UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

MARCIE FISHER-BORNE, *et al.*,

Plaintiffs,

v.

JOHN W. SMITH, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; *et al.*,

Defendants.

CIVIL ACTION NO. 1:12-cv-589

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

EXPEDITED REVIEW REQUESTED

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PRELIMINARY STATEMENT

In the nine months following the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), that the federal government could no longer disregard the legal marriages of same-sex couples, nine district courts have struck down marriage bans.[1] No courts have ruled the other way. Meanwhile, a North Carolina family with a child with cerebral palsy is suffering irreparable harm as their child reaches a critical age for care he is denied.

Plaintiffs Shana Carignan and Megan Parker are a lesbian couple who were lawfully married in Massachusetts and currently live in North Carolina along with their six-year-old son, J.C.[2] Because of North Carolina law, Plaintiff Parker is J.C.'s only legal parent, but Plaintiff Carignan acts as J.C.'s parent and wishes to legally adopt J.C. so that both she and Ms. Parker can be J.C.'s legal parents. The couple seeks recognition of their marriage by the state and the multiple psychological and economic benefits such recognition brings, including the ability to adopt as a married couple. Alternatively, Ms. Parker seeks legal recognition of her parent-child relationship by the State of North Carolina though a second parent adoption which the law currently denies. Ms. Carignan, Ms. Parker, and J.C. are a loving, supportive family, but North Carolina law treats them as second-class citizens, penalizing them each day by denying recognition of

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[1] *DeBoer v. Snyder*, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014) (Michigan); *Tanco v. Haslam*, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (Tennessee); *De Leon v. Perry*, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (Texas); *Lee v. Orr*, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (Illinois); *Bostic v. Rainey*, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (Virginia); *Bourke v. Beshear*, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (Kentucky); *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (Oklahoma); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (Ohio); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (Utah).

[2] Plaintiffs Marcie Fisher-Borne, Chantelle Fisher-Borne, E.F.-B, Terri Beck, Leslie Zanaglio, T.B.Z., D.B.Z., Leigh Smith, Crystal Hendrix, J.H.S, Dana Draa, Lee Knight Caffery, M.M.C.-D, M.L.C.-D, Shawn Long, Craig Johnson, and I.J.-L take no part in this motion.

Ms. Carignan's and Ms. Parker's marriage and refusing to legally recognize a mother's relationship with her son. This motion and the amended complaint filed on July 19, 2013 seek to eliminate the daily indignities and serious detriments Plaintiffs suffer solely because of the adult plaintiffs' sexual orientation. Each day that passes, this family is denied rights and benefits that cannot later be recouped.

Plaintiffs face exigent circumstances that warrant preliminary relief. Ms. Parker and Ms. Carignan became J.C.'s parents in 2011, when Ms. Parker adopted him. J.C. has cerebral palsy and requires considerable medical care in connection with his condition. As set out in detail below, the medical care J.C. receives, covered only by Medicaid, would be substantially improved if J.C. could be added to Ms. Carignan's insurance as her child. That insurance would afford significantly superior coverage, but North Carolina's laws prevent Ms. Carignan from establishing the requisite legal relationship with J.C. Now six years old, J.C. is at a critical stage of his development, and the lack of additional treatment subjects him to a host of long-term physical, psychological, and developmental harms, which will be permanent and irreversible if Plaintiffs are denied the relief sought by this motion.

Plaintiffs can establish each element required for the preliminary injunction they seek. *See*, *e.g.*, *WV Ass'n of Club Owners v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009):

Likelihood of Success on the Merits. North Carolina recognizes out-of-state marriages of heterosexual couples but denies gay and lesbian couples the same recognitions because of their sexual orientation. Denying gay and lesbian couples the fundamental right to marriage and its recognition cannot meet any level of constitutional scrutiny.

Irreparable Harm. Plaintiffs face irreparable harm because, as shown in detail below, J.C. currently requires significant medical care that Plaintiffs Carignan and Parker are unable to obtain because Ms. Carignan's insurance policy does not cover J.C. Moreover, the treatment of this family as second-class citizens and the denial of their Due Process and Equal Protection rights continually subjects them to dignitary harm that is irreparable and cannot be fully compensated by money damages. *Windsor*, 133 S. Ct. at 2694; *Tanco*, 2014 WL 997525, at *7.

Balance of Equities. In contrast to the great harm Plaintiffs suffer daily, the State would encounter no inconvenience by extending its already available marriage and adoption infrastructure to Plaintiffs and other same-sex couples. The State is not harmed by being enjoined from "enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013).

Public Interest. The public interest is not served by furthering a pattern of discrimination and unequal treatment of gay and lesbian Americans, like Plaintiffs. Rather, "upholding constitutional rights surely serves the public interest." *Centro*, 722 F.3d at 191.

STATEMENT OF THE FACTS

I. Procedural History

Plaintiffs filed their complaint on June 13, 2012. Defendants moved to dismiss under Rule 12(b)(6) on August 6, 2012 and that motion was fully briefed. On June 26, 2013, the United States Supreme Court decided *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) and Plaintiffs filed an amended complaint to challenge North Carolina's marriage ban in light of the decision in *Windsor*. Defendants again moved to dismiss, and that motion has been fully briefed as of

November 15, 2013. Because the quality of J.C.'s care becomes more and more critical as he ages, Plaintiffs have filed this motion for a preliminary injunction.

II. North Carolina's Marriage Laws

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 bar recognition of valid marriages from other jurisdictions ("Amendment One"), which provides:

> 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 (as amended); *see also* N.C. Gen. Stat. §§ 51-1, 51-1.2. The effect of Amendment One and North Carolina's marriage statutes are identical to the numerous state marriage bans enjoined or struck down by courts following *Windsor*.

Many of the justifications offered in support of Amendment One were based on a desire to denigrate same-sex relationships and demean same-sex couples, and evidenced animus toward gay and lesbian people:

- "[Y]ou cannot construct an argument for same sex-marriage that would not also justify philosophically the legalization of polygamy and adult incest"; "In countries around the world where they legitimized same-sex marriage, marriage itself is delegitimized." (Compl. ¶ 68(a).)
- "We need to reach out to them and get them to change their lifestyle back to the one we accept"; "[The City of Asheville, North Carolina is] a cesspool of sin." (Compl. ¶ 68(b).)
- "[Y]ou don't rewrite the nature of God's design for marriage based on the demands of a group of adults." (Compl. ¶ 68(c).)
- Marriage by same-sex individuals "undermines the marriage culture by making marriage a meaningless political gesture, rather than a child-affirming social

construct"; "We will have an inevitable increase in . . . all of the documented social ills associated with children being raised in a home without their married biological parents." (Compl. ¶ 68(d).)

- North Carolina residents were urged "to contribute money, 'so we can confront the devils against us on the other side.'" (Compl. ¶ 68(e).)

Amendment One and the North Carolina marriage statute, N.C. Gen. Stat. § 51-1, deny recognition and respect to Ms. Parker's and Ms. Carignan's lawful marriage, along with the marriages of other same-sex couples conferred by other jurisdictions. *See* N.C. Gen. Stat. § 51-1.2 ("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."). In contrast, North Carolina recognizes marriages of heterosexual spouses from other jurisdictions. *See*, *e.g.*, *Parker v. Parker*, 46 N.C. App. 254, 258 (1980).

III. North Carolina's Adoption Laws

North Carolina's adoption statute, authoritatively construed by the North Carolina Supreme Court in *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010),[3] categorically prohibits joint or second parent adoption for unmarried individuals without terminating the first parent's rights. N.C. Gen. Stat. § 48-2-301(c). Adoptions by a parent's legal spouse, however, are permitted. *See* N.C. Gen. Stat. § 48-4-101. Because North Carolina does not permit gay couples to marry, or recognize such marriages performed elsewhere, Ms. Parker and Ms. Carignan are perpetually classified as "unmarried" and are thus unable to take advantage of this stepparent exemption.

[3] Prior to *Boseman*, the North Carolina District Court in Durham County entered adoption decrees allowing unmarried second parents to adopt children without terminating the parental rights of the legal parent.

Despite North Carolina's prohibition on second parent adoption, and belying any rational basis to deny legal recognition of a parent-child relationship that effectively has formed, courts award joint custody to parents from same-sex couples after determining that it would be in the best interests of the child. *See Mason v. Dwinnell*, 660 S.E.2d 58, 63 (N.C. Ct. App. 2008).

IV. The Moving Plaintiffs

Moving Plaintiffs Megan Parker, Shana Carignan and J.C. are a loving, stable family. Ms. Parker and Ms. Carignan have been committed to each other for six years and were legally married in Massachusetts on September 13, 2012. (Affidavit of Megan Parker, dated April 8, 2014 ("Parker Aff.") ¶¶ 5-6.) They welcomed J.C. into their family on March 24, 2011, after both Ms. Parker and Ms. Carignan underwent careful scrutiny in order to become certified as foster parents. (Parker Aff. ¶ 7.) Although both Ms. Parker and Ms. Carignan share equally in all of their parental responsibilities, only Ms. Parker is legally recognized as J.C.'s parent because North Carolina law denies a second parent adoption to unmarried couples and Ms. Carignan and Ms. Parker cannot marry under North Carolina law. Ms. Carignan cannot obtain legal recognition of her relationship with her son and all the benefits such recognition brings.

J.C. is a six-year old boy who has cerebral palsy; he cannot walk and has limited ability to control his limbs or communicate verbally. (Parker Aff. ¶ 8.) Because of his condition, he requires constant and considerable care, and is at a critical point in his growth and development. (Affidavit of Shana Carignan, dated April 8, 2014 ("Carignan Aff.") ¶ 11.) The care and attention he receives now will shape the rest of his life. (Carignan Aff. ¶ 12.) Because he was adopted by Ms. Parker from foster care, J.C. is covered by Medicaid. (Carignan Aff. ¶ 13.) Ms. Parker is also covered under Medicaid because of a stroke that she had last year. (*Id.*) Ms. Carignan is covered

by Blue Cross Blue Shield through her employment. (*Id.*) Under the North Carolina Health Insurance Premium Payment Program, the state would pay the premiums required for J.C. to receive secondary coverage for the expenses Medicaid does not cover through a legal parent's private insurance. (Carignan Aff. ¶ 17.) However, because Ms. Carignan is not J.C.'s legal parent, this state program is unavailable.[4]

J.C. has many medical needs which are not covered under Medicare. Ms. Parker and Ms. Carignan pay for many of these medical expenses out-of-pocket. However, there are some things that Ms. Parker and Ms. Carignan cannot afford that would be covered if J.C. could obtain secondary coverage under Ms. Carignan's insurance. For example, although Ms. Parker and Ms. Carignan ordered a wheelchair through Medicaid last June, J.C. is still on a waitlist to receive one. (Carignan Aff. ¶ 21.) Similarly, they have to pay out of pocket for repairs of J.C.'s wheelchair, his glasses, additional mounts for J.C.'s communication system and the other medical equipment he requires, and sometimes this leaves J.C. without the equipment he needs to be comfortable and to develop to the fullest extent possible. (Carignan Aff. ¶¶ 26-27.) Secondary insurance through Ms. Carignan's plan would allow J.C. to take advantage of these potential treatments, as well other developmental opportunities that will vastly improve the quality of J.C.'s life, as set forth in Ms. Carignan's and Ms. Parker's affidavits. (Carignan Aff. ¶¶ 13-28; Parker Aff. ¶¶ 11-15.)

[4] Although Blue Cross/Blue Shield recently changed its policy to recognize same-sex couples for family benefits, this policy change applies only to the couples themselves, not non-legal parents. (Carignan Aff. ¶ 17 n. 1.) Ms. Carignan's policy still only covers her legal children, even if it might cover Ms. Parker.

Moreover, because Ms. Carignan is not J.C.'s legal parent, she is often faced with situations where her rights are not recognized, and she cannot assume the parental responsibilities that she otherwise would be able to exercise. (Carignan Aff. ¶¶ 29-34.) For example, J.C.'s school recently informed Ms. Parker and Ms. Carignan that they are implementing a new system under which Ms. Carignan can no longer be considered a parent to J.C. Ms. Carignan is now listed on J.C.'s forms as an emergency contact but has none of the rights conferred to a parent. (Carignan Aff. ¶ 33.) She is worried about how this could impact J.C. in an emergency situation if Ms. Parker is unavailable. Further, if Ms. Parker were to die or become incapacitated, Ms. Parker and Ms. Carignan believe it would be in J.C.'s best interests for Ms. Carignan to continue to raise J.C. as his parent. (Carignan Aff. ¶ 34.) However, absent a legal parent-child relationship with J.C., there is no way to ensure that she would be legally permitted to do so. Especially in light of Ms. Parker's health issues, including her stroke last year, the family lives in a state of uncertainty because of Ms. Carignan's lack of a legal relationship with J.C.

In addition to these detriments, the Plaintiffs also suffer continued economic harm as a result of the State's refusal to recognize their legal marriage, including the following:

- Ms. Parker and Ms. Carignan have never been able to file joint tax returns or avail themselves of the tax benefits that North Carolina confers upon married couples. (Compl. ¶ 175(b).)
- Ms. Parker and Ms. Carignan would not be entitled to the default protections of North Carolina's inheritance laws if one of them predeceases the other. (Compl. ¶ 175(c).)
- Ms. Parker and Ms. Carignan are ineligible for important federal protections that are available only to couples whose marriages are legally recognized by their home state, including the ability to take time off of work to care for a sick spouse under the Family & Medical Leave Act ("FMLA") (29 C.F.R. § 825.122(b)), and access to a spouse's social security benefits. 42 U.S.C. § 416(h)(1)(A)(i).

- If one of them dies without the state recognizing their marriage or parentage, the surviving family members will not only suffer the indignity of not being recognized as a family on the death certificate, but will never be able to recoup many of the benefits to which they would have been entitled if Ms. Parker's and Ms. Carignan's lawful marriage was recognized by the state in which they live.

QUESTION PRESENTED

I. Are Plaintiffs entitled to a preliminary injunction against the enforcement of North Carolina's marriage and adoption bans where Plaintiffs are likely to meet the four legal requirements of obtaining preliminary relief?

ARGUMENT

I. Legal Standard

A preliminary injunction may be "appropriate to grant intermediate relief of the same character as that which may be granted finally." *E. Tenn. Natural Gas Co. v. Sage,* 361 F.3d 808, 823-24 (4th Cir. 2004). In order to obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *WV Ass'n of Club Owners*, 553 F.3d at 298. Plaintiffs meet each requirement.

II. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs are likely to succeed in striking down North Carolina's ban on same-sex marriage as violating the Equal Protection and Due Process Clauses of the United States Constitution, based on established legal principles, including those most recently illuminated by the Supreme Court in *Windsor*. In *Windsor*, the Supreme Court struck down the provision of the federal Defense of Marriage Act ("DOMA") that barred the federal government from recognizing valid marriages of same-sex couples on the ground that the law violated the Due Process Clause.

133 S. Ct. at 2695-96. The Court found that "the principal purpose and the necessary effect of [the failure to recognize lawful marriages was] to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695. The Court based its decision in part on the fact that DOMA "instruct[ed] all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Finding no sufficient justification for this infringement of plaintiffs' constitutional rights, the Court held that "[b]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of" due process and equal protection guaranteed by the Constitution. *Id*. Following *Windsor*, district courts have uniformly concluded that bans on marriage for same-sex couples cannot pass constitutional muster. *See supra* note 1.

A. North Carolina's Marriage and Adoption Bans Violate the Equal Protection Clause

Amendment One is discriminatory. Heterosexual persons may marry the partner of their choice; Amendment One declares that gay and lesbian persons may not. Heterosexual couples who marry outside of North Carolina can return to the state, confident that their marriages will be respected. Gay and lesbian couples cannot. Moreover, the statements proffered in support of Amendment One, even beyond the face of the ban and the lack of any rational connection to a valid state interest, demonstrate that its passage was motivated by animus. *See supra* at 4-5; *see also Windsor*, 133 S. Ct. at 2694. As such, North Carolina's discriminatory marriage ban is subject to heightened scrutiny, although the ban would fail under any standard of review.[5]

[5] Similarly, the adoption statutes, in tandem with the marriage statutes, discriminate based on sexual orientation by precluding same-sex couples from securing the protections of a second

Numerous federal and state courts have recently recognized that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny based on the following four-factor test: (1) whether the class has been historically "subjected to discrimination"; (2) whether the class is "a minority or politically powerless"; (3) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society" and (4) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Windsor v. U.S.*, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)), *aff'd Windsor*, 133 S. Ct. 2675; *accord*, *e.g.*, *Windsor*, 699 F.3d at 181-85. It "is easy to conclude that homosexuals have suffered a history of discrimination," *Windsor*, 699 F.3d at 182, and, likewise, that gays and lesbians historically did and still do lack power in the political process, *id*. at 184; *see also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 314-15 (D. Conn. 2012) (recounting history of discrimination against homosexuals). Moreover, there is no legitimate opposition to the scientific consensus that homosexuality is both immutable, *see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010), and bears no relation to an individual's ability to contribute to society or, in particular,

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parent adoption for their children, while allowing families headed by heterosexual couples to obtain those protections. *See Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (restricting benefits to married people is sexual orientation discrimination where state law prevents same-sex couples from marrying). Children of gay and lesbian parents like J.C. are doubly disadvantaged—their parents are unable to marry and provide important tangible and dignitary protections to their family that come through marriage, and they cannot be adopted by both parents, ostensibly because those parents are unmarried. *See Windsor*, 133 S. Ct. at 2694. The Supreme Court has long recognized that laws that treat children differently based on their parents' status—*i.e.*, on the basis of illegitimacy—are subject to heightened scrutiny. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972); *Mills v. Habluetzel*, 456 U.S. 91, 99-102 (1982).

"the characteristics relevant to the ability to form successful marital unions," *Perry*, 704 F. Supp. 2d at 967.

Classifications that disadvantage a suspect class are "treated as presumptively invidious" and must be "precisely tailored to serve a compelling government interest" to pass constitutional muster. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). While the Fourth Circuit has previously subjected claims of sexual orientation discrimination to rational basis review, *see Veney v. Wyche*, 293 F.3d 726, 732-34 (4th Cir. 2002), and *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996), these decisions predate *Windsor* and *Lawrence v. Texas*. *See generally Windsor*, 133 S. Ct. 2675; *Lawrence v. Texas,* 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick,* 478 U.S. 186 (1986), the then-controlling Supreme Court authority relating to sexual orientation discrimination). *Veney* and *Thomasson* rely on outdated Supreme Court precedent and are inconsistent with both more recent Supreme Court jurisprudence and the well-reasoned decisions from other jurisdictions. As set forth in Section II.B.3, *infra*, denigrating and refusing to recognize same-sex marriages fails to pass any level of constitutional scrutiny.

B. North Carolina's Marriage and Adoption Bans Violate the Due Process Clause

1. The Marriage Ban Violates Plaintiffs' Fundamental Rights

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Supreme Court repeatedly has made clear that the "right to marry is of fundamental importance for *all* individuals," even those who have not traditionally been perceived as eligible to exercise that right. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added); *see also id.* at 388-90 (state cannot impose unreasonable barriers on remarriage); *Boddie v. Connecticut*, 401 U.S. 371,

380-81 (1971) (same). The reasoning of these cases applies with equal force to claims of the related right to recognition of a marriage. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013) (plaintiffs' right to remain married, "a fundamental liberty interest appropriately protected by the Due Process Clause," was violated by anti-recognition laws).

As the Supreme Court recently explained in *Windsor*:

> [M]arriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring" . . . For same-sex couples who wished to be married . . . [t]his status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.

133 S. Ct. at 2692 (quoting *Lawrence*, 539 U.S. at 567); *see Obergefell v. Kasich*, 2013 WL 3814262 at *6 (S.D. Ohio July 22, 2013) (rejecting argument that plaintiffs had asserted a new right—there, the right to the description of one's marital status on a death certificate).

Plaintiffs seek to have their marriage recognized (and have their community recognize and celebrate) the nature, depth, and quality of their lifelong commitment to each other in the way that they, their family, friends, and society best understand. (Compl. ¶¶ 74, 320.) They wish to protect each other, and their children, in a host of tangible ways through a marriage recognized by their community. (Compl. ¶¶ 6, 7, 322(a)-(q)) Above all, Ms. Carignan and Ms. Parker love each other and wish to spend the rest of their lives publicly committed to each other in a relationship recognized and respected by the State. (Compl. ¶ 172-173.)

As the Supreme Court recognized in the context of DOMA, North Carolina's statute "tells those couples, and all the world, that their otherwise valid marriages are unworthy of . . .

recognition." *Windsor*, 133 S. Ct. at 2694. By denying Ms. Carignan and Ms. Parker recognition of their marriage, North Carolina discriminates against them and impinges on their right to marry and to enjoy the benefits that legal recognition of marriage confers. *See Obergefell*, 962 F. Supp. 2d at 978. Because North Carolina's failure to recognize their marriage causes North Carolina to "intrud[e] into—and in fact eras[e]—[Ms. Carignan's and Ms. Parker's] already-established marital and family relations," the marriage ban infringes their liberty interests protected by the Due Process Clause and must face heightened scrutiny. *Id.* at 979.

2. The Second Parent Adoption Ban, Combined With the Marriage Ban, Violates Plaintiffs' Fundamental Rights

"The liberty interest . . . of parents in the care, custody, and control of their[] children is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see Moore v. City of E. Cleveland*, 431 U.S. 494, 503-6 (1977) (recognizing fundamental right to family integrity). The Fourth Circuit has recognized that the constitutional right to familial liberty can be implicated both by "governmental attempts to interfere with particularly intimate family decisions," and "government actions that sever, alter, or otherwise affect the parent/child relationship." *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994). North Carolina's adoption laws do both by refusing to recognize—and interfering with—Plaintiffs' decisions regarding the care of their children. (*See, e.g.,* Carignan Aff. ¶¶ 29-34.) Along with North Carolina's marriage ban, prohibiting second parent adoption "humiliates tens of thousands of children now being raised by same-sex couples . . . [and] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct at 2694.

3. North Carolina's Marriage Ban Fails Any Level of Review

North Carolina's marriage ban cannot withstand even rational basis review. *See De Leon*, 2014 WL 715741, at *23-24. Defendants can advance no legitimate state interest that is rationally supported by the refusal to respect Ms. Parker and Ms. Carignan's marriage. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (courts must examine law's connection to the alleged purpose offered by the State to assess whether it is too "attenuated" to rationally advance the asserted governmental interest); *Cleburne*, 473 U.S. at 446. Preserving the "traditional" or "historical" definition of marriage is not, by itself, a sufficient legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 326 (1993) (holding tradition alone does not satisfy rational basis review); *DeBoer*, 2014 WL 1100794, at *14 ("[M]any federal courts have noted that moral disapproval is not a sufficient rationale for upholding a provision of law."). There is no credible argument that recognizing marriages of same-sex couples will diminish the institution by deterring opposite-sex couples from marrying or procreating. *See Kitchen*, 2013 WL 6697874, at *27.

In summarizing the landscape of the last half-century of Supreme Court decisions, including *Windsor*, one district court aptly noted: "Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled." *Bourke*, 2014 WL 556729, at *12. Other district courts have agreed that the "rising tide of persuasive post-*Windsor* federal caselaw" requires "no leap to conclude that the plaintiffs here are likely to succeed in their challenge to [the state's] Anti-Recognition Laws." *Tanco*, 2014 WL 997525, at *6. In fact, to Plaintiffs' knowledge, following the Supreme Court's decision in *Windsor* no lower federal court has upheld a same-sex marriage prohibition. In each

case, the court faced laws causing deprivations and indignities identical to those caused by North Carolina's and concluded that they fail (or are likely to fail) constitutional scrutiny.[6]

To the extent the State seeks to defend the ban as advancing the welfare of minors, that argument is fundamentally flawed. *See Bishop*, 962 F. Supp. 2d at 1291-95 (the "exclusion of same-sex couples [from marriage] is 'so attenuated' from any of [the asserted] goals that the exclusion cannot survive rational basis review") (internal citations omitted); *Kitchen*, 961 F. Supp. 2d at 1215 (finding State's "arguments as unpersuasive as the Supreme Court found them [in the context of interracial marriage] fifty years ago" and that "the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens"). Children raised by same-sex couples in North Carolina—like J.C.—are damaged by the refusal to respect their parents' relationship, not helped. *Cf. Perry,* 704 F. Supp. 2d at 1000 ("The only rational conclusion in light of the evidence is that [California's marriage ban] makes it less likely that California children will be raised in stable households" by preventing same-sex couples from marrying). As one court succinctly explained: "More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents." *Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 991 (N.D. Cal. 2012).

Because North Carolina's marriage ban, like those rejected by other post-*Windsor*

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[6] *See supra* note 1. Additionally, following *Windsor*, courts in New Jersey and New Mexico struck their marriage bans on state constitutional grounds. *See Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Sup. Ct. 2013).

courts, is clearly drawn solely for "the purpose of disadvantaging the group burdened by the law," *Romer,* 517 U.S. at 633, and Defendants can provide no legitimate state interests that are served by the laws, Plaintiffs are likely to succeed in demonstrating that the laws are unconstitutional. *See Obergefell*, 962 F. Supp. 2d at 996 ("[*N]o hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans… to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community*.") (emphasis in the original)).

III. Plaintiffs Are Likely to Suffer Irreparable Harm Absent an Injunction

J.C.'s Medical Conditions. Plaintiff J.C. has serious medical issues that make it likely that he will suffer irreparable harm unless Plaintiffs' motion for preliminary relief is granted. J.C. is currently six years old and at a critical point in his growth and development. The care and attention he receives now for his cerebral palsy will shape the rest of his life.

Because the state does not respect his parents' marriage, and will not allow Ms. Carnigan to adopt absent a marriage recognized in North Carolina, J.C. cannot be covered on Ms. Carnigan's insurance, and his development is being negatively impacted because his parents are unable to pay for the medical care he needs—which would otherwise be covered by insurance. He cannot walk, but is unable to get his wheelchair fixed or properly fitted as he grows; he goes without his glasses, an optimal communication system, and other medical equipment he requires. (Carignan Aff. ¶ 21, 26-27.) Medicaid also will not cover a circumcision for J.C., which is necessary because he needs now and will always need assistance cleaning himself; without this procedure he is at high risk of infection. (Carignan Aff. ¶ 23.) Moreover, he suffers dignitary harm such as being forced to wear diapers out in public because Medicaid does not cover the catheter he needs. (Carignan Aff. ¶ 24.)

Secondary insurance through Ms. Carignan's plan would also allow J.C. to take advantage of unique developmental opportunities that will vastly improve his quality of life, such as one-on-one tutoring and alternative therapies, which have been proven to help with cerebral palsy. (Parker Aff. ¶ 13.) Every day that J.C. is not covered by Ms. Carignan's insurance, his medical needs are not being met. If this situation is not remedied immediately, the opportunity to grow and develop appropriately will be lost. Being treated at a later time will not undo the damage that is being done at this critical stage in his life.

Ms. Carignan's lack of recognition as a legal parent also causes their entire family actual and irreparable harm every day. She is often faced with situations where her rights are not recognized, and she cannot assume the parental responsibilities that she otherwise would be able to exercise. For example, her parental rights are not recognized by J.C.'s school, inhibiting her ability to be there for her son when he needs her. (Carignan Aff. ¶ 33.) Finally, she has been, and may be again, denied access to and decision-making abilities for her son during medical procedures. (Carignan Aff. ¶ 31.)

Denial of a Fundamental Right Constitutes Irreparable Harm. Fourth Circuit law has confirmed that deprivation of a constitutional freedom, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (holding violation of First Amendment constituted *per se* irreparable injury) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) (injunction must be granted "to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right").

Ms. Parker and Ms. Carignan have been in a stable, loving relationship for six years. They are similarly situated in all relevant respects to different-sex couples whose validly contracted out-of-state marriages are recognized. But for the fact that they are a same-sex couple, North Carolina would regard their marriage as valid. "Th[is] differentiation demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. As explained by one recent court:

> "The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization. . . . **[T]here is also an imminent risk of potential harm to their children during their developing years from the stigmatization and denigration of their family relationship**."

Tanco, 2014 WL 997525, at *7 (emphasis added). These are "harms that cannot be resolved through monetary relief." *Id.*; *see also Elrod,* 427 U.S. at 373; *De Leon,* 2014 WL 715741 at *25.

Federal and State Benefits Attendant to Marriage and/or Adoption. In addition to the irreparable harms described above, Plaintiffs are currently being denied state and federal benefits and protections. North Carolina's exclusion of same-sex couples from marriage deprives such couples of many legal protections available to married spouses, including benefits available under tax laws; inheritance laws; retirement benefits; and insurance laws and contracts. (Complaint ¶¶ 13, 175(a)-(d)); *see also Windsor*, 133 S. Ct. at 2691 (a state's "definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities") (internal quotation marks and citation omitted). Even certain federal

protections are available only to couples whose marriages are legally recognized by their home state. *De Leon*, 2014 WL 715741, at *25.

IV. The Balance of Equities and the Public Interest Favor Granting Injunction

Balancing "the competing claims of injury" and considering "the effect on each party of the granting or withholding of the requested relief" in the current controversy makes clear that the equities favor granting Plaintiffs' requested injunctive relief. *Winter*, 555 U.S. at 24. The hardships on the plaintiffs are immediate and severe. In contrast, the burden on the State is minimal, if not nonexistent. North Carolina already possesses the infrastructure necessary to recognize out-of-state marriages, as well as to permit same-sex couples the chance to adopt; the state needs only extend the available mechanisms in a nondiscriminatory manner. In light of the enormous harms inflicted on Plaintiffs every day, the minor effort required of Defendants cannot constitute sufficient grounds to withhold an injunction. "[A] state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Centro*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)).

Preliminarily enjoining enforcement of an unconstitutional law in no way disserves the public interest; rather, "upholding constitutional rights surely serves the public interest." *Id*. Every day that Plaintiffs suffer the indignation of being treated as second-class citizens, as well as the direct loss of pecuniary, dignitary, and psychological benefits associated with establishing legal, familial relationships, is a day that the public interest is harmed.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be granted.

This the 9th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2014, I electronically filed the foregoing 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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