

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

DEB WHITEWOOD, <i>et al.</i> ,	:	
	:	Civil Action
Plaintiffs,	:	
	:	1:13-cv-1861
v.	:	
	:	
MICHAEL WOLF, in his official	:	
capacity as the Pennsylvania	:	
Secretary of Health, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**MOTION OF DEFENDANTS SECRETARY OF HEALTH MICHAEL
WOLF AND SECRETARY OF REVENUE DAN MEUSER FOR
CERTIFICATION AND AMENDMENT OF ORDER
PURSUANT TO 28 U.S.C. § 1292(b)**

Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser hereby move the Court for certification and amendment of its November 15, 2013 Memorandum and Order to allow Defendants to seek an interlocutory appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b).

1. In its November 15, 2013 Order, the Court denied Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

2. Under 28 U.S.C. § 1292(b) and Third Circuit precedent, this Court is authorized to amend its Order to allow an immediate appeal: "(1) where immediate appeal may avoid protracted and expensive litigation, (2) the request involves a

controlling question of law, and (3) where there is a substantial basis for differing opinion.” *J.L. v. Ambridge Area Sch. Dist.*, Civ. No. 06-1652, 2008 U.S. Dist. LEXIS 26014, *7 (W.D. Pa. Apr. 1, 2008) (Fischer, J.) (citing *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958)).

3. As discussed in Defendants’ Memorandum of Law in Support of Motion for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b), which is incorporated herein by reference as if fully set forth at length, each of these conditions is met.

WHEREFORE, Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser respectfully request this Court to certify and amend the November 15, 2013 Order to state that “(1) the Order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) an immediate appeal may materially advance the ultimate termination of the litigation.” A proposed order is attached.

Respectfully submitted,

Date: November 25, 2013

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CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE

I, William H. Lamb, hereby certify that counsel for all parties were contacted regarding possible concurrence with the Motion of Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b). Counsel for Plaintiffs indicated non-concurrence with this motion. Counsel for co-Defendant Donald Petrille, Jr. has indicated that Defendant Petrille takes no position with regard to this Motion.

Respectfully submitted,

LAMB McERLANE PC

Dated: November 25, 2013

By: /s/William H. Lamb
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion of Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser for Certification and Amendment of Order Pursuant to 28 U.S.C. § 1292(b) was served on this, the 25th day of November, 2013, to the attorneys of record as follows:

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS
SECRETARY OF HEALTH MICHAEL WOLF AND SECRETARY OF
REVENUE DAN MEUSER FOR CERTIFICATION AND AMENDMENT
OF ORDER PURSUANT TO 28 U.S.C. § 1292(b)**

In its November 15, 2013 Memorandum and Order, the Court denied the Motion of Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendants respectfully request, pursuant to 28 U.S.C. § 1292(b), that the Court amend the Order to state that “the Order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) an immediate appeal may materially advance the ultimate termination of the litigation.” The controlling question of law at issue is whether, pursuant to the United States Supreme Court’s holding in *Baker v. Nelson*, 409 U.S. 810 (1972), this action must be dismissed due to lack of federal subject matter jurisdiction.

Third Circuit precedent authorizes this Court to amend its Order to allow an immediate appeal under 28 U.S.C. § 1292(b) in the circumstances of this case. *See, e.g., J.L. v. Ambridge Area Sch. Dist.*, Civ. No. 06-1652, 2008 U.S. Dist. LEXIS 26014, *7 (W.D. Pa. Apr. 1, 2008) (authorizing certification: “(1) where immediate appeal may avoid protracted and expensive litigation, (2) the request involves a controlling question of law, and (3) where there is a substantial basis for differing opinion.”) (Fischer, J.) (citing *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958)). The Court should amend its Order because each of these conditions is met.

I. THE COURT’S ORDER PRESENTS A CONTROLLING QUESTION OF LAW

The Order denying Defendants’ Motion to Dismiss squarely presents a controlling question of law. The Third Circuit has defined a controlling question of law to be one that either: “(1) if decided incorrectly would lead to reversal on appeal; or (2) is serious to the conduct of the litigation either practically or legally.” *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974) (*en banc*). Saving court time and expense is a “highly relevant” factor when determining a controlling question of law. *Id.*; *see also Moore’s Federal Practice* ¶ 203.31[3] (3d ed. 2003) (controlling question of law is one that “has the potential of substantially accelerating disposition of the litigation”).

The Third Circuit's definition of “controlling question” of law clearly is met in this case. Defendants moved to dismiss this litigation for lack of federal subject matter jurisdiction, pursuant to the United States Supreme Court’s holding in *Baker*. Such a question relating to federal subject matter jurisdiction is a threshold legal issue that should be resolved at the outset of litigation and which squarely falls within the definition of a “controlling question” of law. *See, e.g., Beazer East, Inc. v. Mead Corp.*, Civ. No. 91-408, 2006 U.S. Dist. LEXIS 74743, *5 (W.D. Pa. Oct. 12, 2006) (“[T]he fundamental issue of subject matter jurisdiction is one of the clearest examples of a ‘controlling question of law’ within the meaning of § 1292(b).”) (citing *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff’d*, 414 U.S. 291(1973) (order dismissing a claim for lack of jurisdiction falls within the criteria of § 1292(b))).

Had the Court reached a contrary conclusion, the appropriate remedy would have been an immediate dismissal of the litigation. *See, e.g., Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012) (dismissing complaint as precluded by *Baker*). Consequently, if the Third Circuit were to determine that the United States Supreme Court’s holding in *Baker* precludes this action, the appropriate remedy would be an immediate reversal with direction to dismiss the litigation. Based on the foregoing, it is clear that the Order involves a “controlling issue of law” within the meaning of 28 U.S.C. § 1292(b) and relevant precedent.

II. A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION EXISTS AS TO WHETHER THE UNITED STATES SUPREME COURT'S HOLDING IN *BAKER* PRECLUDES THIS ACTION

A substantial ground for difference of opinion exists as to whether the United States Supreme Court's holding in *Baker* precludes this action. This factor may be demonstrated "by offering conflicting and contradictory opinions of courts which have ruled upon the issue." *Ambridge Area Sch. Dist.*, 2008 WL 906534 at *7; *see also Fasano v. Federal Reserve Bank of New York*, 457 F.3d 274, 279 (3d Cir. 2006) (split in authority around country and recent contrary opinion from district court demonstrate substantial difference of opinion).

Although this Court held that *Baker* did not preclude this action,¹ numerous other courts have held to the contrary, finding that *Baker* is binding authority in subsequent cases involving claims challenging the constitutionality of a state's definitional marriage statute. *See Massachusetts v. United States Dep't of HHS*,

¹ Although this Court did not find *Baker* controlling "due to the significant doctrinal developments in the four decades that have elapsed since it was announced by the Supreme Court" (Dist. Ct. slip op., 11/15/13, at 4), that determination is appropriately left to the United States Supreme Court. *See generally Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent."); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

682 F.3d 1, 3 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013) (*Baker* is binding precedent that precludes review of all arguments resting on “a constitutional right to same-sex marriage”); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012) (equal protection claim asserting that states may not refuse to permit or recognize same sex marriages performed in other states is “garden-variety equal protection challenge precluded by *Baker*”); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012) (*Baker* is “last word” from Supreme Court regarding constitutionality of state law limiting marriage to opposite-sex couples); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) (“The Supreme Court has not ... provided the lower courts, including this Court, with any reason to believe that the holding [in *Baker*] is invalid today.”).

The Third Circuit has not yet considered whether *Baker* is binding authority in subsequent cases involving claims challenging the constitutionality of a state’s definitional marriage statute, such as this one.² Additionally, the case of *Palladino v. Corbett*, Civil Action No. 13-cv-05641-MAM, pending in the United States District Court for the Eastern District of Pennsylvania, is another case that presents the same jurisdictional issue. Given the Third Circuit’s lack of guidance, together with the conflicting and contradictory case law from other courts, a substantial

² Pennsylvania is the only state within the jurisdiction of the Third Circuit Court of Appeals that will present this issue to that court because both New Jersey and Delaware already allow same-sex marriage.

ground for difference of opinion exists as to the issue for which Defendants seek certification of the Order.

III. PERMITTING AN IMMEDIATE APPEAL FROM THE COURT'S ORDER MAY AVOID PROTRACTED AND EXPENSIVE LITIGATION

Finally, if the Court certifies the Order, a permissive appeal likely would materially advance the termination of the litigation. “Several factors are pertinent in determining whether an immediate appeal would materially advance the ultimate termination of the litigation, including: (1) whether the need for trial would be eliminated; (2) whether the trial would be simplified by the elimination of complex issues; and (3) whether discovery could be conducted more expeditiously and at less expense to the parties.” *Knipe v. Smithkline Beecham*, 583 F. Supp. 2d 553, 600 (E.D. Pa. 2008).

In this instance, permitting an immediate appeal would completely eliminate the need for trial, if the Third Circuit determines that *Baker* precludes this action. Further, such a determination would eliminate the need for costly discovery in this litigation. The parties have agreed that the discovery to be completed in this case may include the taking of ten non-expert depositions each by both Plaintiffs and Defendants, the taking of depositions of all Plaintiffs by Defendants, the serving of twenty-five interrogatories by each side, the serving of twenty-five requests for admissions by each side, and the serving of not more than twenty-five document

production requests by each side. The costs to the parties, as well as the drain on judicial resources to oversee such discovery, plus the attendant expert costs and fees, would be significant. The parties and the Court also would have to expend considerable resources on non-discovery issues as well, including a determination of the appropriate level of scrutiny to apply to Plaintiffs' claims.

For the foregoing reasons, Defendants Secretary of Health Michael Wolf and Secretary of Revenue Dan Meuser respectfully request that the Court certify its Order pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted,

Date: November 25, 2013

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