

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

MARCIE FISHER-BORNE, for herself and as guardian ad litem for M.F.-B., a minor;
CHANTELLE FISHER-BORNE, for herself and as guardian ad litem for E.F.-B., a minor; TERRI BECK; LESLIE ZANAGLIO, for herself and as guardian ad litem for T.B.Z. and D.B.Z., both minors; SHANA CARIGNAN; MEGAN PARKER, for herself and as guardian ad litem for J.C., a minor; LEIGH SMITH; CRYSTAL HENDRIX, for herself and as guardian ad litem for J.H.-S., a minor; DANA DRAA; LEE KNIGHT CAFFERY, for herself and as guardian ad litem for M.M.C.-D. and M.L.C.-D., both minors; SHAWN LONG; CRAIG JOHNSON, for himself and as guardian ad litem for I.J.-L., a minor;

Case No. 1:12-cv-00589

Plaintiffs,

v.

JOHN W. SMITH, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; THE HONORABLE DAVID L. CHURCHILL, in his official capacity as Clerk of the Superior Court of Guilford County; THE HONORABLE ARCHIE L. SMITH III, in his official capacity as Clerk of the Superior Court for Durham County; ROY COOPER, in his official capacity as the Attorney General of North Carolina; WILLIE COVINGTON, in his official capacity as the Register of Deeds for Durham County; and JEFF THIGPEN, in his official capacity as the Register of Deeds for Guilford County;

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT COVINGTON'S
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Defendant Willie Covington moved to dismiss Plaintiffs' Amended Complaint filed in this matter pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Pursuant to Rule 7.3 of the Local Rules of Civil Practice for the Middle District of North Carolina, Defendant Covington submits this memorandum in support of his motion to dismiss.

NATURE OF THE CASE

Plaintiffs have brought this action pursuant to 42 U.S.C. §1983, alleging North Carolina's prohibition against same sex marriages violates their rights to due process and equal protection under the United States Constitution. They seek a declaration that North Carolina's Amendment One and N.C. Gen. Stat. §§51-1, 51-1.2 violate Plaintiffs' rights to due process and equal protection under the United States Constitution and 42 U.S.C. §1983, and that such laws are thus void and unenforceable. Plaintiffs further seek an order directing Defendant Covington to accept marriage applications from same-sex couples and to process such applications consistent with the way he accepts and processes applications from heterosexual couples.

STATEMENT OF FACTS

Relevant Background Information

This case was brought by individuals comprising six North Carolina families. Each family consists of two adults who are in a same-sex relationship who seek to marry each other, or have their marriages respected. (Compl. ¶ 1). Because of the gender and sexual orientation of the adult Plaintiffs, they are denied the freedom to marry in North Carolina, and the out-of-state marriages of the married Plaintiffs are effectively voided within North Carolina by North Carolina law, which specifies that Plaintiffs' marriages are not "valid or recognized in the State." N.C. Const. art. XIV, §6 (as amended). (Compl. ¶ 4).

North Carolina statutory law defines marriage as being between one man and one woman, thereby prohibiting marriage by persons of the same sex. North Carolina Gen. Stat. §51-1 provides in relevant part: “A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other. . . .” (Compl. ¶ 64). North Carolina statutory law explicitly provides that marriages by persons of the same gender are not valid. North Carolina Gen. Stat. §51-1.2 provides: “Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina. “ (Compl ¶65). Furthermore, on May 8, 2012 section 6 of Article XIV of the North Carolina Constitution was amended to exclude same-sex couples from the freedom to marry in North Carolina and to void within North Carolina the lawful marriages of same-sex couples from other jurisdictions. (Compl. ¶66).

Plaintiffs, Chantell Fisher-Borne and Marcie Fisher-Borne are residents of Durham County. (Compl ¶105). They were legally married in the District of Columbia in 2011. (Compl. ¶109). Plaintiffs, Terri Beck and Leslie Zanaglio, are residents of Morrisville, NC and live in a committed same-sex relationship (Compl. ¶¶131, 133). Plaintiffs, Shana Carignan and Megan Parker, are residents of Greensboro, NC and have lived in a committed same-sex relationship for five years. (Compl¶171). They had a commitment ceremony in Greensboro in 2010. (Compl.¶ 172). On September 13, 2012, they were legally married in the Commonwealth of Massachusetts. (Compl. 173). Plaintiffs, Leigh Smith and Crystal Hendrix, are residents of Asheville, NC and have been a committed couple for eight years. (Compl ¶¶199, 201). Plaintiffs, Dana Draa and Lee Knight Caffery, are residents of Charlotte, NC (Compl¶220). They have been a committed couple for eight years and had a formal commitment ceremony on May

19, 2007. (Compl. ¶ 222). Plaintiffs, Craig Johnson and Shawn Long are current residents of Wake Forest, NC. (Compl. ¶243). Mr. Johnson and Mr. Long have been in a committed same-sex relationship for nineteen years. (Compl. ¶244).

Defendant Covington is the Register of Deeds for Durham County. In that capacity, he is entrusted with the authority to carry out certain laws of the State, including the issuance of marriage licenses and certificates. (Compl. ¶342).

QUESTIONS PRESENTED

- I. Does the Court have subject matter jurisdiction over the Plaintiffs' claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure when the Plaintiffs lack standing to bring this action against Defendant Covington?
- II. Have the Plaintiffs stated a claim upon which relief can be granted against Defendant Covington when Defendant Covington has performed his duties as Register of Deeds of Durham County according to NC General Statutes §51-8.

ARGUMENT

- I. The Court does not have subject matter jurisdiction over Plaintiffs' claims as they pertain to Defendant Covington because the Plaintiffs have failed to establish an injury traceable to him; and, therefore, lack standing to bring such claims against him.

The constitutional doctrine requiring a litigant to have “standing” to invoke the power of a federal court is perhaps the most important of the doctrines clustering around the Article III “case or controversy” requirement of federal judicial power. *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (citing U.S.C.A. Const. Art. 3, § 1 et seq.). The standing requirement has a core component derived directly from the Constitution in that a plaintiff must allege a personal injury fairly traceable to a defendant's allegedly unlawful conduct which can likely to be redressed by the requested relief. *Id.*; U.S.C.A. Const. Art. 3, § 1 et seq. In other words, to establish standing a plaintiff must show that he has suffered (1) an “injury in

fact” (2) that is fairly traceable to the defendant’s action and (3) is likely to be “redressed by a favorable decision” of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

In the present case, the Plaintiffs have failed to meet the *Lujan* standard in that the Plaintiffs have not articulated sufficient facts to establish that there is an “injury in fact that is fairly traceable to [D]efendant [Covington’s] actions.” Defendant Covington is the Register of Deeds of Durham County duly elected by the citizens of Durham County pursuant to N.C. Gen. Stat. §161-1. In that capacity he is required, upon proper application, to issue a license for the marriage of any two persons who are able to answer the questions regarding age, marital status, and intention to marry. Based on the answers, he is to determine whether the persons are authorized to be married in accordance with the laws of this State. N.C. Gen. Stat. §51-1 provides that “[a] valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other. Any Register of Deeds that issues a marriage license in violation of these laws is in violation of the criminal laws of this state and shall be guilty of a Class 1 misdemeanor, and removed from office. NC. Gen. Stat. §161-27.

The Plaintiffs in this action offer no evidence that they have presented an application to Defendant Covington for a marriage license at any time. Nor, do they present that they have been denied a marriage license by him. In fact, Plaintiffs Chantelle and Marcie Fisher-Borne, the couple most likely to present to Defendant Covington because they are residents of Durham County, were married in the District of Columbia in 2011. Any alleged injury that they may have suffered is the lack of recognition of their union in this State, which has nothing to do with Defendant Covington and his charge to issue marriage licenses.

The remaining Plaintiffs are residents of Wake, Guilford, Buncombe, Mecklenburg, and Wake Counties, respectively. They are not likely to present to Defendant Covington for a marriage license in Durham County; and, more importantly, the facts indicate that they have not presented to Defendant Covington.

Rule 12(b)(1) provides for dismissal where the court lacks jurisdiction over the subject matter of the lawsuit. Fed.R.Civ.P. 12(b)(1). A defendant's challenge to a plaintiff's standing to assert a claim is properly considered pursuant to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir.2005). Ultimately, the burden of proof is on the plaintiff to demonstrate that the Court has subject-matter jurisdiction over a dispute. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). In order to satisfy the constitutional requirements for standing, a plaintiff, as previously stated, must demonstrate that:

1) he or she suffered an “injury in fact” that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision. *Gaston Copper*, 629 F.3d 387, 396; *see also Lujan*, 504 U.S. at 560–61, 112 S.Ct. at 2136.

Plaintiffs have failed to meet this burden, and this action as it pertains to Defendant Covington should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

II. The Plaintiffs have failed to state a claim upon which relief can be granted against Defendant Covington because Defendant Covington has performed his duties as Register of Deeds of Durham County according to NC General Statutes §51-8.

N.C. Gen. Stat. §51-8 provides in pertinent part that “every register of deeds shall, upon proper application, issue a license for the marriage of any two persons who are able to answer the questions regarding age, marital status, and intention to marry, and, based on the answers, the register of deeds determines the persons are authorized to be married in accordance with the laws

of this State.” However, “[t]he register of deeds shall not issue a marriage license unless all of the requirements of this section have been met.” *Id.* In determining that persons are authorized to be married in accordance with the laws of this State the Register of Deeds must determine that the applicants for the license are one male and one female. *See* N.C. Gen. Stat. §51-1.

Defendant Covington, pursuant to N.C. Gen. Stat. § 161-3, took the oath of office upon his election vowing to support and maintain the Constitution and laws of the United States and the Constitution and laws of North Carolina, not inconsistent therewith, and to faithfully discharge the duties of his office as Register of Deeds to the best of his knowledge and ability. N.C. Gen. Stat. §11-7. Any register of deeds who fails to perform any of the duties imposed or authorized by law, shall be guilty of a Class 1 misdemeanor, and shall be removed from office. N.C. Gen. Stat. §161-27. For that reason, Defendant Covington has no discretion in this matter and is bound by the charge of his office to apply and uphold the law, whatever it may be. To hold him responsible for a law that he did not make, endorse, or have the ability to alter, modify or transform is incomprehensible. To issue marriage licenses is a duty imposed by law upon him. It is not the guiding principle of the register of deeds to obstruct or retard marriages. *Harcum v. Marsh*, 130 N.C. 154, 41 S.E. 6, 7 (1902). His guiding principle is the application of the law.

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.” *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir.1992) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990)). In considering a motion to dismiss for failure to state a claim, a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993); *see also Martin*, 980 F.2d at 952.

The Federal Rules of Civil Procedure “require[] only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Courts long have cited the “rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [a] claim which would entitle him to relief.” *Conley*, 355 U.S. at 45–46. In *Twombly*, the United States Supreme Court noted that a complaint need not assert “detailed factual allegations,” but must contain more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Conley*, 550 U.S. at 555 (citations omitted). Thus, the “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *id.* (citations omitted), to one that is “plausible on its face,” *id.* at 570, rather than merely “conceivable.” *Id.* Therefore, in order for a complaint to survive dismissal for failure to state a claim, the plaintiff must “allege facts sufficient to state all the elements of [his or] her claim.” *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir.2003) (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir.2002); *Iodice v. United States*, 289 F.3d 279, 281 (4th Cir.2002)). In so doing, the complaint must meet a “plausibility” standard, instituted by the Supreme Court in *Ashcroft v. Iqbal*, where it held that a “claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Thus, a well-pleaded complaint must offer more than “a sheer possibility that a defendant has acted unlawfully” in order to meet the plausibility standard and survive dismissal for failure to state a claim. *Id.*

In the present case the complaint on its face fails to allege any conduct by Defendant Covington which would allow the court to draw a reasonable inference that he engaged in any misconduct. In fact, the complaint is no more than labels and conclusions or a formulaic recitation of the elements of a cause of action in that it only describes Defendant Covington's role as Register of Deeds for Durham County; and, more importantly, the complaint fails to directly link the Plaintiffs with *any* conduct of Defendant Covington. Accordingly, the Plaintiff's have failed to state a claim against Defendant Covington upon which relief can be granted.

CONCLUSION

The Complaint as it pertains to Defendant Covington should be dismissed as the Plaintiffs lack standing to bring such an action and, likewise, the Plaintiff's have failed to state a claim upon which relief can be granted.

This the 10th day September 2013.

/s/ Kathy R. Everett-Perry
Kathy R. Everett-Perry
N.C. State Bar No.: 20958
*Counsel for Willie Covington, in his Official
Capacity as Register of Deeds for Durham County*
P.O. Box 3508
Durham, NC 27702
Telephone: (919) 560-0710
Fax: (919) 560-0719
E-mail: keverettperry@dconc.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS was filed electronically with the Clerk of Court using the CM/ECF system which will serve copies to counsel of record in this matter as indicated below:

PLAINTIFFS:

Jonathan D. Sasser
Jeremy M. Falcone
Ellis & Winters, LLP
P.O. Box 33550
Raleigh, NC 27636

OF COUNSEL:

Rose A. Saxe
James D. Esseks
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004-2400

Elizabeth O. Gill
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, California 94111-4805

Christopher Brook
ACLU of North Carolina
PO Box 28004
Raleigh, North Carolina 27611-8004

Garrard R. Beeney
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498

DEFENDANTS:

Grady L. Balentine, Jr.
Special Deputy Attorney General
NC Department of Justice
PO Box 629
Raleigh, North Carolina 27602

Olga E. Vysotskaya de Brito
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, North Carolina 27602

Charles Whitehead
Special Deputy Attorney General
NC Department of Justice
PO Box 629
Raleigh, North Carolina 27602

Jeff L. Thigpen
Register of Deeds for Guilford County
2nd Floor, BB&T Building
201 West Market Street
Greensboro, North Carolina 27401

This the 10th day of September, 2013.

/s/ Kathy R. Everett-Perry
Kathy R. Everett-Perry
Assistant County Attorney