintiff-couples. *See infra* 12.

A relevant exception to the mootness doctrine is voluntary cessation. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Laidlaw*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). The underlying rationale for this exception "'traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.'" *Porter*, 852 F.3d at 364 (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001)). "A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *Laidlaw*, 528 U.S. at 190.). It has been held that a change in policy "renders a challenge moot when the governmental entity 'has not asserted its right to enforce [the challenged policy] at any future time.'" *Id.* (quoting *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1231 (4th Cir. 1989)). However, it has also been held that "a defendant fails to meet its heavy burden . . . when the defendant 'retains the authority and capacity to repeat an alleged harm.'" *Id.* (quoting *Wall v. Wade*, 741 F.3d 492, 497 (2014)).

Defendants did not meet their "heavy burden" of establishing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Although it is

acknowledged that General Herring interpreted the statute to not require race labeling, Defendants could not declare the statute unconstitutional. It is true that the Defendant clerks swore to uphold General Herring's interpretation. However, the Clerks of Court are required to uphold the statute, and General Herring's interpretation lacks the force of law. *See MCIMetro Access Transmission Servs. of Virginia, Inc. v. Christie*, 310 Fed. App'x. 601, 605 (4th Cir. 2009) (The Court expressed "reluctance to assume that a stage agency such . . . would not comply with a properly recognized law."). In addition, future Attorneys General are not bound by AG Herring's memorandum and may advance a different interpretation of the statute.

ii. Merits

The facts necessary to resolve these issues are undisputed.

All Plaintiffs request that this Court find Va. Code Ann. § 32.1-267 unconstitutional to the extent it burdens their fundamental right to marry.

First, the Court undertakes to determine the meaning of the statute at issue. Questions of statutory interpretation are reviewed *de novo*. *Ignacio v. United States*, 674 F.3d 252, 254 (4th Cir. 2012) (citing *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010)). To begin with, the Court must "determine, and adhere to, the intent of the legislature reflected in or by the statute being construed." *Virginia Soc. For Human Life, Inc. v. Caldwell*, 152 F.2d 268, 272 (4th Cir. 1998)). "As an initial and primary proposition, that intent is to be determined by the words in the statute." *Id.* (citing *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987)). In addition, Virginia adheres to the doctrine of constitutional avoidance: "there is a presumption that the legislature in the passage of an act did not intend to violate the constitution of the state or of the United States, and if such an act is susceptible of two constructions, one of which would make the same invalid as in violation of the state or federal constitutions and the other give

validity to the act, the latter interpretation will be adopted upon the theory of legislative intent not to violate any provision of either of such instruments." *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 387 n.17 (4th Cir. 1998) (quoting 17 *Michie's Jurisprudence of Virginia and West Virginia*, Statutes, § 56). In considering the deference afforded to General Herring's interpretation, in Virginia, an Opinion of the Attorney General is "not binding on this Court" but is "entitled to due consideration." *Beck v. Shelton*, 267 Va. 482, 491-92, 593 S.E.2d 195, 200 (2004) (quoting *Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998)).

The statute at issue is not susceptible to two constructions, only one. It unambiguously requires that "[f]or each marriage performed in the Commonwealth, a record showing personal data, including but not limited to the age and race of the married parties, the marriage license, and the certifying statements of the facts of marriage shall be filed with the State Registrar as provided in this section."[4] The Court notes that General Herring's interpretation was memorialized in a memorandum as opposed to a formal opinion, and General Herring provided a construction of the statute that is expressly at odds with its plain meaning. Accordingly, applicants for marriage licenses still must disclose their race in order to be issued a marriage license.

Having determined what the statute requires, the Court must next decide whether the statute can withstand constitutional scrutiny. The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person

[4] At no point in these proceedings did any party request that this interpretive question be certified to the Virginia Supreme Court. Rule 5:42. In addition, the Attorney General did not request to intervene as a party. Notwithstanding those considerations, this constitutional question is properly before this Court for the reasons contained in this Order.

of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment states that "all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927)). "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. Virginia*, 388 U.S. 1, 12 (1967). Interference with a fundamental right warrants strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). To survive this heightened scrutiny, the statute at issue must be "narrowly tailored to serve a compelling state interest." *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Although Defendants attempt to argue that the line connecting the statute at issue to the Racial Integrity Act of 1924 is not so clear, it is. In the not so distant past, the General Assembly revised the statute at issue in 2003, inserting language that the application "shall be prepared without statements indicating racial designation." 2003 Va. Acts 504. However, this corrective language was stricken one year later. When asked by this Court at oral argument whether there was any state interest in this racial data, Defendants conceded there was not. The only state interest found appears in Va. Code Ann. § 32.1-268.1, which provides

> [t]he State Registrar shall compile, publish, and make available to the public aggregate data on the number of marriages, divorces, and annulments from the year 2000 forward that occurred in the Commonwealth. The data shall be organized according to the locality in which the marriage license is issued or in which the divorce or annulment report is certified, and shall include but not be limited to information regarding the age and race of the parties. . . . The State Registrar shall post, update, and maintain this information on the Department website. Names, addresses, social

> security numbers, and any other personal identification information shall not be included.

Moreover, due to the variability in racial classifications provided, data collection efforts would seemingly result in high rates of error. This state interest is not compelling. Thus, requiring Plaintiffs to disclose their race in order to receive marriage licenses burdens their fundamental right to marry. The statute does not withstand strict scrutiny. In so finding, this Court need not proceed to the three other grounds of constitutional infirmity.

E. Conclusion

The Commonwealth of Virginia is the home state of some of the greatest individuals of our nation's history...George Washington, Thomas Jefferson, George Mason and Patrick Henry among others. It is also the home state of other "greats" including Oliver Hill, Lewis Powell and the first elected African-American governor; L. Douglas Wilder. The Commonwealth of Virginia is naturally rich in its greatest traditions. But like other institutions, the stain of past mistakes, misgivings and discredited legislative mandates must always survive the scrutiny of our nation's most important institution... The Constitution of the United States of America.

The Court finds that Va. Code Ann. § 32.1-267(A) is unconstitutional as it denies Plaintiffs their rights to due process under the Fourteenth Amendment of the United States Constitution.

Accordingly, this Court DENIES Plaintiffs Motion for Temporary Restraining Order, GRANTS Plaintiffs Motion for Summary Judgment, and DENIES Defendants Motion to Dismiss.

This Court ENJOINS the enforcement of Va. Code Ann. § 32.1-267(A) to the extent it burdens individuals' fundamental right to marry.

It is SO ORDERED.

The matter was exceptionally well-argued by all counsel involved and the Court appreciates the professionalism and civility exercised by all counsel involved during the disposition of this most significant matter.

Alexandria, Virginia
October 11, 2019

/s/
Rossie D. Alston, Jr.
United States District Judge