IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEB WHITEWOOD, *et al.*,	:	1:13-cv-1861
Plaintiffs,	:	
	:	Hon. John E. Jones III
v.	:	
MICHAEL WOLF, *in his official capacity as Secretary, Pennsylvania Department of Health, et al.*,	:	
Defendants.	:	

MEMORANDUM AND ORDER

December 17, 2013

On November 15, 2013, this Court issued a Memorandum and Order (Doc. 67), relevantly denying the Motion to Dismiss of Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser ("Defendants"). Thereafter, Defendants filed a Motion for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b) ("the Motion") (Doc. 76). For the reasons articulated herein, the Court will deny the instant Motion.

I. BACKGROUND

In this action, Plaintiffs challenge as unconstitutional provisions of Pennsylvania's Marriage Law that define marriage as between one man and one woman, *see* 23 Pa.C.S. § 1102, and declare void same-sex marriages validly

entered into in other jurisdictions, *see* 23 Pa.C.S. § 1704. Defendants moved to dismiss the claims, asserting that the United States Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972) precludes federal subject matter jurisdiction in the present matter. *See* FED. R. CIV. P. 12(b)(1). We denied the motion based on the decades of significant jurisprudential developments in the areas of equal protection and due process since the issuance of *Baker*. Defendants' present Motion timely followed, and it has been fully briefed by the parties.

II. DISCUSSION

Interlocutory review was intended by Congress for only "exceptional cases." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (citation and internal quotation marks omitted); *see also Rottmund v. Continental Assurance Co.*, 813 F.Supp. 1104, 1112 (E.D. Pa. 1992) (stating that the movant must show that "exceptional circumstances justify a departure from the basic policy against piecemeal litigation and of postponing appellate review until after the entry of a final judgment") (citations omitted). A district court may certify an order for interlocutory appeal where (1) the relevant order involves a "controlling question of law"; (2) there is "substantial ground for difference of opinion" on that question; and (3) a prompt appeal "may materially advance the ultimate

termination of the litigation." 28 U.S.C. § 1292(b); *see Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974) (*en banc*). The burden is on the moving party to demonstrate that each requirement is satisfied. *See Orson, Inc. v. Miramax Film Corp.*, 867 F.Supp. 319, 320 (E.D. Pa. 1994) (citation omitted). However, even if the statutory conditions are met, a district court may exercise its discretion to decline to certify the order. *See Bachowski v. Usery*, 545 F.2d 363, 368 (3d Cir. 1976); *In re Chocolate Confectionary Antitrust Litig.*, 607 F.Supp.2d 701, 704 (M.D. Pa. 2009) (citations omitted).

Here, Defendants argue that our Memorandum and Order denying their motion to dismiss presents a controlling question, namely, whether *Baker* precludes subject matter jurisdiction of this action. They assert that the issue of subject matter jurisdiction clearly presents a controlling question of law and aver that, if the Third Circuit finds *Baker* to be preclusive, our decision would be reversed with direction to dismiss the litigation. As to whether there is substantial ground for differing opinions, Defendants cite various cases finding *Baker* controlling (Doc. 76, pp. 4-5 (collecting cases)), and note that the Third Circuit has not yet considered *Baker*'s effect. Finally, in terms of materially advancing the litigation, Defendants maintain that certifying appeal would completely eliminate the necessity of a trial.

Although Defendants arguably present a controlling question of law, *see Beazer East, Inc. v. The Mead Corp.*, No. Civ.A.91-408, 2006 WL 2927627, at *2 (W.D. Pa. Oct. 12, 2006) (describing the issue of subject matter jurisdiction as a clear example of a controlling question of law), we disagree that substantial grounds for a difference of opinion exist on that question. As stated by the Third Circuit, "indications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition." *Lecates v. Justice of Peace Court No. 4 of State of Del.*, 637 F.2d 898, 904 (3d Cir. 1980). As we discussed when denying Defendants' Motion to Dismiss (Doc. 67, pp. 4-6), it is manifest that there have been substantial and far-reaching developments in the jurisprudence of equal protection and substantive due process in the forty-one years since *Baker* was issued. *See generally Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012) (describing developments). And, contrary to Defendants' assertion, this Court is rightfully in position to consider and assess such doctrinal advancements. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (stating that a question branded as unsubstantial "remains so except when doctrinal developments indicate otherwise") (citation and quotation marks omitted); *Romeo v. Youngberg*, 644 F.2d 147, 169 n.56 (3d Cir. 1980) (observing that "Supreme Court decisions have indicated that summary

dispositions are not ironclad rulings, and that their precedential force may well be modulated by subsequent doctrinal developments") (citations omitted), *vacated on other grounds*, 457 U.S. 307 (1982); *Lecates*, 637 F.2d at 904.[1]

Based on the foregoing discussion, we decline to certify an appeal. We note that, in view of the conjunctive nature of 28 U.S.C. § 1292(b), we need not address whether the ultimate termination of the litigation would be materially advanced by an immediate appeal.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT

1. Defendants' Motion for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b) (Doc. 76) is **DENIED**.

John E. Jones III
United States District Judge

[1] While Defendants correctly note that conflicting decisions may demonstrate substantial grounds for differing opinions, *see Knipe v. SmithKline Beecham*, 583 F.Supp.2d 553, 600 (E.D. Pa. 2008), we again observe, with significance, that all of the cases Defendants cite in support of *Baker*'s preclusive effect predate the Supreme Court's decision in *United States v. Windsor*, 570 U.S. – (2013) (holding that Section 3 of the federal Defense of Marriage Act, defining marriage as between one man and one woman, is unconstitutional).