UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
1:12-cv-00589-WO-JEP

MARCIE FISHER-BORNE, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
JOHN W. SMITH, et al.,	)
	)
Defendants.	)
	)

MEMORANDUM OF LAW IN SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

In support of their Motion to Dismiss, and pursuant to Rule 7.3 of the Local Rules of Civil Practice for the Middle District of North Carolina, the North Carolina Attorney General, the Director of the North Carolina Administrative Office of the Courts, and the two named Clerks of Superior Court ("State Defendants") submit this memorandum of law.

Nature of the Case

Plaintiffs' First Amended Complaint names certain State and County officials, solely in their official capacity, as defendants in this action challenging the validity of North Carolina marriage and adoption laws. The North Carolina Attorney General represents the State Defendants only. Defendant John W. Smith is the Director of the North Carolina Administrative Office of the Courts, and serves primarily in an administrative and advisory capacity. Defendant John Smith assumes no enforcement role with respect to adoption or marriage proceedings. See N.C. Const., art. IV, § 15; N.C. Gen. Stat. § 7A–340 (2013); see also N.C. Gen. Stat. § 7A–343 (2013). Defendants Churchill and Archie L. Smith III are Clerks of Superior Court, and act as judicial officers in

adoption proceedings. N.C. Gen. Stat. § 48–2–100 (2013). Clerks of Court are not charged with any statutory authority over the issuance of marriage licenses. The Attorney General's duties are prescribed by statute and common law. See N.C. Gen. Stat. § 114-2 (2013); Martin v. Thornburg, 359 S.E.2d 472 (N.C. 1987). The Attorney General maintains no specific enforcement authority over marriage or adoption proceedings. Moreover, opinions of the Attorney General do not constitute "enforcement," but are instead advisory. Lawrence v. Shaw, 186 S.E. 504 (N.C. 1936), rev'd on other grounds, 300 U.S. 245 (1937).

In contrast, Registers of Deeds are elected county officials, N.C. Gen. Stat. § 161-1 (2013), and are responsible for the issuance of marriage licenses in accordance with State laws. N.C. Gen. Stat. § 51-8 (2013). The named Registers of Deeds are represented in this matter by their respective county attorneys.

Plaintiffs bring their action pursuant to 42 U.S.C. § 1983, and allege that North Carolina's definition of "marriage" violates their Due Process and Equal Protection rights, and, additionally, precludes same-sex couples from the opportunity to adopt children. Plaintiffs pray the Court for a declaration that N.C. Gen. Stat. §§ 51-1 and 51-1.2, as well as Amendment One of the North Carolina Constitution,[1] are void and unenforceable, and that by extension, North Carolina's adoption statutes premised on the "marriage" definition are void and unenforceable.

Statement of Facts

The predicate to Plaintiffs' claim is their challenge to North Carolina's definition of "marriage" as being exclusively a legal union between one man and one woman. The various damages Plaintiffs describe, including the inability of same-sex couples to simultaneously adopt children, flow from

[1] NC Constitution, Article XIV, Section 6.

this definition of "marriage." That definition has been codified by the North Carolina General Assembly, and has been further ratified by the citizens of this State with Amendment One to the North Carolina Constitution.

Questions Presented

I. As To The State Defendants, Whether Plaintiffs' First Amended Complaint Should Be Dismissed Pursuant To Rules 12(b)(2) and (6) Of The Federal Rules of Civil Procedure, And Whether The North Carolina Attorney General May Thereafter Intervene In This Action.

II. Whether The Principles Of Federalism And Abstention Warrant The Dismissal Of Plaintiffs' First Amended Complaint Pursuant To Rules 12(b)(1) and (6) Of The Federal Rules of Civil Procedure.

III. Whether North Carolina's Definition of "Marriage" Deprives Plaintiffs Of Due Process Rights, Including Those Related To Adoption.

IV. Whether North Carolina's Definition of "Marriage" Deprives Plaintiffs Of Equal Protection Rights, Including Those Related To Adoption.

Standard of Review

A motion filed under Rule 12(b)(2) of the Federal Rules of Civil Procedure tests a court's jurisdiction over an individual. The burden is on the plaintiff to demonstrate that jurisdiction is proper. Dean v. Motel 6 Operating L.P., 134 F.3d 1269, 1272 (6th Cir. 1998). A plaintiff must set forth specific facts showing that the court has jurisdiction. Weller v. Cromwell Oil Co., 504 F.2d 927, 930 (6th Cir. 1974). Although a plaintiff who opposes a 12(b)(2) motion is entitled to have all reasonable inferences drawn in his favor, the court is not required to look solely to plaintiff's proof. Mylan Labs., Inc. v Akzo, N.V., 2 F.3d 56, rev'd on other grounds, 7 F.3d 1130 (4th Cir 1993).

Pursuant to Rule 12(b)(1), the burden of proving subject matter jurisdiction is on the party asserting jurisdiction. See Mims v. Kemp, 516 F.2d 21 (4th Cir. 1975). "[T]he court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction." Adams v. Bain, 697 F.2d 1213, 1219

(4th Cir. 1982). Further, a motion under Rule 12(b)(6) will be granted only when it clearly appears that the plaintiff can prove no set of facts to support a claim which would entitle him to the requested relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).

Argument

I. Plaintiffs' First Amended Complaint Should Be Dismissed Pursuant to Rules 12(b)(2) and (6) Of The Federal Rules Of Civil Procedure.

A. This Court Lacks Personal Jurisdiction Over The Respective Named State Defendants Who Act In Their Official Capacities.

Plaintiffs' First Amended Complaint fails to allege any facts sufficient to draw the necessary connection between the State Defendants and the enforcement of North Carolina's marriage laws. Specifically, Plaintiffs have failed to allege that Defendants John Smith, Churchill, Archie Smith or Cooper have taken, or have threatened to take, any particular action against any of them to prevent their marriages as same-sex couples.

Under § 1983, claimants must establish that a **person** acted in such a way as to deprive them of rights, privileges, or immunities secured by the Constitution and laws. Ex parte Young, 209 U.S. 123 (1908), permits a federal court to issue prospective and injunctive relief against a state officer to prevent ongoing violations of federal law, even when the Court would not otherwise maintain jurisdiction under the Eleventh Amendment. The Ex parte Young exception is directed at "officers of the state [who] are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings...to enforce against parties affected [by] an unconstitutional act." 209 U.S. at 155-56.

Application of the Ex parte Young exception requires a demonstration of a "special relationship" between the officers being sued in the present action, and the challenged state law. Id. at 157; Waste Mgmt. Holdings v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001). This requirement of "proximity to and responsibility for the challenged state action," S.C. Wildlife Fed'n v. Limehouse, 549 F.3d 324, 333 (4th Cir. 2008), is not met when an official merely possesses "[g]eneral authority to enforce the laws of the state." Id. at 331 (citation omitted). The Supreme Court has specifically delineated the test to determine whether a public officer is a proper defendant in official-capacity actions challenging the constitutionality of a state statute:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

209 U.S. at 157 (internal citation omitted). The jurisprudence on this issue has been constant and pervasive.[2]

Plaintiffs fail to demonstrate that the State Defendants have engaged in an ongoing violation of the U.S. Constitution. Consequently, the State Defendants do not qualify as "persons" for the purposes of a § 1983 action.

Plaintiffs allege only that Defendant John Smith is the Director of the North Carolina Administrative Office of the Courts which, "on information and belief, has the responsibility for promulgating rules, policies and procedures to control or advise North Carolina clerks of county courts who apply the North Carolina adoption laws when considering whether to accept or reject

[2] See, e.g., Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp., 980 F.2d 437, 440-41 (7th Cir. 1992) (applying Ex parte Young test to request for declaratory relief under 42 U.S.C. § 1983 and holding attorney general was not proper defendant when "[p]laintiffs ha[d] not articulated any theory under which Ex parte Young supports a suit against the Attorney General, who has never threatened the [plaintiffs] with prosecution and as far as we can tell has no authority to do so").

petitions for adoption." [DE 40 ¶¶ 330-31] With respect to the Defendants Churchill and Archie Smith, Plaintiffs alleged that they are "entrusted with the authority to carry out certain laws of the state, including the adoption statutes described herein." [DE 40 ¶¶ 333-34, 336-37]

As to Defendant Cooper, Plaintiffs allege only that "it is his duty to appear for the State in any court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested. N.C. Gen. Stat. § 114-2. It is the duty of Defendant Cooper to defend and enforce the laws of North Carolina." [DE 40 ¶ 339] Plaintiffs also note that the North Carolina Department of Justice has issued an advisory opinion letter regarding the issuance of marriage certificates to same-sex couples under North Carolina's marriage statutes. [DE 40 ¶ 340]

The Supreme Court in Ex parte Young expressly and specifically rejected the type of generalized assertions offered by Plaintiffs in their First Amended Complaint. In laying out the "some connection with the enforcement of the act" test, the Court quoted its prior decision in Fitts v. McGhee, 172 U.S. 516 (1899):

> In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes…

Ex parte Young, 209 U.S. at 157 (quoting Fitts, 172 U.S. at 530).

Although not binding on this Court, the North Carolina Court of Appeals exhaustively addressed this issue in its recent decision in Thigpen v. Cooper, 739 S.E.2d 165 (N.C. Ct. App. 2013). In that case, same-sex couples who sought marriage licenses sued the Attorney General and the State of North Carolina for a declaratory judgment that North Carolina marriage laws violated the U.S. Constitution. The Court of Appeals exclusively applied federal law to conclude that the Attorney General, sued in his official capacity, was not a proper defendant under 42 U.S.C. § 1983 in a federal constitutional claim concerning the State's enforcement of its marriage laws. Specifically, the Court opined that a § 1983 action permits suits only against a "person," and that neither the State nor the State Attorney General could be properly classified as a "person" under the section.

The Court of Appeals' decision turned on the issue of whether the Attorney General was directly involved in an alleged ongoing violation of federal law. Answering that question in the negative, the Court specifically rejected the argument that the Attorney General's duty to defend the validity of state laws established the requisite connection with the enforcement of marriage statutes alleged to be unconstitutional. Id. Although not binding, the decision in Thigpen is persuasive, provides a comprehensive analysis of pertinent federal law, and should be followed.

Plaintiffs have failed to demonstrate that any of the State Defendants have a connection with the enforcement of Amendment One or the marriage statutes alleged to be unconstitutional. Stated alternatively, in light of the test articulated in Ex parte Young, Plaintiffs make no allegation to sufficiently connect the State Defendants "with the duty of enforcement to make [them] a proper party." Id. at 161. Plaintiffs have further failed to demonstrate that these public officials have engaged in an ongoing violation of the U.S. Constitution, and therefore qualify as "persons" under

42 U.S.C. § 1983. These failures necessitate the dismissal of Plaintiffs' First Amended Complaint pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure.

B. Although Not A Proper Party, In His Capacity As North Carolina's Attorney General, Defendant Cooper Maintains The Right To Intervene In This Matter.

Although not a proper party defendant to this action, the Attorney General seeks to intervene in future proceedings in this matter, if any, for the purpose of defending this State's laws from claims of unconstitutionality. In any action in which statutory construction is at issue, 28 U.S.C. § 2403(b) permits "the State to intervene... for argument on the question of constitutionality." Likewise, N.C. Gen. Stat. § 114-2 provides that it is the duty of the Attorney General "to appear for the State in any [other] court or tribunal in any case or matter, civil or criminal, in which the State may be a party or interested." Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, intervention by the Attorney General in this matter is by right. The proper participation of the Attorney General in any further proceeding would be as an intervenor in furtherance of his duty to defend the constitutionality of the challenged State statutes and State constitutional provision, not as a named party-defendant.

II. Federalism And The Principles Of Abstention Warrant Dismissal of Plaintiffs' First Amended Complaint Pursuant to Rules 12(b)(1) and (6) Of The Federal Rules of Civil Procedure.

The U.S. Constitution grants enumerated powers to the federal government, and reserves the remaining powers to the States. Gregory v. Ashcroft, 501 U.S. 452, 457-458 (1991). "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as

political entities in their own right." Bond v. United States, ___U.S.__, __, 131 S. Ct. 2355, 2364 (2011).

States possess "full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." United States v. Windsor, __ U.S. __, __, 133 S. Ct. 2675, 2691 (2013) (citing Haddock v. Haddock, 201 U. S. 562, 575 (1906)). Regulation of domestic relationships, including those between spouses, parents and children, and other "incidents, benefits, and obligations of marriage" is ordinarily left to the states. Windsor, 133 S. Ct. at 2691-2692; Sosna v. Iowa, 419 U.S. 393, 404 (1975). This is true even where federal jurisdiction may otherwise exist. See Ankenbrandt v. Richards, 504 U. S. 689, 703 (1992). States' authority over marriage is especially vital:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See Williams v. North Carolina, 317 U. S. 287, 298, 63 S. Ct. 207, 87 L. Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." Ibid.

Windsor, 133 S. Ct. at 2691. Federal jurisprudence cedes to the States the right to enforce their own laws concerning marriage and other domestic responsibilities, subject only to Constitutional guarantees.

Plaintiffs seek to avoid the consequences of federalism by alleging that North Carolina's marriage and adoption laws violate the Fourteenth Amendment. [DE 40 ¶¶360-432]. At the heart of Plaintiffs' First Amended Complaint is the question of whether same-sex couples have a constitutionally protected right to marry in North Carolina. In turn, Plaintiffs allege that their inability

to marry prevents them from pursuing one of North Carolina's three adoption methods - a stepparent adoption - which is available only to lawfully married couples.[3] Resolution of the same-sex marriage issue necessarily controls Plaintiffs' challenges to the State's adoption statutes.

Although Plaintiffs assert a purported federal question, [DE 40 ¶20], the Supreme Court has specifically refused to disregard the limits of federal jurisdiction with respect to the issue of same-sex marriage. Specifically, in Baker v. Nelson, 409 U.S. 810 (1972), the Court refused to review an appeal from Minnesota's highest court, which had concluded that a state law banning same-sex marriages did not offend Due Process and Equal Protection guarantees. The Court ruled that the appeal failed to raise a viable and justiciable federal question. Id. Under 28 U.S.C. § 1257(2) as in effect at the time, the Supreme Court had "no discretion to refuse adjudication of the case on the merits," and the Court's dismissal for lack of substantial federal question is a binding precedent preventing "lower courts from coming to opposite conclusions on the precise issue presented." Hicks v Miranda, 422 U.S. 332, 344 (1975) (quoting Mandel v Bradley, 432 U.S. 173, 176 (1977)). Federal courts have relied on Baker to resolve same-sex marriage arguments. For example, the First Circuit Court of Appeals concluded that Baker was a binding precedent that precluded review of all arguments resting on "a constitutional right to same-sex marriage." Massachusetts v. United States Dep't of HHS, 682 F.3d 1, 3 (1st Cir. 2012), cert denied by, __ U.S. __ (2013); see also Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012).

Baker is dispositive, and Plaintiffs' grievances over marriage and adoption issues should not be construed to implicate any federal right. Moreover, even if this Court determines that Plaintiffs have met the procedural requirements to invoke federal jurisdiction, it should nevertheless abstain

[3] N.C. Gen. Stat. §§ 48-4-100 - 103 (2013) (stepparent adoption statutes).

from revising North Carolina's definition of marriage and its regulation of adoption.[4] The authority to regulate domestic relations remains within the dominion of the State, and, pursuant to Baker, Plaintiffs' First Amended Complaint presents no viable federal question. Plaintiffs' First Amended Complaint should be dismissed for failure to state a claim and lack of subject matter jurisdiction.

III. Neither State Recognition Of Same-Sex Marriage, Nor Adoption Rights, Are Fundamental Rights Under the Due Process Clause.

A. There Is No Fundamental Right To Marry A Person Of The Same Sex.

Plaintiffs allege in their First Amended Complaint that enforcement of North Carolina's marriage laws denies them the fundamental right to marry. Although the right for a man and a woman to marry is fundamental, the right to other unions, including same-sex marriage, is not. When an asserted right is not fundamental, the due process clause of the Fourteenth Amendment dictates that any governmental interference with that right be merely rationally related to legitimate government interests. Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).

The substantive due process analysis features two steps. First, courts require a "careful description" of the asserted fundamental liberty interest; and second, the courts consider whether the right is "objectively, deeply rooted in this nation's history and tradition, and implicit in the

[4] Three oft-cited abstention theories are: (1) abstention to permit state court resolution of state law, including Pullman, R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500 (1941), Thibodeaux, La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27–30 (1959), and Burford, Burford v. Sun Oil Co., 319 U.S. 315, 317–19 (1943), (2) abstention to avoid interfering with state litigation – Younger, Younger v. Harris, 401 U.S. 37, 44 (1971), and (3) abstention to avoid duplicative litigation - Colorado River, Colo. River Cons. Dist. v. Akin, 424 U.S. 800, 817 (1976). Other federal courts have abstained without reference to a specific abstention theory, because cases revolved around the issues of state domestic and family law. See, e.g., Smith v. Pension Plan of Bethlehem Steel Corp., 715 F. Supp. 715, 718 (W.D. Pa. 1989); Huynh Thi Anh v. Levi, 586 F.2d 625, 632–33 (6th Cir. 1978); Am. Airlines v. Block, 905 F.2d 12, 15 (2d Cir. 1990) (per curiam). Both California and the Ninth Circuit applied Pullman abstention to avoid deciding the constitutionality of California's marriage laws, which limited marriage to unions between men and women. See Smelt v. County of Orange, 447 F.3d 673, 678–82 (9th Cir. 2006) (Pullman analysis); Smelt v. County of Orange, 374 F. Supp. 2d 861, 865–70 (C.D. Cal. 2005), aff'd in part, rev'd in part on other grounds, 447 F.3d 673 (9th Cir. 2006) (abstaining in challenge of statute prohibiting same-sex marriage).

concept of ordered liberty such that neither liberty nor justice would exist if it were sacrificed." Id. at 720-21 (internal quotations and citations omitted).

Only a few fundamental rights have been recognized, and the Supreme Court has been reluctant to expand substantive due process beyond clearly established boundaries. Id. at 720. The right for a man and a woman to marry is among the established fundamental rights. However, that "careful description" does not extend the constitutional right to same-sex marriage. Indeed, the term has ordinarily contemplated only a "relationship between a man and a woman." Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1095 (D. Haw. 2012) (quoting Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982)); see Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. Ct. App. 2006).

Marriage between same-sex couples is a relatively new and evolving concept. However, by its very nature, the emerging debate demonstrates that same-sex marriage is not "objectively, deeply rooted in this Nation's history and tradition." Consequently, it cannot be deemed a fundamental right for Fourteenth Amendment purposes. "The limitation of lawful marriage to heterosexual couples … for centuries had been deemed both necessary and fundamental…." Windsor, 133 S. Ct. at 2689; Hernandez, 855 N.E.2d at 10; In re Kandu, 315 B.R. 123, 140 (W.D. Wash 2004) ("[T]here are no grounds to conclude objectively that same-sex marriages are deeply rooted in this Nation's history and tradition.")

Other courts, which have addressed the issue of same-sex marriage, have concluded that it does not qualify as a fundamental right, underpinned by the historical understanding of marriage as

the union of one man and one woman.[5] Although some states have redefined marriage pursuant to the popular consensus of their own residents, the majority of states continue to adhere to the historical definition. While not conclusive, this fact bears considerable weight upon whether a fundamental right is implicated. See Schall v Martin, 467 U.S. 253, 268 (1984).

Since North Carolina's marriage laws do not interfere with a fundamental right, they are constitutional because they bear a rational relationship to a legitimate governmental interest. See Section IV. A, infra.

B. North Carolina's Adoption Statutes Do Not Violate The Due Process Clause.

Plaintiffs' allegation that their Due Process rights are denied by the State's prohibition against second parent adoption do not withstand analysis.

A Due Process claim under 42 U.S.C. § 1983 calls for a "familiar two-stage analysis" to determine (1) whether "the asserted individual interests are encompassed within the fourteenth amendment's protection of 'life, liberty, or property"; and (2) whether the procedures available provided the plaintiff with "due process of law." Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972). Plaintiffs fail to meet the first step of this analysis. The opportunity to adopt is not, and has never been construed to be, a fundamental right. Instead, adoption is a statutory scheme devised by sovereign states. See Wilson v. Anderson, 59 S.E.2d 836, 839 (N.C. 1950).

The State's trial courts are empowered to grant or deny applications for adoption in light of the best interests of the child. N.C. Gen. Stat. § 48-2-603. This statute guarantees no person any particular outcome of an adoption proceeding, irrespective of gender or sexual orientation.

[5] See Wilson v Ake, 354 F. Supp. 2d 1298, 1305-06 (M.D. Fla., 2005); Smelt, 374 F. Supp. 2d at 879; Conaway v. Deane, 932 A.2d 571, 619 (Md. 2007) (evaluating challenge under Maryland Constitution); Lewis v. Harris, 908 A.2d 196, 210-211 (N.J. 2006) (evaluating challenge under New Jersey constitution); In re J.B., 326 S.W.3d 654, 675 (Tex. App. 2010).

Petitions for adoption in North Carolina do not give rise to a protected liberty interest under the Due Process Clause of the Fourteenth Amendment. See Lofton v Sec'y of Fla. Dep't of Children and Family Servs., 358 F.3d 804, 811-12 (11th Cir. 2004). [6] A Due Process analysis is inappropriate and unnecessary. Plaintiffs' contentions regarding the supposed violation of Due Process must be dismissed.

IV. Because North Carolina Marriage And Adoption Laws Rationally Relate To Legitimate State Interests, They Are In Accord With The Equal Protection Clause Of The Fourteenth Amendment.

A. The Equal Protection Clause Does Not Prohibit A Citizen Referendum On The Definition Of Marriage As A Legal Union Between A Man And A Woman.

With their First Amended Complaint, Plaintiffs incorrectly assert that their Equal Protection rights under the Fourteenth Amendment are violated by North Carolina's marriage laws. However, States may treat different groups of people in different ways when legislation is reasonable and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting F. S. Royter Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). Classifications that neither involve a fundamental right nor create a suspect class of individuals are strongly presumed to be constitutionally valid. North Dakota v. United States, 495 U.S. 423, 433 (1990).

The first task in an equal protection analysis is to identify the classification at issue, and then to apply an appropriate level of scrutiny. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-29 (1973). A rational basis standard applies when there exist classifications based on

[6] Mullins v Oregon, 57 F.3d 789, 794 (9th Cir. 1995)("Whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest"); see e.g., Lindley v Sullivan, 889F.2d 124 (7th Cir. 1989; Adar v Smith, 639 F.3d 146 (5th Cir. 2011); Griggs v Arizona, 2013 U.S. Dist. LEXIS 51643 (D. Ariz. 2013).

"distinguishing characteristics relevant to interests the State has the authority to implement." Cleburne v. Cleburne Living Center, Inc., 473 U. S. 432, 441 (1985). Under the rational basis test, the question is whether the challenged legislation is rationally related to any legitimate government interest. Heller v. Doe, 509 U.S. 312, 320 (1993). Same-sex marriage is not a fundamental right, see Section III. A., supra, and North Carolina's marriage laws do not create a suspect class of people. Therefore, these laws are subject, at most, to a rational basis analysis.

Plaintiffs urge the Court to reject North Carolina's marriage laws under a heightened scrutiny standard given the purported discriminatory purpose of those laws. [DE 40 ¶¶89-104] In doing so, Plaintiffs characterize "lesbians and gay men" as being a suspect class that deserves an intermediate level of scrutiny. [Id.] Yet this argument fails as (1) North Carolina marriage laws do not single out "lesbians and gay men," and (2) the definition of marriage as a legal union between a man and a woman bears a direct relationship to a legitimate and compelling state interest – North Carolina's marriage laws.

North Carolina's marriage laws bar not only same-sex unions, but also civil unions and domestic partnerships maintained by many unmarried couples. The State's marriage laws apply equally to men, women, heterosexual couples living in civil arrangements, polyamorous family units, unmarried heterosexual couples, and same-sex couples. As a consequence, North Carolina's marriage laws do not target the purported class. Moreover, North Carolina's definition of marriage as a union "between a man and a woman" stems from one of the roles marriage plays in society. See Windsor, 133 S. Ct. at 2689. In that sense, deference to the procreative abilities of heterosexual marriage is important, because a failure to "acknowledge even our most basic biological differences -- such as the fact that a mother must be present at birth but the father need

not be -- risks making the guarantee of equal protection superficial, and so disserving it." Tuan Anh Nguyen v. INS, 533 U.S. 53, 73 (2001). This fundamental element of marriage between a man and woman should be subjected to no more than a rational basis review, as are most social and economic state laws. See Dandridge v. Williams, 397 U.S. 471 (1970); Windsor, 133 S. Ct. at 2689.

A legislative classification is accorded a strong presumption of validity and "must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." Heller, 509 U.S. at 320. The presumption of legislation's validity requires a challenger "to negative every conceivable basis which might support it." Id. "A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" Id. (internal citations and quotations omitted).

In other cases, the U.S. Supreme Court has considered the following legitimate state interests: (1) respect for the basic premise of referendum process, and that power flows from the people to its government on issues of vital importance to the public;[7] (2) advancement of responsible procreation by encouraging the development of a biologically procreative relationship into enduring marriage;[8] (3) ensuring the best interests of minors through laws where children born as a result of

[7] See Bond, 131 S. Ct. 2355, 2364 (2011); Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

[8] See Zablocki v. Redhail, 434 U.S. 374, 383 (U.S. 1978) ("[Marriage] is the foundation of the family in our society. . . . [I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."); See Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

a union between a man and a woman are cared for by their natural parents in the stable family environment;[9] (4) stability, uniformity and continuity of laws in the face of an ongoing public and political debate about the nature and role of marriage;[10] (5) preservation of the public purposes and social norms linked to the historical and "deeply-rooted" meaning of marriage;[11] and (6) a cautious, historical approach to governmental social experimentation as democratic, cultural and scientific discussions proceed.[12]

These State interests, among others, are legitimate, and rationally support marriage classifications established by North Carolina legislature. Indeed, Plaintiffs' characterizations of discriminatory intent fade when the entirety of Amendment One's language is considered:

> Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. **This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts**.

N.C. Const. Art. XIV §6 (emphasis added). Irrespective of sexual orientation, the rights to contract on domestic issues, prepare testamentary and legal documents, partake in benefits offered by private employers, and to grant each other various economic and social assurances are now

[9] Nordlinger v. Hahn, 505 U.S. 1, 17 (1992) (promotion of family stability and continuity are legitimate reasons); Quilloin v. Walcott, 434 U.S. 255 (best interest of a child is a legitimate interest)(1978); Prince v. Massachusetts, 321 U.S. 158, 166 (1944)(legitimate interest in a child's wellbeing); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("[t]he rights to conceive and to raise one's children" is essential).

[10] See, e.g., Glucksberg, 521 U.S. at 720, Timmons, 520 U.S. 351 (political stability is a valid state interest); Storer v. Brown, 415 U.S. 724 (1974) (stability of political system is a compelling state interest); Parham v. Hughes, 441 U.S. 347, 357-58 (1979) (legitimate interest in maintenance of orderly legal system in family/inheritance matters).

[11] Marriage is "…the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211 (1888); see Sosna, 419 U.S. at 404 (1975); Lawrence v. Texas, 529 U.S. 558, 585 (2003) (O'Connor, J., concurring); see Michael H. v. Gerald D., 491 U.S. 110 (1989)(family, privacy and parentage).

[12] See Chandler v. Fla., 449 U.S. 560, 579 (1981) (decision to proceed with governmental experimentation in the face of debate, especially in social matters, is ordinarily better left to each state); DA's Office v. Osborne, 557 U.S. 52, 72-73 (2009)(state legislative responses to emerging science are preferred to judicial interference); Bellotti v. Baird, 443 U.S. 622, 638 (1979).

indelibly protected by the North Carolina Constitution. Plaintiffs' assertions are rendered more dubious in light of the Supreme Court's long-standing proposition that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U. S. 367, 383 (1968); Michael M. v. Superior Court, Sonoma Cty., 450 U. S. 464, 472 n. 7 (1981). Indeed, a legislative classification is ordinarily upheld "even if the law . . . works to the disadvantage of a particular group, or if the rationale for it seems tenuous." Romer v. Evans, 517 U. S. 620, 632 (1996).

Plaintiffs have failed to meet their burden to refute all conceivable reasons for the challenged laws. See Heller, 509 U.S. at 320–21. North Carolina's marriage laws do not violate Plaintiffs' Equal Protection rights, and this Court should reject proposition that North Carolina's definition of marriage as a legal union between a man and a woman is irrational, especially given the important public policy interests implicated by that definition.

B. The Equal Protection Clause Does Not Prevent North Carolina From Enacting State Laws That Prohibit Second Parent Adoption.

The adoption process is a product of state law. An adult who is not a natural parent of a minor has no Constitutional right to adopt. See fn. 6 supra. Further, North Carolina's limitation on adoption to single persons and married couples does not create a suspect classification.

The U.S. Supreme Court has demonstrated a deferential attitude toward State legislation, striking social laws only if State classifications are irrelevant to achievement of any reasonable objective. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). "In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect." Dandridge, 397 U.S. at 485. A legislative

classification is strongly presumed to be valid, and will be upheld if it rationally relates to a legitimate government interest. Heller, 509 U.S. at 320.

Plaintiffs' adoption claims must fail. The North Carolina General Assembly may legitimately favor parenthood by a married couple or single individual as the best and least restrictive manner to further interests of adopted children. Indeed, the legislature is free to determine that adoption by unmarried partners, in a relationship that is freely severable, is not sufficiently stable and nurturing. It is also reasonable for legislature to conclude that the interests of children are best promoted by limiting adoptions to situations where parents are either divested of their parental rights and duties, or adoptive parent is married to the custodial parent.

Contrary to Plaintiffs' assertions [DE 40 ¶¶89-104], no statutory differentiation is made on the basis of gender or sexual orientation. See N.C. Gen. Stat. § 48-2-301 (2013). In fact, North Carolina treats same-sex and heterosexual couples similarly when reviewing post-separation child custody and visitation issues by employing a case-by-case, best interests of the child standard, regardless of sexual orientation of a party. See Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010); Price v. Howard, 484 S.E.2d 528 (N.C. 1997); Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008). *De facto* parents in both heterosexual and same-sex relationships have been awarded child custody and visitation rights in North Carolina. Id. The same-sex status of a party is simply immaterial to the State courts' determination of what is in the child's best interests.

Plaintiffs have neither alleged unfavorable treatment based on a suspect classification, nor a violation of a fundamental right, under the "rational basis" analysis. The Court should therefore find that North Carolina's adoption laws are in compliance with the U.S. Constitution.

V. Conclusion And Relief Requested.

The regulation of marriage and child adoption are among powers traditionally reserved to sovereign states, without federal intervention. North Carolina laws do not violate the U.S. Constitution, and this Court should defer to determinations made by North Carolina's citizens, and the statutes adopted by their representatives. The State Defendants respectfully request the Court to grant their Motions to Dismiss Plaintiffs' First Amended Complaint, award attorneys' fees and costs, and grant such further relief as this Court deems just and equitable.

Respectfully submitted, this the 11th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2013, I electronically filed the foregoing **Memorandum Of Law In Support Of The State Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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