UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Colleen Therese Condon and Anne Nichols Bleckley, Plaintiffs, -v- Nimrata (Nikki) Randhawa Haley, in her official capacity as Governor of South South Carolina; Alan Wilson, in his official capacity as Attorney General; and Irvin G. Condon, in his official capacity as Judge of Probate Charleston County, Defendants.	Civil Action No.: 2:14-cv-04010-RMG **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION WITH MEMORANDUM OF LAW IN SUPPORT**

COMES NOW, Plaintiffs COLEEN CONDON and NICHOLS BLECKLEY, pursuant to Fed. R. Civ. P. 65(a) and (b), and Local R. Civil Rule 7.03 (D.S.C.), and respectfully request that this Court issue a preliminary injunction enjoining Defendants and their officers, employees, and agents from enforcing S.C. CONST. ART. XVII, § 15, S.C. Code Ann. § 20-1-10 and S.C. Code Ann. § 20-1-15 (hereinafter jointly referenced as the "marriage ban") and any other sources of state law that preclude same-sex couples from marriage or refuse to recognize their lawful marriages.

INTRODUCTION

Plaintiffs bring this civil rights action to enforce the clear and unequivocal law in the Fourth Circuit that government officials *must* allow same-sex couples the freedom to marry:

> The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) *cert. denied*, 2014 U.S. LEXIS 6405 (October 6, 2014).

NATURE OF THE CASE

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 seeking to declare unconstitutional under the United States Constitution, and enjoin Defendants from enforcing, those provisions of the South Carolina Constitution and the South Carolina Statutes which deny Plaintiffs, and all same-sex couples, the freedom to marry the persons they love.

Defendants Haley and Wilson may disagree with the avalanche of federal court decisions ruling that states may not prohibit same-sex couples and their families from the privileges and protections of marriage,[1] but they cannot disregard prevailing law. The legal issue is now completely settled in this jurisdiction. In *Bostic*, the United States Court of Appeals for the

[1] *See, e.g.*, *Latta v. Otter*, 2014 U.S. App. LEXIS 19828 (9th Cir. Oct. 15, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1206 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *Bowling v. Pence*, 2014 U.S. Dist. LEXIS 114926 (S.D. Ind. Aug. 19, 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Burns v. Hickenlooper*, U.S. Dist. LEXIS 100894 (D. Colo. July 23, 2014) (granting a preliminary injunction enjoining enforcement of Colorado's ban); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014); *Evans v. Utah*, 2014 U.S. Dist. LEXIS 69177 (D. Utah May 19, 2014) (granting a preliminary injunction enjoining enforcement of Utah's ban); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Henry v. Himes*, No. 1:14-CV-129, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Latta v. Otter*, No. 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *Lee v. Orr*, No. 13-CV-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Obergefell v. Wymslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. Mar. 14, 2014) (granting a preliminary injunction enjoining the enforcement of Tennessee's ban); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

Fourth Circuit has unequivocally ruled that same-sex couples have a fundamental right to marry which cannot be denied or infringed absent a compelling state interest, 760 F.3d 377, and has rejected every justification the Commonwealth of Virginia conjured to justify their exclusion of same-sex couples from marriage. 760 F.3d 384. The U.S. Supreme Court denied all petitions for *certiorari* on October 6, 2014. *Schaefer v. Bostic*, 2014 U.S. LEXIS 6405 (Oct. 6, 2014). The Fourth Circuit thereafter issued its mandate. Same-sex couples throughout the Fourth Circuit must now be allowed to marry.

As expressly recognized in *Bostic*, there are no relevant distinctions between Virginia marriage ban and similar marriage bans in the other three states in the Fourth Circuit. 760 F.3d. at n. 1. Moreover, there are no additional governmental interests that could overcome application of strict scrutiny. Accordingly, every state in this circuit has adhered to the rule of law and ceased to enforce their marriage bans – except South Carolina. Defendants Haley and Wilson stand alone in the virtual courthouse door to bar their citizens from exercising their constitutional rights to marry the person they love.

Disregarding their constitutional duty to uphold the United States Constitution, Defendants Haley and Wilson acted in concert to interfere with Judge Condon's efforts to discharge his own, choosing to expend the State's finite resources in order to avoid the inevitable. Fortunately, this Court exists to rise above the politics and follow the law. Plaintiffs accordingly seek a preliminary injunction to force Defendants to comply with the Fourteenth Amendment in conformance with binding Fourth Circuit precedent.

As the federal court in North Carolina recently set out in enjoining the enforcement of a similar marriage ban:

> The issue before this court is neither a political issue nor a moral issue. It is a *legal* issue and it is clear as a matter of law what is now settled in the Fourth

> Circuit that North Carolina laws prohibiting same-sex marriage, refusing to recognize same-sex marriage originating elsewhere, and/or threatening to penalize those who would solemnize such marriages are unconstitutional.

General Synod of the United Church of Christ, et. al. v. Resinger, et. al., Case No. 3:14-cv-00213 (W.D.N.C. October 10, 2014) (attached hereto as "Exhibit 1").

The same, of course, is true for South Carolina.

"Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security." *Bostic*, 760 F.3d. at 384. "Marriage is one of the 'basic civil rights of man…'" *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (*quoting Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). It is "the most important relation in life" and of "fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Plaintiffs seek simply to exercise this basic civil right.

FACTUAL BACKGROUND

As set forth in the Complaint, Plaintiffs are a committed same-sex couple. (Compl., ECF. No.1.) Plaintiff Condon is a lawyer, and she has served as an elected official in this State for three consecutive terms. (Condon Aff., ¶ 1, attached hereto as "Exhibit 2.") Her fiancée, Plaintiff Nichols Bleckley, has worked in customer service for the same private employer for the last 12 years. (*Id.*) Together, they are helping to raise Condon's 15 year-old son. (*Id.*, ¶4.) After just a few dates, they knew that they wanted to spend the rest of their lives together. (*Id.*, ¶5.) Both life-long South Carolinians, they became engaged to be married before merging their lives into a shared home, and hope to be able to marry each other surrounded by friends and family in their home state. (*Id.*, ¶6.)

On July 28, 2014, in an opinion issued by the Honorable Henry F. Floyd of South Carolina, the Fourth Circuit held that the fundamental right to marry encompasses the right of all individuals to marry the person of their choice, including the right to marry a same-sex spouse. *Bostic*, 760 F.3d at 377 ("the fundamental right to marry encompasses the right to same-sex marriage."). On October 6, 2014, the United States Supreme Court's issued its decision not to grant *certiorari* in *Bostic*, or in four other federal appellate decisions from the Seventh and Tenth Circuits striking down similar bans excluding same-sex couples from marriage. *Bogan v. Baskin*, 2014 U.S. LEXIS 5797 (U.S. Oct. 6, 2014); *Walker v. Wolf*, 2014 U.S. LEXIS 6655 (U.S. Oct. 6, 2014); *Smith v. Bishop*, 2014 U.S. LEXIS 6054 (U.S. Oct. 6, 2014); *Herbert v. Kitchen*, 2014 U.S. LEXIS 6637 (U.S. Oct. 6, 2014).

South Carolina's discriminatory scheme does not differ in any relevant respect from Virginia's discriminatory marriage scheme:

Virginia Marriage Amendment **VA. CONST. ART. I, § 15-A**	**South Carolina Marriage Amendment** **S.C. CONST. ANN. ART. XVII, § 15**
Only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.	A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State.
This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.	This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated.
Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.	This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated.

Virginia's Statutory Marriage Ban Va. Code Ann. § 20-45.2	**South Carolina's Statutory Marriage Ban, S.C. Code Ann. §§20-1-10, 20-1-15**
A marriage between persons of the same sex is prohibited.	No man shall marry …another man. No woman shall marry … another woman.
Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable. § 20-45.2	A marriage between persons of the same sex is void ab initio and against the public policy of this State.

While Attorney Generals from North Carolina and West Virginia announced that they would follow the binding decision of the Fourth Circuit and stop defending marriage bans in pending federal litigation, Defendant Wilson, South Carolina Attorney General, released a statement on October 6, 2014 that read: "Our case has not yet been decided. Until the courts rule on the matter, South Carolina will seek to uphold our state constitution." (News release from Office of the Attorney General Alan Wilson dated October 6, 2014, attached hereto as "Exhibit 4".) Defendant Haley, South Carolina Governor, likewise indicated her intention to obstruct the application of the Fourth Circuit's ruling, releasing the following statement through a spokesperson: "Governor Haley agrees with Attorney General Wilson – our voter-approved state law should be followed until a court rules on it directly." (*See, e.g.*, Mary Trohan *Wilson continues defense of gay marriage ban*, Greenville Online, attached hereto as "Exhibit 5".)

Judge Condon, on the other hand, recognized the binding nature of the Fourth Circuit's mandate and issued the following statement on October 8, 2014:

> As a result of the actions of the United States Supreme Court this past Monday, the Charleston County Probate Court is required to accept and issue marriage licenses for same sex couples. Applications will be accepted beginning today, October 8, 2014, and the Charleston County Probate Court will issue the marriage license after the mandatory 24 hour waiting period unless stayed by the South Carolina Supreme Court or another appropriate court.

(October 8, 2014 Statement of Judge Condon, attached hereto as "Exhibit 6.")

Plaintiffs thereafter applied for a marriage license at the Charleston County Probate Court and paid the requisite filing fee. (Ex. 2, ¶ 8.) Judge Condon accepted Plaintiffs' application and filing fee for a marriage license at or about 9:15 a.m. on October 8, 2014. (*Id.*, ¶9.) Plaintiffs are legally qualified to marry under the laws of South Carolina, except that they are the same sex, and want to marry each other in the State. (*Id.* ¶ 3.) Each Plaintiff is over the age of 18, and neither is precluded from marriage as a result of having another spouse or being closely related to each other. (*Id.)*

In conformity with Defendants' public statements and positions opposing marriage for same-sex couples, Defendant Wilson filed a Petition for Original Jurisdiction and Motion for a Temporary Injunction and Administrative Order (attached hereto as "Exhibit 7") with the South Carolina Supreme Court to stop probate judges from marriage licenses to same-sex couples. Plaintiffs objected and moved to intervene.

On October 9, 2014, before 9:15 a.m. Plaintiff Bleckley was present at the Charleston County Probate Court's office to pick up the Plaintiffs' couple's marriage license. (Affidavit of A. Bleckley, ¶ 7, attached hereto as "Exhibit 3.") Under South Carolina Code section 20-1-230, Judge Condon was required by State law to issue a marriage license to the Plaintiffs on October 9, 2014 at or about 9:15 a.m. On October 9, 2014, prior to Plaintiffs receipt of a marriage license, the South Carolina Supreme Court granted Defendant Wilson's motion and ordered Judge Condon not to issue marriage licenses to same-sex couples. *See* South Carolina Supreme Court Order, attached hereto as "Exhibit 8." The South Carolina Supreme Court issued an Order forbidding the issuance of marriage licenses to same-sex couples throughout the State until an order requiring such issuance is entered by the United States District Court for the District of

South Carolina. *Id.* Judge Condon declined to issue the license for the sole reason that the proceedings instituted by Defendant Wilson resulted in an order from the South Carolina Supreme Court. *Id.*

In the Petition for Temporary Injunction, Defendant Wilson, on behalf of the State, offers *no* substantive reason to continue to deny same-sex couples their fundamental right to marry. (*See* Ex. 7.) Instead, ignoring his oath to uphold the Unites States Constitution, S.C. CONST., ART. . VI, §§ 4, 5, Wilson relied on the following arguments: 1) that Justice Kennedy stayed issuance of the mandate in the Ninth Circuit's decision in *Otter v. Latta* concluding that Idaho's ban on marriages for same-sex couples was unconstitutional; [2] 2) *Baker v. Nelson* binds state courts; [3] 3) that the question whether South Carolina may continue to prevent same-sex couples from exercising their fundamental right to marry, as announced by the Fourth Circuit, "remains alive in the courts" based on pending litigation in *Bradacs v. Haley.* None of the justifications affect the issues before this Court.[4] Indeed, they support that that this Court should promptly rule where the State's position is that there is an "absence of any ruling to the contrary as to the statutes at issue by the District Court in this state." (*See* Ex. 7 at p.7.)

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[2] The stay issued in *Otter* has been vacated, *Otter v. Latta*, 2014 U.S. LEXIS 6735 (U.S. Oct. 10, 2014).

[3] The summary dismissal in *Baker v. Nelson* cannot be considered binding precedent by this Court where the Fourth Circuit expressly "decline[d] to view *Baker* as binding precedent" to the issues in this case. *Bostic* 760 F.3d at 375.

[4] Not only is there no obligation on this Court to allow clear constitutional violations to continue – and a countervailing Article VI duty to uphold the Constitution – the claims at issue in *Bradacs v. Haley* are distinct in that they involve whether the State must *recognize* <u>*out-of-state*</u> marriages, as opposed to the relief Plaintiffs seek here, which is enjoinment of the laws that prevent them, and all unmarried same-sex couples throughout the State, from *marrying in South Carolina*. *See Bradacs v. Haley*, Case No. 3:13-cv-02351 (D.S.C. 2013) (V. Compl., attached hereto as "Exhibit 9").

LEGAL STANDARD

A preliminary injunction may be granted if the movants establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Pashby v. Delia*, 709 F.3d 307, 332-333 (4th Cir. 2013) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)). A plaintiff must make a "clear" showing that she is likely to suffer irreparable harm absent relief and is likely succeed on the merits at trial. *Id.* (citations omitted).

ARGUMENT

Plaintiffs are entitled to a preliminary injunction. ***First***, application of controlling law in this jurisdiction means that Plaintiffs have far more than a likelihood of success on the merits—based on the ruling in *Bostic*, they are practically assured that they will prevail on their claim that South Carolina marriage ban is unconstitutional under both the Due Process and Equal Protection Clauses of the U.S. Constitution. 760 F.3d 352; *see also Windsor v. United States* 133 S. Ct. 2675, 2693-95 (2013) (observing that when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans the couple," "humiliates…children being raised by same-sex couples,'" deprives these families of equal dignity, and "degrade[s]" them, in addition to causing them countless tangible harms, all in violation of "basic due process and equal protection principles."). As an ever-increasing number of courts following *Windsor* have already recognized, state-law bans on marriage by same-sex

couples—many of which are functionally indistinguishable from South Carolina's ban—violate the Constitution.[5]

Second, Plaintiffs will suffer irreparable harm if the injunction does not issue because of the significant emotional, dignitary, and tangible harms caused by the State's ongoing refusal to provide them equal dignity and deprivation of their constitutional rights. ***Third***, in permitting Plaintiffs and other same-sex couples to marry, the State's burden would be limited to performing minor administrative tasks that are no different from those it routinely performs for different-sex couples who marry within the state. Indeed, South Carolina's sister states in the Fourth Circuit have seamlessly followed the decision in *Bostic* and allowed same-sex couples to marry in Virginia, West Virginia and North Carolina. As of the drafting of this motion, thirty-one states and the District of Columbia have easily amended their laws to prevent discrimination against same-sex couples with respect to marriage. Furthermore, enjoining enforcement of South Carolina's unconstitutional marriage ban can only promote the public interest, since the public interest is necessarily served by vindicating constitutional rights.

I. THE FOURTH CIRCUIT HAS HELD THAT STATES MAY NOT DENY SAME-SEX COUPLES THEIR FUNDAMENTAL RIGHT TO MARRY; PLAINTIFFS ARE HIGHLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

In *Bostic v. Schaefer*, the Fourth Circuit ruled that Virginia's laws prohibiting same-sex couples from marrying the person they choose violates the Fourteenth Amendment. 760 F.3d at 384. The court expressly noted that Virginia's marriage laws are virtually identical to South Carolina marriage ban. *See Bostic*, 760 F.3d at n 1; *compare* VA. CONST. ART. I, § 15-A with S.C. CONST. ANN. ART. XVII, § 15 and Va. Code Ann. § 20-45.2 with S.C. Code Ann. §§20-1-10, 20-1-15. Where "enforcement of [a] statute" has properly been invalidated as

[5] *See supra*, at n. 1.

unconstitutional, "then so is enforcement of all identical statutes in other States, whether occurring before or after our decision." *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 175 (1990) (Scalia, J. concurring); *see also Windsor*, 133 S. Ct. at 2691 (striking down a federal law that discriminated against legally married same-sex couples, the Supreme Court emphasized that "[s]tate laws . . . regulating marriage, of course, must respect the constitutional rights of persons.").

Plaintiffs seek from this Court only what *Bostic* requires, which is a ruling enjoining the enforcement of laws that "prevent same-sex couples from marrying" because such laws "violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment." 760 F.3d at 384. *See also, e.g., Suber v. Comm'r of the SSA*, 640 F. Supp. 2d 684, 687 (D.S.C. 2009) (recognizing that "published decisions of the Fourth Circuit … are binding on the Court."); *Gen. Synod of the United Church of Christ v. Resinger*, 2014 U.S. Dist. LEXIS 144383 (W.D.N.C. Oct. 10, 2014) (recognizing that "the Fourth Circuit's decision in *Bostic* [] is undeniably the law of this circuit and binding on this lower court in light of the denial of *certiorari.*"); *Preferred Communications v. City of Los Angeles*, 13 F.3d 1327, 1333 (9th Cir. 1994) ("All government officials have a duty to uphold the United States Constitution…").

South Carolina's marriage ban undeniably violates Plaintiffs' rights where it denies them the legal, social, and financial benefits enjoyed by different-sex couples and their children. The Fourth Circuit held that because marriage bans, such as the laws at issue in both *Bostic* and here, "unquestionably . . . impede the right to marry by preventing same-sex couples from marrying and nullifying the legal import of their out-of-state marriages. Strict scrutiny therefore applies." 370 F.3d. at 377*; see also Zablocki*, 434 U.S. at 388 (holding that a law that "significantly

interferes with the exercise of a fundamental right," cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

Every argument put forward by Virginia as justification to continue discriminating against same-sex couples was held insufficient to justify the state's encroachment on the fundamental right to marry. 370 F.3d. at 384. Defendant Wilson, joined by the attorneys general of thirteen other states, co-authored an amicus brief submitted on behalf of South Carolina in *Bostic* (Brief of the States of Indiana, et al. as Amici Curiae in Support of Reversal, *Bostic v. Schaefer*, 760 F.3d 352 (2014) (No. 14-1167), attached hereto as "Exhibit 10"), setting out the State's arguments for upholding laws that ban same-sex couples from protecting their families through marriage. The states did not offer any compelling governmental interests, instead admitting that their justifications merely satisfied rational basis review. (Ex. 10, at 15 ("The Concept of Traditional Marriage Embodied in the Laws of Thirty-three States Satisfies Rational Basis Review").) Moreover, the only governmental interests argued in the South Carolina Amicus Brief were: 1) upholding tradition and 2) encouraging responsible procreation. Both were specifically rejected by the Fourth Circuit. Indeed, Defendant Wilson admitted that rejection of the responsible procreation rationale "undermines the existence of *any* legitimate state interest in recognizing marriages." (*Id.*, at 17 (emphasis in original).)

Thus, because *Bostic* expressly rejected the 'responsible procreation' argument, the State concedes there are no legitimate state interests left for it to advance—let alone a compelling one that would satisfy strict scrutiny—for denying individuals of the same sex the right to marry.[6]

[6] Indeed, far from withstanding the rigorous test of strict scrutiny, South Carolina's marriage ban cannot satisfy even rational basis review because it irrationally targets gay and lesbians for the sole purpose of excluding them from the right to marry the person they choose. Government action that discriminates against a class of citizens must "bear[] a rational relation to some

As a result, the South Carolina marriage ban violates Plaintiffs' due process rights. Plaintiffs have met their burden to show that they are likely to succeed on the merits.

II. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

Because Plaintiffs have shown that they are likely to succeed on their claims that South Carolina's marriage ban is unconstitutional, the remaining three preliminary injunction factors — (1) they will likely suffer irreparable harm absent an injunction; (2) the balance of equities weighs in their favor; and (3) the injunction is in the public interest, *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) — weigh in favor of relief. As the Sixth Circuit noted in *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987), a showing of a likelihood of success on the merits of a constitutional violation easily leads to a finding of the remaining factors to grant a preliminary injunction because: (1) "there is potential irreparable injury in the form of a violation of constitutional rights"; (2) "a likelihood that the Ordinance will be found unconstitutional [means] it is therefore questionable whether the City has any 'valid' interest in enforcing the Ordinance"; and (3) "the public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional."

Defendants' continued enforcement of the marriage ban against the Plaintiffs violates their constitutional rights, which, without more, establishes irreparable harm as a matter of law. *See, e.g., Elrod v. Burns*, 427 U.S.347, 373 (1976) (holding that deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm"); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("the denial of a constitutional right, if denial is

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legitimate end." *Romer v. Evans*, 517 U.S. 620,631 (1996) (holding that a "bare . . . desire to harm a politically unpopular group" is not rationally related to a legitimate purpose).

established, constitutes irreparable harm for purposes of equitable jurisdiction"); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citing 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995)); *Preston v. Thompson*, 589 F.2d 300, 303 at n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm") (citations omitted); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist*., 774 F. Supp. 977, 986 (D.S.C. 1991) (holding that "a violation of the plaintiffs' constitutional rights . . . constitutes irreparable harm, and that injunctive relief is warranted"), *aff'd in part and vacated in part, Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist*., 991 F.2d 154 (4th Cir. 1993); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014) (granting preliminary injunction requiring state to recognize same-sex couple's marriage and reaffirming "its conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief.") (citations omitted).

An injury is irreparable "'if it cannot be undone through monetary remedies.'" *Tiffany v. Forbes Custom Boats, Inc*., 1992 U.S. App. LEXIS 6268, *26 (4th Cir. Apr. 6, 1992) (citing *Enterprise Int'l, Inc. v. Corporacion Estatal Petroleva Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). Accordingly, in addition to the deprivation of constitutional rights, which is *per se* sufficient to satisfy their irreparable harm prong, Plaintiffs and other same-sex couples are also suffering severe dignitary and practical harms that, if allowed to continue, can never be redressed by money damages or a subsequent court order.

It is beyond dispute that marriage plays a unique and central social, legal, and economic role in American society; it reflects the commitment that a couple makes to one another, and is a

public acknowledgement of the value, legitimacy, depth, and permanence of the married couple's relationship. A marriage "is a far-reaching legal acknowledgement of the intimate relationship between two people," and the State inflicts grave dignitary harm when its law announces that the Plaintiffs' relationships are not "deemed by the State worthy of dignity in the community equal with all other marriages." *Windsor*, 133 S. Ct. at 2692.

"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." *Tanco v. Haslam*, 2014 U.S. Dist. LEXIS 33463, at *26-27 (M.D. Tenn. Mar. 14, 2014). Particularly because Plaintiffs are raising a teenager together, South Carolina's marriage ban creates irreparable harm by instructing Condon's son – as it does to every child in the State being raised by same-sex couples who wish to marry – that his parent's relationship is unworthy of respect in the eyes of the State and need not be respected by private parties. In refusing to provide Plaintiffs a marriage license and allow them to marry, South Carolina "demeans" and "humiliates" not only same-sex couples but their children, including Condon's, by making 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." *See Windsor*, 133 S.Ct. at 2694.

Plaintiffs are also denied access to the array of state-law protections intended to safeguard married couples and their families, especially important because of the unpredictability of, for example, illnesses, accidents, emergencies and natural disasters. From hospital personnel to state emergency agencies to law enforcement personnel to health insurance companies,

"families"—defined by blood, adoption or marriage—are afforded special treatment.[7] By way of example only, same-sex couples are denied family health insurance coverage; employee benefits such as spousal health benefits, retirement benefits, and surviving spouse benefits for public employees; Social Security death and disability benefits; family leave for an employee to care for a spouse; the ability to safeguard family resources under an array of laws that protect spousal finances; the ability to make caretaking decisions for one another in times of death and serious illness, including the priority to make medical decisions for an incapacitated spouse, the automatic right to make burial decisions, and other decisions concerning disposition and handling of remains of deceased spouses; the right to sue for wrongful death; the right to inheritance under the laws of intestacy and the right of a surviving spouse to an elective share.

Given such pressing harms and the importance of the constitutional interests involved, Plaintiffs and other same-sex couples and their children in this State should not be forced to continue to wait even longer while futile, but potentially lengthy, litigation and the appellate process concludes in order obtain the critical security and protection to which they are entitled today. This is especially so where neighboring states in this jurisdiction are following the law and the effect of the litigation is purely political and merely to forestall the inevitable. No relief at the end of litigation could make the Plaintiffs whole for the harm caused by their exclusion from the most "intimate" and "sacred" of life's relationships in the interim. *Zablocki*, 434 U.S. at 384.

[7] *See e.g.*, South Carolina Emergency Operations Plan, referencing the obligation of the State to provide services for "individuals, families and businesses" throughout. Available at *http://www.scemd.org/files/Plans/2014%20SC%20EOP%20Publish/Appendix%2009%20-%20(NEW)%20Catastrophic%20Incident%20Response%20Plan.pdf*. Of course, Plaintiffs seek to be recognized and treated as family members – not individuals — at all times, but particularly in times of crises.

III. THE BALANCE OF EQUITIES WEIGHS IN PLAINTIFFS FAVOR BECAUSE GRANTING INJUNCTIVE RELIEF WILL NOT HARM DEFENDANTS AND WILL PROMOTE THE PUBLIC INTEREST.

Finally, a preliminary injunction is appropriate because the balance of equities weighs in Plaintiffs favor where an order enjoining the enforcement of South Carolina's marriage ban would not burden the rights of Defendants or third parties, and would promote the unquestioned public interest in the enforcement of constitutional rights. "[T]he public is certainly interested in the prevention of enforcement of [laws] which may be unconstitutional." *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 829 (E.D. Va. 1998) (quoting *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987), *Frye v. United States*, 916 F. Supp. 546, 548 (M.D.N.C. 1995).). Indeed, where continued litigation is futile based on controlling law, it is certainly in the public's interest to save judicial resources and taxpayer money with a prompt and certain ruling.

In *Centro Tepeyac*, the Fourth Circuit upheld the district court's joint consideration of "the third and fourth *Winter* factors (the balance of equities and the public interest), invoking precedent deeming those 'factors established when there is a likely First Amendment violation.'" 722 F.3d at 191. Further, the Fourth Circuit approved the precedent cited by the district court holding that "'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 [and]… that 'upholding constitutional rights surely serves the public interest.'" *Id.* (citations omitted); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (likewise affirming the district court's holding that "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.' The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. Again, we agree with the district court that upholding constitutional rights surely serves the public interest.") (citations omitted).

The State is unquestionably trampling Plaintiffs' fundamental right to marry pursuant to the Fourth Circuit's ruling in *Bostic*. Accordingly, Plaintiffs seek an order that is plainly in the public's interest to enjoin Defendants from continuing to infringe fundamental constitutional rights – their own as well as similarly situated same-sex couples — because the public has an interest in ensuring that laws comport with constitutional requirements. "The Fourth Circuit has stated unequivocally that 'upholding constitutional rights serves the public interest.'" *Bowden v. Town of Cary*, 754 F. Supp. 2d 794, 808 (E.D.N.C. 2010) (citing *Newsome v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."). *See also, e.g., Stuart v. Huff*, 834 F. Supp. 2d 424, 433 (M.D.N.C. 2011) ("[I]t is in the public interest for statutes that likely violate fundamental constitutional rights be to enjoined from being enforced."); *Does v. City of Indianapolis*, 2006 U.S. Dist. LEXIS 72865 at *29 (S.D. Ind. Oct. 5, 2006) ("Defendants will not be harmed by having to conform to constitutional standards[.]").

Compared to the substantial harms suffered by Plaintiffs in absence of an injunction, and to all of the South Carolina families headed by same-sex couples who are seeking the protections of marriage, the balance of harms tips decidedly in Plaintiffs' favor. Because the marriage ban is unconstitutional on its face, "governmental compliance with the Constitution always serves the common good." *Tanford v. Brand* 883 F. Supp. 1231, 1237 (S.D. Ind. 1995). In addition, issuance of preliminary injunction will not burden the rights of third parties or the public. "The Fourth Circuit has explained that a government 'is in no way harmed' by the issuance of an

injunction prohibiting it from enforcing an unconstitutional law." *Ostergren v. McDonnell*, 643 F. Supp. 2d 758, 763 (E.D. Va. 2009) (citing N*ewsome, supra*. 54 F.3d at 261) *aff'd*¸ *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010). In sum, continued enforcement of an unconstitutional statute can never be in the public interest.

CONCLUSION

For the foregoing reasons, this Court should issue a preliminary injunction that (1) enjoins Defendants and all those acting in concert therewith from enforcing S.C. CONST. ART. XVII, § 15 and S.C. Code Ann. § 20-1-15 and any other sources of state law that preclude same-sex couples from marriage or refuse to recognize their lawful marriages; (2) enjoins Defendants from enforcing any and all other state statutes, regulations or other laws which act as a barrier to or otherwise discourage same-sex couples from marrying, including but not limited to S.C. CONST. ART. XVII, § 15 and S.C. Code Ann. § 20-1-15 (hereinafter jointly referenced as the "marriage ban") and any other sources of state law that preclude same-sex couples from marriage or refuse to recognize their lawful marriages; (3) requires Defendant Condon to issue a marriage license to the Plaintiffs and all other same-sex couples upon their application and satisfaction of all legal requirements for a marriage in South Carolina except for the requirement that they be of different sexes, and requires Defendant Condon and all South Carolina probate judges to register their solemnized marriage as is presently required for all other marriages; 4) enjoins Defendants Wilson and Haley, and those acting in concert therewith, from enforcing laws prohibiting a person from marrying another person of the same sex, prohibit recognition of same-sex marriages lawfully solemnized, seeking to punish in any way officiants who solemnize the union of same-sex unions, or otherwise interfering with the exercise of same-sex couples ability to marry and be recognized as lawfully married in the State.

For all of the foregoing reasons, Plaintiffs respectfully request this Court grant their motion for preliminary injunction.

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

s/Elizabeth L. Littrell
Elizabeth L. Littrell (Georgia Bar No. 454949)
730 Peachtree Street, NE, Suite 1070
Atlanta, Georgia 30308
Phone: (404) 897-1880
Fax: (404) 897-1884
blittrell@lambdalegal.org

ATTORNEYS FOR PLAINTIFFS
Admitted Pro Hac Vice
by Order dated October 17, 214

SOUTH CAROLINA EQUALITY COALITION, INC.

s/Nekki Shutt
M. Malissa Burnette (Fed. I.D. No.:1616)
Nekki Shutt (Fed. I.D. No.: 6530)
CALLISON TIGHE & ROBINSON, LLC
1812 Lincoln Street
Post Office Box 1390
Columbia, South Carolina 29202
Telephone: 803-404-6900
Facsimile: 803-404-6901
mmburnette@callisontighe.com
nekkishutt@callisontighe.com

s/Victoria L. Eslinger
Victoria L. Eslinger (Fed. I.D. No.:738)
NEXSEN PRUET, LLC
P.O. Drawer 2426
Columbia, South Carolina 29202-2426
Telephone: 803-253-8249
Facsimile: 803-253-8228
veslinger@nexsenpruet.com

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Colleen Therese Condon and Anne Nichols Bleckley, Plaintiffs, vs. Nimrata (Nikki) Randhawa Haley in her official capacity as Governor of South Carolina; Alan Wilson in his official capacity as Attorney General; and Irvin G. Condon in his official capacity as Probate Judge of Charleston County, Defendants.	**C/A No.: 2:14-cv-04010-RMG** **CERTIFICATE OF SERVICE**

I hereby certify that I have caused **PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** to be served upon Defendants Nimrata (Nikki) Randhawa Haley and Alan Wilson by causing copies of the same to be deposited in the U.S. Mail, first-class postage prepaid, and addressed to the following:

J. Emory Smith, Jr., Esq.
Deputy Solicitor General
OFFICE OF ATTORNEY GENERAL
Post Office Box 11549
Columbia, South Carolina 29211

s/Nekki Shutt
Nekki Shutt (Fed. ID No. 6530)

October 22, 2014
Columbia, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Colleen Therese Condon and Anne Nichols Bleckley, Plaintiffs, -v- Nimrata (Nikki) Randhawa Haley, in her official capacity as Governor of South South Carolina; Alan Wilson, in his official capacity as Attorney General; and Irvin G. Condon, in his official capacity as Judge of Probate Charleston County, Defendants.	Civil Action No.: 2:14-cv-04010-RMG **INDEX OF DOCUMENTS IN SUPPORT OF PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION**

Exhibit 1	Order, *General Synod of the United Church of Christ, et. al. v. Resinger, et. al.*, Case No. 3:14-cv-00213 (W.D.N.C. October 10, 2014)
Exhibit 2	Affidavit of Coleen Condon
Exhibit 3	Affidavit of Anne Nichols Bleckley
Exhibit 4	News release from Office of the Attorney General Alan Wilson dated October 6, 2014
Exhibit 5	October 6, 2014 News Article, Mary Trohan *Wilson continues defense of gay marriage ban*, Greenville Online
Exhibit 6	October 8, 2014 Statement of Judge Condon
Exhibit 7	Petition for Original Jurisdiction and Motion for a Temporary Injunction and Administrative Order
Exhibit 8	South Carolina Supreme Court Order
Exhibit 9	Verified Complaint, *Bradacs v. Haley*, Case No. 3:13-cv-02351 (D.S.C. 2013)

Exhibit 10	Brief of the States of Indiana, et al. as Amici Curiae in Support of Reversal, *Bostic v. Schaefer*, 760 F.3d 352 (2014) (No. 14-1167)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:14-cv-00213-MOC-DLH

GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, et al.	)	
Plaintiffs,	)	
Vs.	)	**MEMORANDUM OF DECISION AND ORDER**
DREW RESINGER, REGISTER OF DEEDS FOR BUNCOMBE COUNTY, et al.,	)	
Defendants.	)	
And	)	
ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA,	)	
Intervenor.	)	

THIS MATTER is before the court on its own Motion for Judgment on the Pleadings. In light of the decision of the Court of Appeals for the Fourth Circuit in Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), cert. denied, ___ S.Ct.___, 2014 WL 4354536 (U.S. Oct. 6, 2014), as to which the Mandate has now issued, Bostic v. Schaefer, No. 14-1167, 14-1169, 14-1173 (4th Cir. Oct. 6, 2014), the court determines that North Carolina's laws prohibiting same-sex marriage are unconstitutional as a matter of law.[1]

1 The Stay (#91) previously imposed was automatically dissolved on October 6, 2014, when *certiorari* was denied in *Bostic*.

Specifically, the court finds Article XIV, Section 6 of the North Carolina Constitution, North Carolina General Statute § 51-1 *et seq.*, and any other source of state law that operates to deny same-sex couples the right to marry in the State of North Carolina, prohibits recognition of same-sex marriages lawfully solemnized in other States, Territories, or a District of the United States, or threatens clergy or other officiants who solemnize the union of same-sex couples with civil or criminal penalties, are, in accordance with Bostic, supra, unconstitutional as they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Finally, in the hours preceding this Order there have been a number of last minute motions filed by interested parties. The issue before this court is neither a political issue nor a moral issue. It is a *legal* issue and it is clear as a matter of what is now settled law in the Fourth Circuit that North Carolina laws prohibiting same sex marriage, refusing to recognize same sex marriages originating elsewhere, and/or threating to penalize those who would solemnize such marriages, are unconstitutional.

ORDER

IT IS, THEREFORE, ORDERED that

(1) the consent Motion to Dismiss Plaintiff's First Amendment Claims (#114) is GRANTED, and those claims are DISMISSED without prejudice;

(2) the court's Motion for Judgment on the Pleadings is **GRANTED**, and the court finds Article XIV, Section 6 of the North Carolina Constitution, North Carolina General Statute § 51-1 *et seq.*, and any other source of state law that operates to deny same-

sex couples the right to marry in the State of North Carolina or prohibits recognition of same-sex marriages lawfully solemnized in other States, Territories, or a District of the United States, or threatens clergy or other officiants who solemnize the union of same-sex couples with civil or criminal penalties, are **UNCONSTITUTIONAL** as they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

(3) all other pending motions are terminated as **MOOT**.

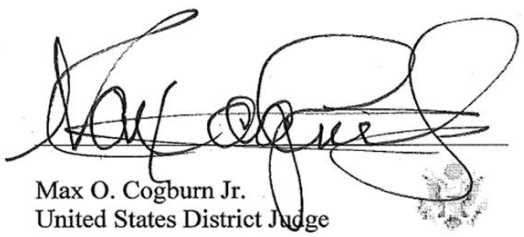
PERMANENT INJUNCTION

Defendants are **PERMANENTLY ENJOINED** from enforcing such laws to the extent these laws prohibit a person from marrying another person of the same gender, prohibit recognition of same-sex marriages lawfully solemnized in other States, Territories, or a District of the United States, or seek to punish in any way clergy or other officiants who solemnize the union of same-sex couples.

With the exception of retaining such jurisdiction as may be necessary to enforce such injunction, this action is otherwise **DISMISSED**.

The Clerk of Court shall issue a Judgment consistent with this Memorandum of Decision and Order.

Signed: October 10, 2014



Max O. Cogburn Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Colleen Therese Condon and Anne Nichols Bleckley, Plaintiffs, -v- Nimrata (Nikki) Randhawa Haley, in her official capacity as Governor of South South Carolina; Alan Wilson, in his official capacity as Attorney General; and Irvin G. Condon, in his official capacity as Judge of Probate Charleston County, Defendants.	)	Civil Action No.: 2:14-cv-04010-RMG

AFFIDAVIT OF COLLEEN CONDON

The undersigned, being duly sworn, is competent to testify and deposes and says as follows:

1. My name is Colleen Condon. I am a lawyer. I have served as an elected official since 2005, for three terms. I live with my same-sex partner, who is also my fiancée, Anne Nichols Bleckley ("Nichols"), in a home in Charleston County, South Carolina. Nichols has worked in customer service for the same private employer for the last 12 years.
2. Nichols and I are a committed same-sex couple who want to marry each other in their home state of South Carolina.
3. Both Nichols and myself are over the age of 18, and neither are precluded from marriage as a result of having another spouse or being closely related to each other.
4. Together, Nichols and I are helping to raise my15 year-old son.
5. After just a few dates, both Nichols and I knew that we wanted to spend the rest of our lives together.

6. Both life-long South Carolinians, we became engaged to be married on Valentine's Day 2014, before moving in together into our shared home about 5 months ago, and hope to be able to marry each other surrounded by friends and family in our beloved home state of South Carolina.

7. On October 8, 2014, I read the following public statement issued by Judge Condon:

> As a result of the actions of the United States Supreme Court this past Monday, the Charleston County Probate Court is required to accept and issue marriage licenses for same sex couples. Applications will be accepted beginning today, October 8, 2014, and the Charleston County Probate Court will issue the marriage license after the mandatory 24 hour waiting period unless stayed by the South Carolina Supreme Court or another appropriate court.

8. Nichols and I applied for a marriage license at the Charleston County Probate Court and paid the requisite filing fee on October 8, 2014.

9. Judge Condon accepted our application and filing fee for a marriage license at about 9:15 a.m. on October 8, 2014.

10. On October 9, 2014, Nichols went to the Charleston County Probate Court's office to pick up our marriage license.

11. South Carolina's discriminatory laws banning me from marrying my partner harms my son by signaling that his mother's committed relationship is unworthy of respect in the eyes of the State and need not be respected by private parties.

12. South Carolina's discriminatory laws banning me from marrying my partner also harms me and Nichols by de-legitimizing our relationship, degrading us in our interactions with the state officials, causes us to suffer public indignity, and invites public and private discrimination and stigmatization. The discriminatory marriage scheme also causes great distress and anxiety because we are precluded from the protections of marriage, which we

may need at any moment because of the unpredictability of illnesses, accidents, emergencies and natural disasters that leave us vulnerable to being treated as legal strangers to each other, and she to my son, by everyone we come in contact with when we are, and need, to be recognized as *family* to each other.

Colleen Therese Condon

Sworn to before me
the 22 day of October, 2014

Notary Public For South Carolina

My commission expires: 2/27/2018

NOTARY PUBLIC
SOUTH CAROLINA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Colleen Therese Condon and Anne Nichols Bleckley, Plaintiffs, -v- Nimrata (Nikki) Randhawa Haley, in her official capacity as Governor of South South Carolina; Alan Wilson, in his official capacity as Attorney General; and Irvin G. Condon, in his official capacity as Judge of Probate Charleston County, Defendants.	)	Civil Action No.: 2:14-cv-04010-RMG

AFFIDAVIT OF ANNE NICHOLS BLECKLEY

The undersigned, being duly sworn, is competent to testify and deposes and says as follows:

1. My name is Anne Nichols Bleckley ("Nichols"). I live with my same-sex partner, who is also my fiancée, Colleen Condon, in a home in Charleston County, South Carolina. I have worked in customer service for the same private employer for the last 12 years.
2. Colleen and I are a committed same-sex couple, together for more than a year, who want to marry each other in our home state of South Carolina.
3. Both Colleen and myself are over the age of 18, and neither are precluded from marriage as a result of having another spouse or being closely related to each other.
4. Both life-long South Carolinians, we became engaged to be married on Valentine's Day 2014, before moving in together into our shared home about 5 months ago, and hope to be able to marry each other surrounded by friends and family in our beloved home state of South Carolina.

5. Colleen and I applied for a marriage license at the Charleston County Probate Court and paid the requisite filing fee on October 8, 2014.

6. Judge Condon accepted our application and filing fee for a marriage license at 9:15 a.m. on October 8, 2014. Our receipt stated we could pick up our license at 9:15 a.m. on October 9, 2014.

7. On October 9, 2014, at 9:15 a.m., I went to the Charleston County Probate Court's office to pick up our marriage license. After presenting myself, the Probate Court employee made me wait for more than one hour with no explanation for the delay. A letter was then given to me instead of our marriage license. Because the South Carolina Supreme Court granted the State's request for a restraining order, the Probate Court was unable to provide the marriage license that should have been provided as a matter of law.

Anne Nichols Bleckley

Sworn to before me
the 22 day of October, 2014

Notary Public For South Carolina

My commission expires: 12/4/22

News Release

OFFICE OF ATTORNEY GENERAL ALAN WILSON
STATE OF SOUTH CAROLINA

For Immediate Release
October 6, 2014

Contact: J. Mark Powell
(803) 734-3670
mpowell@scag.gov

ATTORNEY GENERAL ALAN WILSON STATEMENT REGARDING TODAY'S U.S. SUPREME ACTION

(COLUMBIA, S.C.) South Carolina Attorney General Alan Wilson released the following statement after the U.S. Supreme Court today rejected petitions for certiorari related to same-sex marriage cases:

"Our case (Bradacs v. Wilson) has not yet been decided. Until the courts rule on the matter, South Carolina will seek to uphold our state constitution."

# # #

Wilson continues defense of gay marriage ban

Mary Troyan, Gannett Washington Bureau *7:13 p.m. EDT October 6, 2014*

South Carolina Attorney General Alan Wilson continued to defend the state's ban on same sex marriage Monday, despite the U.S. Supreme Court's refusal to address lower court rulings declaring such unions a constitutional right.

(Photo: Tim Dominick tdominick@thestate.com)

WASHINGTON ï South Carolina Attorney General Alan Wilson continued to defend the state's ban on same sex marriage Monday, despite the U.S. Supreme Court's refusal to address lower court rulings declaring such unions a constitutional right.

The high court offered no explanation for its decision, which directly affects Virginia and four other states, which immediately began issuing marriage licenses to same-sex couples Monday.

The court's action does not immediately affect South Carolina, even though it is part of the same federal judicial circuit as Virginia.

Wilson, who has been defending South Carolina's 2006 ban in court, said that case is still pending.

"Until the courts rule on the matter, South Carolina will seek to uphold our state constitution," Wilson said.

GREENVILLEONLINE

High court ruling may lead to gay marriage in 30 states

(http://www.greenvilleonline.com/story/news/nation/2014/10/06/supreme-court-gay-marriage/16546959/?from=global&sessionKey=&autologin=)

GREENVILLEONLINE

Q&Amy: How does the gay marriage ruling affect South Carolina?

(http://www.greenvilleonline.com/story/news/local/2014/10/06/qamy-gay-marriage-ruling-affect-south-carolina/16821535/?from=global&sessionKey=&autologin=)

Gov. Nikki Haley agreed with Wilson, according to her spokesman, Doug Mayer.

"Our voter-approved state law should be followed until a court rules on it directly," Mayer said.

Based on what happened Monday, the lawyer who filed the challenge to South Carolina's ban on same-sex marriages said she will ask U.S. District Judge Michelle Childs within a few days to declare the ban unconstitutional.

"We're very hopeful she will do that, given the developments," said Carrie Warner of Columbia. "We're hopeful she will follow that pattern."

Gay and lesbian couples in South Carolina could start obtaining marriage licenses soon if the court moves quickly and agrees that South Carolina's ban is similar to Virginia's and is therefore unconstitutional.

But the process could take longer if Wilson continues to support the ban in court.

"We're hopeful the state will not continue to waste resources and fight the inevitable decision in our favor, given what happened across country and in the Fourth Circuit," Warner said. "But there is no indication from the state that they intend to throw their hands up."

The state, for example, could argue that Virginia's ban and South Carolina's ban aren't identical. Wilson's statement did not address his legal strategy for defending the ban.

But marriage equality advocates in South Carolina celebrated the possibility that gay marriage could become legal within days or weeks, and urged Wilson to drop his opposition.

Warren Redman-Gress, executive director of the Alliance for Full Acceptance in Charleston, said state officials are reviewing "when and how they should actually agree or acquiesce to this ruling."

Ivy Hill and Misha Gibson have been denied a marriage license four times at the courthouse in Greenville.

"So it will be really cool to walk back up to that same counter and finally hear a yes," Hill said Monday.

Contact Mary Troyan at mtroyan@usatoday.com (mailto:mtroyan@usatoday.com)

Read or Share this story: http://grnol.co/1vK7qYj

MORE STORIES

5 things to know today in South Carolina (/story/news/local/2014/10/22/5-things-to-know-in-south-carolina-today/17706905/)

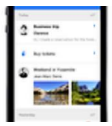
Oct. 22, 2014, 9:03 a.m.

DSS reaches settlement on child support computer system (/story/news/politics/2014/10/22/dss-reaches-settlement-child-support-computer-system/17707749/)

Oct. 22, 2014, 8:08 a.m.

Candidates attack issues in final gubernatorial debate (/story/news/local/2014/10/21/south-carolina-gubernatorial-debate-furman-university/17695081/)

Oct. 21, 2014, 9:28 p.m.



Google debuts Inbox, a new way to stay on top of email (/story/tech/2014/10/22/google-gmail-inbox/17693037/)

Oct. 22, 2014, 2:54 p.m.

IRVIN G. CONDON
Judge of Probate

TAMARA C. CURRY
Associate Judge of Probate

JACK I. GUEDALIA
Associate Judge of Probate

LENNA S. KIRCHNER
Associate Judge of Probate

CHARLESTON COUNTY
SOUTH CAROLINA

COMMITMENT DIVISION
JUDICIAL CENTER
100 BROAD STREET, SUITE 469
CHARLESTON, SC 29401
PHONE: 843.958.5180
FAX: 843.958.5191

October 8, 2014

As a result of the actions of the United States Supreme Court on October 6, 2014, the Charleston County Probate Court is required to accept and issue marriage licenses for same sex couples. Applications will be accepted beginning today, October 8, 2014, and the Charleston County Probate Court will issue the marriage license after the mandatory 24 hour waiting period unless stayed by the South Carolina Supreme Court or another appropriate court.

Irvin G. Condon

Irvin G. Condon
Judge of Probate
Charleston County Probate Court
100 Broad Street, Suite 469
Charleston, South Carolina 29401
Phone: (843) 958-5180
Fax: (843) 958-5191

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

The State of South Carolina ex rel Alan Wilson, Attorney General
. . . . . Petitioner,

v.

Irvin G. Condon, in his capacity as Judge of Probate Charleston County . . . . .
Respondent.

PETITION FOR ORIGINAL JURISDICTION
AND MOTION FOR TEMPORARYINJUNCTION

The State of South Carolina ex rel Alan Wilson, Attorney General, respectfully requests that the South Carolina Supreme Court authorize the bringing of this petition and motion within its original jurisdiction pursuant to Rule 245, SCACR, S.C. Code Ann §14-3-310 and S.C. Const. art. V §5 and that this Court issue a temporary injunction and administrative order as set forth below.

INTRODUCTION

This case is about following the rule of law and the legal process. As the chief legal officer of South Carolina, it is the sworn duty of the Attorney General to seek to uphold State law until set aside by the courts. Moreover, a public official may not refuse to follow State law because "he thought the law unconstitutional." It is, instead, his

or her duty to "follow it until judicially declared invalid." *Trustees of Wofford College v. Burnett*, 209 S.C. 92, 104-5, 395 S.E.2d 155 (1946).

Today, Justice Kennedy has stayed a decision of the Ninth Circuit Court of Appeals in *Otter v. Latta,* 14A374, 2014 WL 4996356 (U.S. Oct. 8, 2014). concluding that Idaho's ban on same sex marriages violates the Equal Protection Clause. *Baker v. Nelson*, 409 U.S. 810 (1972), dismissed, for want of a federal question, an appeal from a decision of the Supreme Court of Minnesota, concluding that the federal constitution did not bestow a constitutional right to same sex marriage. This decision has never been overruled and must be followed by lower courts such as this Court and the Probate Court of Charleston County. *Hicks v. Miranda*, 422 U.S. 332 (1975) ("the lower courts are bound by summary decisions by this Court 'until such time as [this] Court informs (them) that (they) are not." *Hicks*, 422 U.S. at 344-45). Although state courts are bound by the decision of the United States Supreme Court construing federal law, there is no similar obligation with respect to lower federal courts. *Abela v. GM Corp.*, 677 N.W.2d 325 (Mich. 2004). Judge Childs has just lifted her stay and ordered a briefing schedule in the Bradacs case, challenging the constitutionality of South Carolina's marriage amendment. It is our understanding that Greenville County has denied marriage license applications. *See, Post and Courier* article, *infra.*

Thus, it is entirely premature for Respondent to begin issuing marriage licenses today. We urge this Court, therefore, to allow the legal process to run its course before any licenses in South Carolina are issued. Until the federal courts rule on this very

important matter, in which the people of the State voted overwhelmingly, it is not legally proper to issue such licenses. If the federal courts conclude, in accordance with the Fourth Circuit panel in *Bostic*, that South Carolina's marriage amendment (Art. XIII, § 15) is invalid, there will be sufficient time to issue marriage licenses to same sex couples. That time is not now, however. Until the courts rule, the rule of law must prevail.

I

BACKGROUND

According to the attached news article, Respondent Probate Judge Irvin Condon has announced that he has accepted a marriage license application from a same-sex-couple and that he will issue a marriage license to them after the mandatory 24 hour waiting period unless he is enjoined by the Supreme Court. "First same sex marriage license to be granted in Charleston County, *The Post and Courier* , October 8, 2014, on-line edition, http://www.postandcourier.com/article/20141008/PC1603/141009465/1177. The State asks that he be enjoined from issuing the license because South Carolina statutes and its Constitution prohibit same-sex marriages. S.C. Code Ann §§20-1-10 and 20-1-15 and S.C. Const. art. XVII, §15.

Although Federal litigation is pending regarding §20-1-15 and art. XVII, §15, they have not been enjoined. *Bradacs v. Haley*, 3:13-CV-02351-JMC was brought last August, 2013 in the United States District Court regarding the constitutionality of those provisions. The District Court stayed that case on April 22, 2014 (Document Number 54, CMECF) until a final order of the Court of Appeals for the Fourth Circuit was issued in

the appeal of a Virginia same-sex marriage case, *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014). *Bostic* was decided in July, and this week, the Supreme Court denied the petition for certiorari in that case. *McQuigg v. Bostic*, 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014).

The legal issues regarding same-sex marriage remain unsettled. In *Bostic,* only Virginia laws were found to be unconstitutional. South Carolina law was not at issue. Today, as noted, the United States Supreme Court by Justice Kennedy granted a temporary stay of the decision of the Court of Appeals for the Ninth Circuit striking down same-sex marriage bans in Nevada and Idaho. *Otter v. Latta, supra.* Therefore, the possibility remains that the constitutional issues regarding same-sex marriage may be considered by the Supreme Court in those cases or in a case now pending in a federal district court or court of appeals.

Moreover, *Bradacs* remains active. The Honorable Michelle Childs issued a text order yesterday lifting the stay in that case which had been imposed while *Bostic* was pending and directed the parties to submit a proposed amended scheduling order and / or briefing scheduled by next Wednesday, October 15. *See* text order. Therefore, the issue of the constitutionality of South Carolina's same-sex marriage laws remains alive in the courts[1] Although Judge Childs has not yet issued an updated scheduling order, a strong chance exists that she could issue a ruling on the merits of the issue in that case this year.

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1 Issues regarding the Constitutionality of South Carolina's same-sex marriage bans have also been raised in the pending appeal *Swicegood v. Thompson, Respondent and State ex rel Wilson,* Appellate Case No. 2014-001109. The State has taken the position that the constitutional claims are not properly before the Court or controlling.

II

AUTHORITY OF THE COURT TO ASSUME ORIGINAL JURISDICTION AND REASONS FOR TAKING JURISDICTION

Under Rule 245, SCACR, the Court may assume original jurisdiction "if the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised...." *See also* S.C. Const. art. V, §§ 5 and 20 and §14-3-310 (1976); *see* also *Key v. Currie*, 305 S.C. 115, 406 S.E. 2d 356, 357 (1991). Certainly, the public interest is involved here, when South Carolina law has not been enjoined or declared unconstitutional, but a Probate Judge is taking steps to issue marriage licenses. Although we do not question that Judge Condon is acting in what he believes to be good faith, he is barred by South Carolina law from issuing licenses now, and he should be enjoined from doing so until the District Court issues a final ruling regarding South Carolina's law.

The Fourth Circuit's decision in *Bostic* is not binding on the Supreme Court. For example, this Court has declined to apply a strict scrutiny test applied by that circuit and followed the law of other circuits. *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 453, 633 S.E.2d 482, 487 (2006). Although the South Carolina Court of Appeals has stated that Fourth Circuit decisions are binding on that Court, this Supreme Court is not so limited. *State v. Dukes*, 404 S.C. 553, 561, 745 S.E.2d 137, 141 (Ct. App. 2013). Moreover, as noted, the constitutionality of South Carolina law remains a live issue.

South Carolina's statutes and constitutional provision at issue still carry a strong presumption of constitutionality. As stated in *S. Carolina Pub. Interest Found. v. S. Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 523 (2013):

> This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). "A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution." *Segars–Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Id.*

This presumption is very difficult to overcome, and here, the statutes at issue are supported by a State Constitutional provision, art. S.C. Const art. XVII, §15 that states, in part, that "[a] marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State."

No controlling precedent applicable to this Court would overcome this presumption of constitutionality. *Baker v. Nelson*, *supra,* dismissed a case for want of a substantial federal question in which two men sought review of a Minnesota decision that no fundamental right exists to marry someone of one's own sex; that the traditional definition of marriage works "no irrational or invidious discrimination;" and that it easily survives rational basis review. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (en banc).

With this ruling by the United States Supreme Court, and the absence of any ruling to the contrary as to the statutes at issue by the District Court in this State, or the South

Carolina Supreme Court[2], no binding authority authorizes the Probate Courts to issue marriage licenses to same-sex couples contrary to this State's laws.

III

MOTION FOR TEMPORARY INJUNCTION

Pursuant to authority of this Court in its original jurisdiction (*see* Complaint and Petition for Original Jurisdiction herein) and Rule 15 (a), SCRCP, the Petitioners move for this Court to issue a temporary injunction to Respondent directing him not to issue any marriage licenses until a final, operative order is issued in the *Bradacs* case and this Court lifts the injunction. Petitioners also ask this Court by administrative order, injunction or by other means it deems fit, direct the same instructions to the other Probate Judges of this State.

"For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). Here, regardless of the likelihood of ultimate success, litigation regarding same-sex marriage is ongoing under the authority of the Federal District Court in this state.

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2 Although the South Carolina Supreme Court has not addressed the constitutionality of the same-sex marriage ban statutes, it has referenced §20-1-15. "The following types of marriages in South Carolina are considered void *ab initio:* . . .(2) same sex marriages, S.C.Code Ann. § 20-1-15 (Supp.2002) . . . ." *Joye v. Yon*, 355 S.C. 452, 455, 586 S.E.2d 131, 133 (2003)

Irreparable harm could result if licenses were granted without full consideration of the constitutionality of South Carolina law. Because at least one Probate Court in this State is apparently not issuing marriage licenses to same-sex couples, different rules and procedures would apply in this state contrary to law if the Charleston Court were allowed to issue such licenses.

IV

THE STATE REQUESTS WAIVER OF THE REQUIREMENT FOR FILING A COMPLAINT

Due to the urgency of this matter and the simple request for a temporary injunction, the State requests that this Court waive or defer filing of a complaint in this action. Normally, such a complaint is required by Rule 245(c), SCACR, but the State does not seek a ruling by this Court on the merits of the constitutional issues. The State only asks that this Court temporarily enjoin the issuance of licenses until the issuance of a final, operative order by the District Court. If the Court would like a complaint filed, we will do so quickly as directed.

CONCLUSION

The State ex rel Wilson respectfully requests that this Court order the following relief:

1. Grant this Petition
2. Issue an injunction to the Respondent directing him not to issue any marriage licenses until a final, operative order is issued in the *Bradacs* case, and this Court lifts this injunction.

3. Enjoin or issue an administrative order, directing all Probate Judges in this state not to issue such licenses until *Bradacs* is decided as set forth above and this Court lifts the injunction.

Respectfully submitted,

ROBERT D. COOK
Solicitor General
S.C. Bar No.1373

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

IAN P. WESCHLER
Assistant Attorney General
S.C. Bar. No. 101422

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Email:esmith@scag.gov

By: 

Attorneys for the
State ex rel Wilson

August 21, 2013

The Supreme Court of South Carolina

The State of South Carolina ex rel Alan Wilson, Attorney General, Petitioner,

v.

Irvin G. Condon, in his capacity as Judge of Probate Charleston County, Respondent.

Appellate Case No. 2014-002121

ORDER

The Attorney General petitions this Court, in its original jurisdiction, to enjoin respondent from issuing any licenses for same-sex marriages pending a decision by United States District Court Judge J. Michelle Childs in *Bradacs v. Haley*, 3:13-CV-02351-JMC. Respondent has filed a return requesting the Court deny the petition for original jurisdiction, but requests that if the Court grants the petition, respondent be given guidance on how to proceed. Colleen Therese Condon and Anne Nichols Bleckley move to intervene in the action and request an opportunity to reply to the Attorney General's petition.

In *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), the Fourth Circuit Court of Appeals held that the statutory scheme in Virginia banning same-sex marriage violates the United States Constitution. The Fourth Circuit acknowledged in its opinion that three other states in the Fourth Circuit have similar bans, including South Carolina. *See* S.C. Const. art. XVII, § 15; S.C. Code Ann. §§ 20-1-10 through -15 (2014). The United States Supreme Court denied the petition for a writ of certiorari in that case on October 6, 2014. *McQuigg v. Bostic*, 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014). Based on that ruling, respondent accepted a marriage application from a same-sex couple and indicated he would issue a marriage license to the couple after the expiration of the twenty-four hour waiting period. *See* S.C. Code Ann. § 20-1-220 (2014).

The Attorney General argues the Fourth Circuit's decision in *Bostic* is not binding on this Court; therefore, the constitutionality of South Carolina's law on same sex marriage "remains a live issue." Indeed, the Attorney General argues *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), which the United States Supreme Court dismissed for want of a substantial federal question,[1] continues to be binding on the courts of this state absent a ruling to the contrary by a Federal District Court in South Carolina or by this Court.

Currently, the issue of whether Article XVII, Section 15 of the South Carolina Constitution, which provides, in relevant part, that a marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in the State of South Carolina, and Sections 20-1-10 through -15, violate the United States Constitution is actively under consideration by Judge Childs in the *Bradacs* case. We agree with the Attorney General that this issue is more appropriately resolved in the pending litigation in the Federal District Court. Avoiding concurrent litigation in both the courts

of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources. *Cf. Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (discussing discretionary abstention when concurrent proceedings are pending in the state and federal courts or in multiple federal courts). Further, although the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies to this case.

Accordingly, we accept this case in our original jurisdiction for the limited purpose of maintaining the status quo until the Federal District Court can resolve the case pending before it. We also grant the motion to intervene, but take no further action on the motion with the exception that movants' request to dismiss the Attorney General's petition *sua sponte* is denied. Respondent and all other probate judges are hereby directed not to issue marriage licenses to same-sex couples pending a decision by the Federal District Court in *Bradacs*. Further, unless otherwise ordered by this Court, the issue of the constitutionality of the foregoing state law provisions shall not be considered by any court in the South Carolina Unified Judicial System while that issue remains pending before the Federal District Court.

s/Jean H. Toal C.J.

s/Donald W. Beatty J.

s/Kaye G. Hearn J.

We concur with the order of the majority directing respondent and all other probate judges not to issue marriage licenses to same-sex couples, but would continue this Court's order in effect pending final judgment in the *Bradacs* federal court litigation.

s/Costa M. Pleicones J.

s/John W. Kittredge J.

Columbia, South Carolina
October 9, 2014

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[1] The Supreme Court of Minnesota held in *Baker* that a Minnesota statute prohibiting the marriage of persons of the same sex does not offend the First, Eighth, Ninth or Fourteenth Amendments to the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Katherine Bradacs and Tracie Goodwin, Plaintiffs, vs. Nimrata ("Nikki") Randhawa Haley, in her official capacity as Governor of South Carolina; Alan M. Wilson, in his official capacity as Attorney General of South Carolina, Defendants.	)	Civil Action No.: 3:13-cv-02351-JFA **VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF**

I. NATURE OF ACTION

1. Plaintiffs bring this action to challenge the constitutionality of South Carolina's laws and constitutional provisions that deny legal recognition in South Carolina to the marriages of same-sex couples who are married in one of the many states and numerous foreign countries where same-sex marriages are legal. S.C. Const. Art. XVII, § 15; S.C. Code 1976 § 20-1-15.

2. Plaintiff Katherine Bradacs and Tracie Goodwin were legally married in the District of Columbia on April 6, 2012. The marriage of the Plaintiffs is legally recognized in the District of Columbia, and their marriage is legally recognized by the federal government by virtue of the decision in *United States v. Windsor*, 133 S. Ct. 2675 (U.S., June 23, 2013), but they are treated as legal strangers in their home state of South Carolina. Meanwhile, the marriages of opposite-sex couples that are legal in other

states but would not be accepted in South Carolina (e.g., marriages of first cousins or a young partner) are routinely accepted in South Carolina if those marriages are legal in the jurisdiction where they are celebrated. This recognition of opposite-sex marriages but rejection of same-sex marriages that do not meet the South Carolina criteria for marriage violates the rights secured to the Plaintiffs by the United States Constitution.

3. The State of South Carolina's exclusion of same-sex couples from marriage adversely impacts the Plaintiffs and same-sex couples across South Carolina by excluding them from the many legal protections available to spouses: For example, when one partner dies, the surviving partner may face serious financial hardship, including the loss of her home, because she is denied the inheritance tax exemption provided to widows. Lesbian and gay police officers, firefighters and other first responders are denied the peace of mind of knowing that if they make the ultimate sacrifice, their partner will be taken care of through the financial support available to help those who lost their spouses in service to the community. Because of South Carolina's refusal to allow or recognize their marriages, same-sex couples are also denied many federal protections afforded to married couples such as the ability to take time off work to care for a sick spouse under the Family Medical Leave Act and access to a spouse's social security retirement benefits.

4. The exclusion from marriage undermines the Plaintiff couple's ability to achieve their life goals and dreams, threatens their mutual economic stability, and denies them "a dignity and status of immense import." *United States v. Windsor*, *supra*, 133 S. Ct. at 2681. Moreover, they and their children are stigmatized and relegated to a

second class status by being barred from marriage. The exclusion "tells [same-sex couples and all the world that their relationships are unworthy" of recognition, *id.* at 22-23, and it "humiliates the ... 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." *Id.*, 133 S.Ct. at 2694.

5. South Carolina's exclusion of same-sex couples from marriage infringes on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This discriminatory treatment is subject to heightened scrutiny because it burdens the fundamental right to marry and because it discriminates based on sex and sexual orientation. It cannot stand under any level of scrutiny because the exclusion does not rationally further any legitimate government interest. It serves only to disparage and injure lesbian and gay couples and their families. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (holding that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the "right of privacy" guaranteed by the Due Process Clause of the Fourteenth Amendment).

6. Plaintiffs bring this suit pursuant to 42 U.S.C. § 1983 for declaratory and injunctive relief against Defendants. Specifically, Plaintiffs seek: (a) a declaration that the State of South Carolina's prohibition of marriage for same-sex couples and its refusal to recognize marriages of same-sex couples validly entered into outside of the State of South Carolina violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and (b) a

permanent injunction directing Defendants to recognize the marriages of the Plaintiff couple and same-sex couples validly entered into outside of South Carolina.

7. There is no adequate remedy at law. The Plaintiffs are suffering irreparable injury. There is no harm to the state or local governments by granting an injunction and prohibiting enforcement of the challenged statute and South Carolina Constitution. The harm to the Plaintiffs is severe. The public interest is clearly served by this Court acting to order recognition in South Carolina of same-sex marriages celebrated in other jurisdictions consistent with the manner in which South Carolina treats similarly situated opposite-sex couples. Only prompt action by this Court ordering declaratory and injunctive relief will serve the public interest.

II. PARTIES

8. The Plaintiff Katherine Bradacs is a citizen and resident of the State of South Carolina, County of Lexington.

9. The Plaintiff Tracie Goodwin is a citizen and resident of the State of South Carolina, County of Lexington.

10. The Plaintiffs were lawfully married in the District of Columbia on April 6, 2012 (**Exhibit 1-Marriage License from the District of Columbia**).

11. The Defendant Nikki Haley is the Governor of the State of South Carolina. In her official capacity, she is the Chief Executive Officer of the State and is, pursuant to Article IV, Section 15 of the South Carolina Constitution, responsible for the faithful execution of the laws of the State of South Carolina, including the laws that exclude same-sex couples from marrying or having their marriages recognized.

12. The Defendant Alan Wilson is the Attorney General of the State of South Carolina. He is sued in his official capacity pursuant to Chapter 7 of Title 1 of the Code of Laws of South Carolina.

III. JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343(3) and (4), because the suit raises federal questions under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

14. Venue is proper in the District of South Carolina under 28 U.S.C. § 1391(b) because Defendants Haley and Wilson reside in this District.

IV. FACTUAL BACKGROUND

15. South Carolina's Marriage Laws, Title 20, Chapter 1, Article 1, governs marriages in South Carolina. In 1996, the Marriage Law was amended to expressly prohibit marriage for same-sex couples, and to prevent the recognition of valid same-sex marriages contracted elsewhere. S.C. Code § 20-1-15, "Prohibition of same sex marriage," provides, "A marriage between persons of the same sex is void ab initio and against the public policy of this State." As a result, by declaring that a marriage between persons of the same sex is both (a) void ab initio and (b) against the public policy of this State, marriage is legally available only to opposite-sex couples. Same-sex couples may not marry in South Carolina, and if they are married elsewhere, their marriages are not recognized in South Carolina.

16. The South Carolina Constitution was amended in 2007 to expressly prohibit marriage for same-sex couples, and to prevent the recognition of valid same-sex marriages contracted elsewhere. S.C. Const. Art. XVII, § 15, provides: "A marriage

between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments." As a result, marriage is legally available only to opposite-sex couples. Same-sex couples may not marry in South Carolina, and if they are married elsewhere, their marriages are not recognized in South Carolina.

V. DENIAL OF EQUAL PROTECTION AND DUE PROCESS OF LAW

17. The Supreme Court has called marriage "the most important relation in life," *Zablocki u. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted), and an "expression[] of emotional support and public commitment." *Turner v. Safley*, 482 U.S. 78, 95 (1987). It is "a far-reaching legal acknowledgement of the intimate relationship between two people...." *United States v .Windsor, supra*, 133 S.Ct. at 2692. This is as true for same-sex couples as it is for opposite-sex couples.

18. Same-sex couples such as the Plaintiff couple are identical to opposite-sex couples in all of the characteristics relevant to marriage.

19. By refusing to recognize their marriages from others states, South Carolina law deprives them of numerous legal protections that are available to opposite-sex couples. More than 1,000 federal benefits, privileges, and responsibilities are impacted by marital status. Numerous South Carolina benefits are also impacted by marital status. By way of example only:

A. A married person is exempt from tax on property left to him by an opposite-sex spouse, including the spouse's share of the couple's home, and, thus, protected against economic distress or loss of a home because of an estate tax bill. S.C. Code Ann. §§ 12-6-1630, 12-37-220, 12-37-265 (2007 & Cum. Supp.) A same-sex surviving spouse or partner is denied this exemption.

B. A widow or widower of an opposite-sex spouse is entitled to 50% to 100% of his or her deceased spouse's estate if the spouse died without a will depending upon whether there are issue of the opposite couple. S.C. Code Ann. § 62-2-102 (1986 & Cum. Supp.). A same-sex surviving spouse or partner in this situation receives nothing in this scenario.

C. A widow or widower of an opposite-sex spouse is entitled to claim an elective share of the net probate estate of the deceased spouse even if the deceased spouse did not nominate the surviving spouse as a beneficiary under his or her will. S.C Code Ann §62-2-201. A same sex surviving spouse or partner in this situation receives nothing.

D. If an opposite-sex spouse becomes incapacitated, her spouse is automatically authorized to make decisions regarding her care. S.C. Code Ann.

§ 62-5-301(b) (1986 & Cum. Supp.). This protection does not extend to a same-sex spouse or partner under this scenario.

E. Under the workers' compensation laws, the opposite-sex spouse of someone who dies or is injured in the workplace is entitled to damages and may bring suit. S.C. Code Ann. §§ 42-9-110, 42-9-290, and 42-9-320 (1976 & Cum. Supp.). Same-sex spouses or partners have no legal standing to sue over their spouse or partner's workplace injury.

F. South Carolina requires opposite-sex spouses to support one another financially. S.C. Code Ann. §§ 20-3-130 and 20-3-140 (1979 & Cum. Supp.) . There is no support obligation for same-sex spouses or partners.

G. South Carolina laws promote the stability of marriages through rules such as mandatory waiting periods prior to divorce by mutual consent. S.C. Code Ann. §§ 20-3-10 (2), (5) and 20-3-80 (1979 & Cum. Supp.). The divorce laws, including these provisions, do not apply to same-sex spouses or partners.

H. Opposite-sex widows and widowers of military personnel and veterans are eligible for numerous assistance programs 10 U.S.C.A. §1408; 10 U.S.C.A. §1450; 38 U.S.C.A. §101. These programs are not available to same-sex surviving spouses or partners of military personnel and veterans.

I. Opposite-sex widows and widowers of public employees in the South Carolina are eligible to receive various pensions and survivor benefits upon their spouse's death. S.C. Code Ann. §9-8-110 ; S.C Code Ann. §9-11-140; S.C. Code Ann. §12-37-220(receipt of police officer spouse's pension by

surviving spouse); (tax exemption of public employee spouse's retirement allowance); (lifetime survivor benefits for spouse of retired pensioner); (receipt of fireman's pension by surviving spouse);(exemption from ad valorem taxation for surviving spouse of permanently and totally disabled law enforcement officer, firefighter, or veteran). These benefits are not provided to surviving same-sex spouses or partners of public employees.

J. Opposite-sex public employees in the State of South Carolina are eligible to nominate and receive health insurance coverage for their spouse. S.C. Code Ann. §38-71-170. These benefits are not provided to same-sex spouses or partners of public employees.

K. Opposite-sex widows and widowers of firefighters, police officers, and other first responders killed in the line of duty are provided financial assistance. S.C. Code Ann. § 1-11-730(A)(5), (B)(5) (2008) (spouse of person covered by state health plans who is killed in the line of duty is eligible for continued coverage under the plans); S.C. Code Ann. § 12-37-220(B) (1)(b), (e)(iii) (1976 & Cum. Supp.) (providing exemption for ad valorem taxes on a house owned by a qualified surviving spouse of a law enforcement officer or firefighter who died in the line of duty); S.C. Code Ann. § 23-6-100 (1997) (providing the SC Highway Patrol Division shall transfer the service sidearm of an active duty state trooper killed in the line of duty to that trooper's surviving spouse upon request at no charge once the sidearm is rendered permanently inoperable**).** This assistance is not provided to same-sex surviving spouses or partners of first responders.

L. Property tax exemptions are available under South Carolina law to certain people age 65 or over who are widows and widowers of opposite-sex spouses. S.C. Code Ann. §12-37-250 (1976). They are not available to same-sex surviving spouses or partners.

M. Opposite-sex spouses are eligible for a "two wage earner" credit for state tax purposes under certain circumstances. S.C. Code Ann. §12-6-3330 (1995 & Cum. Supp.) Same-sex married couples would not be eligible under any circumstances for the state tax credit.

20. In this case and by way of example, Plaintiff Bradacs is a public employee. Because her marriage to Plaintiff Goodwin is not recognized in the State of South Carolina, she cannot nominate her spouse, nor her biological children, on her health insurance policy through the State of South Carolina just as opposite-sex couples whose marriage is recognized in the State of South Carolina can.

21. Plaintiff Goodwin is 80% disabled from the United States Air Force and receives disability from the Veterans Administration. If her marriage to Plaintiff Bradacs was recognized in the State of South Carolina, not only could Plaintiff Bradacs be entitled to make a claim as a surviving beneficiary on Plaintiff Goodwin's VA benefits, but Plaintiff Goodwin would be entitled to receive more in disability from the VA if her marriage to Plaintiff Bradacs was recognized in the State of South Carolina. Plaintiffs Bradacs and Goodwin cannot claim being married as a standard exemption on their federal tax returns while residing in the State of South Carolina because their marriage

is not recognized, among many of the other federal benefits they each would be entitled to if their marriage was recognized in South Carolina.

22. The exclusion of same-sex couples from marriage also denies them eligibility for numerous federal protections afforded to married couples including in the areas of immigration and citizenship, taxes, and social security. Some of the federal protections for married couples are only available to couples if their marriages are legally recognized in the state in which they live. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (marriage for eligibility for social security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act). Thus, Plaintiffs, though legally married, cannot access such federal protections as long as South Carolina refuses to recognize their existing marriage.

23. Although the Plaintiff couple is in a long-term committed relationship, this couple and other same-sex couples are denied the stabilizing effects of marriage, which helps keep couples together during times of crisis or conflict.

24. Excluding same-sex couples from marriage also harms couples and their children by denying them the social recognition that comes with marriage. Marriage has profound social significance both for the couple that gets married and the family, friends and community that surround them. The terms "married" and "spouse" have universally understood meanings that command respect for a couple's relationship and the commitment they have made.

VI. EXCLUDING SAME-SEX COUPLES FROM MARRIAGE IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST, AND IS NOT ABLE TO WITHSTAND HEIGHTENED SCRUTINY.

25. The prohibition against marriage for same-sex couples in South Carolina and the prohibition against recognition of marriage validly contracted outside South is not closely tailored to serve an important government interest or substantially related to an exceedingly persuasive justification. The prohibition fails any level of constitutional scrutiny. It is not rationally related to any legitimate justifications that were offered in support of it when the Marriage Law was amended in 1996 or when the Constitution was amended in 2007. None of the justifications offered in support of these measures, or any other justification that might now be offered, passes constitutional muster.

26. Neither tradition nor moral disapproval of same-sex relationships or marriage for lesbian and gay couples is a legitimate basis for unequal treatment of same-sex couples under the law. The fact that a discriminatory law is longstanding does not immunize it from constitutional scrutiny. The Supreme Court has made clear that the law cannot, directly or indirectly, give effect to private biases and has expressly rejected moral disapproval of marriage for same-sex couples as a legitimate basis for discriminatory treatment of lesbian and gay couples. *United States v. Windsor*, *supra,* 133 S.Ct. at 2693 (an "interest in protecting traditional moral teachings reflected in heterosexual-only marriage laws" was not a legitimate justification for federal Defense of Marriage Act).

VII. CLAIMS

FIRST CLAIM: 42 U.S.C. § 1983, DUE PROCESS UNDER THE UNITED STATES CONSTITUTION

27. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

28. The Fourteenth Amendment to the United States Constitution precludes any State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Governmental interference with a fundamental right may be sustained only upon a showing that the legislation is closely tailored to serve an important governmental interest.

29. The Supreme Court has long recognized that marriage is a fundamental right and that choices about marriage, like choices about other aspects of family, are a central part of the liberty protected by the Due Process Clause.

30. South Carolina law denies the Plaintiff couple and other same-sex couples this fundamental right by denying them access to the state-recognized institution of marriage and refusing to recognize the marriages they entered into in other states and foreign countries where such marriages are legal.

31. South Carolina can demonstrate no important interest to justify denying the Plaintiff couple this fundamental right. Indeed, it cannot demonstrate that the denial is tailored to any legitimate interest at all.

32. South Carolina's prohibition of marriage between persons of the same sex and its refusal to recognize marriages entered into by same-sex couples in other jurisdictions violates the Due Process Clause.

33. Defendants, acting under color of state law, are depriving Plaintiff of rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

SECOND CLAIM: 42 U.S.C. § 1983, EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION ON THE BASIS OF SEXUAL ORIENTATION

34. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

35. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no State shall ...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

36. By denying the Plaintiff couple and other lesbian and gay couples the ability to marry and to have their out-of-state marriages recognized, South Carolina, through Defendants, disadvantages lesbian and gay people on the basis of their sexual orientation. It denies them significant legal protections. It "degrade[s] [and] demean[s]" them by "instruct[ing] ...all persons with whom same-sex couples interact, including their own children," that their relationship is "less worthy" than the relationships of others. *United States v. Windsor*, *supra,* 133 S.Ct. at 2696.

37. Same-sex couples and opposite-sex couples are similarly situated for purposes of marriage.

38. Classifications based on sexual orientation demand heightened scrutiny.

39. South Carolina's prohibition of marriage for same-sex couples and its refusal to recognize the marriages of same-sex couples entered into elsewhere violates the Equal Protection Clause.

40. Defendants, acting under color of state law, are depriving Plaintiffs of rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM: 42 U.S.C. § 1983, EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION ON THE BASIS OF SEX

41. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

42. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no State shall ...deny to any person within its jurisdiction the equal protection of the laws.'.' U.S. Const. amend. XIV, § 1.

43. S.C. Const. Art. XVII, § 15, provides: "A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State."

44. By defining marriage in this way, South Carolina discriminates on the basis of sex.

45. The Supreme Court has made clear that perpetuation of traditional gender roles is not a legitimate government interest. Given that there are no longer legal distinctions between the duties of husbands and wives, there is no basis for the sex-based eligibility requirements for marriage.

46. Defendants, acting under color of state law, are depriving Plaintiffs of rights secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

FOURTH CLAIM: 42 U.S.C. § 1983, DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION, BY FAILING TO HONOR THE FULL FAITH AND CREDIT CLAUSE

47. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

48. Article IV, Section 1 of the United States Constitution states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

49. 28 USC § 1738 reads: "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

50. State law prohibits marriage between persons of the same sex, and marriage between a man and a woman is the only marriage the State will recognize.

51. By prohibiting the Courts and officials of the State of South Carolina from recognizing marriage contracted in another state, the State is violating the Full Faith and Credit Clause of the United States Constitution.

52. Defendants, acting under color of state law, by refusing to honor the Full Faith and Credit Clause, are depriving Plaintiffs of rights secured by the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

VIII. PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs request this Court:

A. To issue a declaratory judgment that the statute and South Carolina constitutional provision at issue in this case, as applied to Plaintiffs, violate the constitutional and statutory rights of Plaintiffs;

B. To ssue a preliminary and permanent injunction against the Defendants and all those acting in concert prohibiting enforcement of the laws, as applied, at issue in this action, enjoining these Defendants from denying the Plaintiff couple and all other same-sex couples the right to marry, and directing the Defendants to recognize marriages validly entered into by the Plaintiff couple and other same-sex couples outside the State of South Carolina;

C. To award to Plaintiffs reasonable costs, expenses, and attorneys' fees; and

D. To award such other and further relief as this Court shall deem just and reasonable.

Respectfully submitted,

/S/ Carrie A. Warner

Carrie A. Warner
Federal ID Number 11106
Warner, Payne & Black, LLP
1531 Blanding Street
Post Office Box 2628
Columbia, South Carolina 29201
(803) 799-0554
Facsimile: (803) 799-2517
carriewarner@wpb-law.net

John S. Nichols
Federal ID Number 11598
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor Street
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
Facsimile: (803) 771-8097
jsnichols@bntdlaw.com

ATTORNEYS FOR PLAINTIFFS

Case Nos. 14-1167(L), 14-1169, 14-1173

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, *et al.*,
Plaintiffs-Appellees,
v.

GEORGE E. SCHAEFER, III, *et al.*,
Defendants-Appellants,

and

MICHELE B. McQUIGG,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia, No. 2:13-cv-00395-AWA-LRL
Arenda L. Wright Allen, District Judge

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, IDAHO, LOUISIANA, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General

Counsel for Amici States

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

Luther Strange
Attorney General
State of Alabama

Michael C. Geraghty
Attorney General
State of Alaska

Thomas C. Horne
Attorney General
State of Arizona

John Suthers
Attorney General
State of Colorado

Lawrence G. Wasden
Attorney General
State of Idaho

James D. "Buddy" Caldwell
Attorney General
State of Louisiana

Timothy C. Fox
Attorney General
State of Montana

Jon Bruning
Attorney General
State of Nebraska

E. Scott Pruitt
Attorney General
State of Oklahoma

Alan Wilson
Attorney General
State of South Carolina

Marty J. Jackley
Attorney General
State of South Dakota

Sean Reyes
Attorney General
State of Utah

Peter K. Michael
Attorney General
State of Wyoming

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INTEREST OF THE *AMICI* STATES[1]

The *amici* States file this brief in support of Appellants, as a matter of right pursuant to Federal Rule of Appellate Procedure 29(a).

The majority of States—thirty-three in all—limit marriage to the union of one man and one woman, consistent with the historical definition of marriage.[2] As the Supreme Court affirmed just last term,

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[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* Fed. R. App. P. 29(a).

[2] Twenty-nine States have done so by constitutional amendment: Alabama (Ala. Const. art. I, § 36.03), Alaska (Alaska Const. art. 1, § 25; Arizona (Ariz. Const. art. 30, § 1); Arkansas (Ark. Const. amend. 83, § 1); Colorado (Colo. Const. art. 2, § 31); Florida (Fla. Const. art. 1, § 27); Georgia (Ga. Const. art. 1, § 4 ¶ I); Idaho (Idaho Const. art. III, § 28); Kansas (Kan. Const. art. 15, § 16); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. 14, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); Nevada (Nev. Const. art. I, § 21); North Carolina (N.C. Const. art. XIV, § 6); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. 2, § 35); Oregon (Or. Const. art. XV, § 5a); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. 1, § 32); Utah (Utah Const. art. 1, § 29); Virginia (Va. Const. art. I, § 15-A); and Wisconsin (Wis. Const. art. XIII, § 13). Another four States restrict marriage to the union of a man and a woman by statute: Indiana (Ind. Code § 31-11-1-1); Pennsylvania

"[b]y history and tradition the definition and regulation of marriage . . . [is] within the authority and realm of the separate States." *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013). Indeed, the Court has long recognized that authority over the institution of marriage lies with the States. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . .") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877)). Primary state authority over family law is confirmed by definite limitations on federal power, as even the broadest conception of the commerce power forbids any possibility that Congress could regulate marriage. *See United States v. Lopez*, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (agreeing with majority that commerce power cannot extend to "regulate marriage, divorce, and child custody") (quotations omitted).

Nor can federal judicial power do what Congress cannot. In finding a lack of federal habeas jurisdiction to resolve a custody dispute, the Supreme Court long ago identified the axiom of state sovereignty

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(23 Pa. Cons. Stat. Ann. § 1704); West Virginia (W. Va. Code § 48-2-603); and Wyoming (Wyo. Stat. Ann. § 20-1-101).

that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). The Court has recognized that "the domestic relations exception . . . divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

Particularly in view of traditional, exclusive state prerogatives over marriage, the *amici* States have an interest in protecting state power to adhere to the traditional definition of marriage.

SUMMARY OF THE ARGUMENT

Even aside from *Baker v. Nelson*, 409 U.S. 810 (1972), which the district court erroneously failed to respect as controlling authority, traditional marriage definitions implicate no fundamental rights or suspect classes, and are therefore subject only to rational-basis scrutiny. Traditional marriage is too deeply imbedded in our laws, history, and traditions for a court to hold that more recent state constitutional enactment of that definition is illegitimate or irrational.

As an institution, marriage always and everywhere in our civilization has enjoyed the protection of the law. For the Founding

generation and those who enacted and ratified the Fourteenth Amendment, the institution of marriage was a given—antecedent to the State in fact and theory. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). Consequently, it is implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that states long-ago invented marriage as a tool of invidious discrimination against homosexuals. *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006); *Hernandez*, 855 N.E.2d at 8; *Conaway v. Deane*, 932 A.2d 571, 627-28 (Md. 2007).

The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill,* 125 U.S. 190, 205, 211 (1888). The right "to marry, establish a home and bring up children" is a central component of liberty protected by the Due Process

Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate the traditional definition of marriage. That definition, in turn, arises not from a fundamental impulse of animus, but from a cultural determination that children are best reared by their biological parents. The theory of traditional civil marriage turns on the unique qualities of the male-female couple for procreating and rearing children under optimal circumstances. It not only reflects and maintains deep-rooted traditions of our Nation, but also furthers the public policy of encouraging biological parents to stay together for the sake of the children produced by their sexual union.

The district court's redefinition of marriage as nothing more than societal validation of personal bonds of affection leads not to the courageous elimination of irrational, invidious treatment, but instead to the tragic deconstruction of civil marriage and its subsequent reconstruction as a glorification of the adult self. And unlike the goal of encouraging responsible procreation that underlies traditional

marriage, the mere objective of self-validation that inspires same-sex marriage lacks principled limits. If public affirmation of anyone and everyone's personal love and commitment is the single purpose of civil marriage, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning.

The decision below denies traditional marriage's long-recognized underpinnings, but identifies no alternative public interests or principled limits to define marriage. Once the natural limits that inhere in the relationship between a man and a woman can no longer sustain the definition of marriage, it follows that any grouping of adults would have an equal claim to marriage. This theory of constitutional law risks eliminating marriage as government recognition of a limited set of relationships and should be rejected.

ARGUMENT

I. No Fundamental Rights or Suspect Classes are Implicated

A. Same-sex marriage has no roots in the Nation's history and traditions

Fundamental rights are those that are "objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they

were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). A "'careful description' of the asserted fundamental liberty interest" is required, and courts must "'exercise the utmost care whenever [they] are asked to break new ground in this field . . . .'" *Id.* at 720, 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) and *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

"Marriage" is a foundational and ancient social institution that predates the formation of our Nation and has been thought of "as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Until recently, its meaning was internationally and universally understood as limited to the union of a man and a woman. *See id.* at 2715 (Alito, J., dissenting) (noting that the Netherlands first extended marriage to same-sex couples in 2000). Indeed, the word and concept, as historically understood, presuppose an exclusive union between one man and one woman. The plaintiffs

cannot assert a fundamental right to "marriage" because they, as same-sex couples, plainly fall outside the scope of the right itself.

They also cannot assert a fundamental right to "same-sex marriage," as this concept is not "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty.'" *Glucksberg*, 521 U.S. at 720-21. Barely a decade ago, in 2003, Massachusetts became the first State to extend the definition of marriage to same-sex couples. It did so through a 4-3 court decision, without a majority opinion, by interpreting its state constitution. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Other state supreme courts followed suit, *see Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008), *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), but so far only twelve States and the District of Columbia have extended marriage to same-sex unions legislatively, the first not occurring until 2009.[3]

[3] *See* Conn. Gen. Stat. § 46b-20, -20a; 15 V.S.A. § 8; N.H. Rev. Stat. Ann. § 457:46; N.Y. Dom. Rel. § 10-A; Wash. Rev. Code § 26.04.010; Me. Rev. Stat. § 650-A; Del. Code tit. 13, § 129; Haw. Rev. Stat. § 572-1.8; 750 Ill. Comp. Stat. 5/201; Md. Code Ann., Fam. Law § 2-201; Minn. Stat. § 517.01-.02; R.I. Gen. Laws § 15-1-1; D.C. Code § 46-401 (2010). Even at that, not all have stuck. In 2009, Maine voters repealed a 2009 statute enacted by its legislature that extended marriage to same-sex couples.

The district court divined "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Bostic v. Rainey*, No. 2:13-cv-395, slip op. at 21-22 (E.D. Va. Feb. 13, 2014) (quoting *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *16 (D. Utah Dec. 20, 2013). While such a definition might sound "deeply rooted in the nation's history," it plainly fails to meet the *Glucksberg* requirement that a "careful description of the asserted fundamental liberty interest" be made. *Glucksberg*, 520 U.S. at 720-21. By declaring that the plaintiffs sought "nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens[,]" *Bostic*, slip op. at 21, the district court left out the only part of Plaintiffs' asserted right that matters: that they seek this right as a same-sex couple.

Glucksberg defined the asserted liberty interest from the specific statute at issue—there, a law prohibiting assisting another in committing suicide. *Glucksberg*, 520 U.S. at 722. While the lower

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Bureau of Corporations, Elections and Commissions, Department of the Maine Secretary of State, *November 3, 2009 General Election Tabulations*, http://www.maine.gov/sos/cec/elec/2009/referendumby county.html (last visited April 3, 2014).

courts and Glucksberg had defined the interest as the "right to die," the Court limited this to include the distinction that mattered—"the right to commit suicide and . . . assistance in doing so." *Id.* Plaintiffs' asserted interest, properly defined, is the right to state-sanctioned marriage for a same-sex couple—not the right to "marriage" the district court defines by *fiat*. Same-sex marriage is not a fundamental right—as the Supreme Court itself indicated in *Windsor*, 133 S. Ct. at 2689—and a State's refusal to provide it is therefore not subject to any form of heightened scrutiny.

B. Adhering to traditional marriage implicates no suspect classes because it does not discriminate on the basis of sexual orientation, and such a classification would not elicit heightened scrutiny in any event

Traditional marriage laws in no way target homosexuals as such, and the court below erred in assuming the contrary. With traditional marriage, "the distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry . . . but like heterosexual persons, they may not marry members of the same sex." *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012). While traditional marriage laws *impact* heterosexuals and homosexuals

differently, they do not create classifications based on sexuality, particularly considering the benign history of traditional marriage laws generally. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose). Further, deducing any such discriminatory intent (unaccompanied by any actual statutory classification) is highly anachronistic. There is no plausible argument that the traditional definition of marriage was invented as a way to discriminate against homosexuals or to maintain the "superiority" of heterosexuals vis-à-vis homosexuals.

Even if the traditional marriage definition does discriminate based on sexual orientation, the Supreme Court has never held that homosexuality constitutes a suspect class, and the law in this circuit is that homosexual persons do not constitute a suspect class. *See Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996). *See also Goulart v. Meadows,* 345 F.3d 239, 260 (4th Cir. 2003) ("Classifications based on race, national origin, alienage, sex, and illegitimacy must survive heightened scrutiny in order to pass constitutional muster. All other classifications need only

be rationally related to a legitimate state interest.") (internal citations omitted). The same holds true in other circuits. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (applying rational basis scrutiny to classification based on sexual orientation). *But see SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (applying heightened scrutiny to *Batson* challenges based on sexual orientation, but subject to reconsideration by the full court due to a *sua sponte* en banc call).

Furthermore, neither *United States v. Windsor*, 133 S. Ct. 2675 (2013), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), nor *Romer* supports

heightened scrutiny for legislation governing marriage. *Romer* expressly applied rational basis scrutiny, while *Lawrence* and *Windsor* implied the same. *Romer*, 517 U.S. at 631-32; *Lawrence*, 539 U.S. at 578; *Windsor*, 133 S. Ct. at 2696. In *Windsor*, the Court invalidated Section 3 of DOMA as an "unusual deviation from the usual tradition of *recognizing and accepting state definitions of marriage*," 133 S. Ct. at 2693 (emphasis added), which required analyzing whether DOMA was motivated by improper animus. It further found that "no legitimate purpose" saved the law—a hallmark of rational basis review. *Id.* at 2696. There is nothing about Virginia's adherence to the traditional definition of marriage—which has prevailed since before statehood—that either targets sexual orientation or constitutes an "unusual deviation from tradition." Until the past decade, every State in the Union adhered to this same traditional definition of marriage.

In 2006, to be sure, voters affirmed that definition through a constitutional amendment, but recent political affirmation of longstanding law and tradition does not invite heightened scrutiny that would not otherwise apply. Plaintiffs challenge both Article I, Section 15A of the Virginia Constitution and its corresponding statutes. A

fundamental problem for Plaintiffs is that because traditional marriage is historically legitimate, a recent legislative or popular choice to reaffirm that definition via constitutional amendment cannot be illegitimate. Again, the Supreme Court in *Windsor* examined the motivations behind Section 3 of DOMA not because it adhered to traditional marriage, but because it was an "unusual deviation from the usual tradition" of deferring to state marriage definitions. 133 S. Ct. at 2693.

Given the benign purposes of traditional marriage and the lack of any "unusual deviations" at work, the motivations behind any particular recent perpetuation of the status quo are irrelevant. Otherwise States adhering to traditional marriage could face different litigation outcomes depending on the record of recent public debate. The meaning of the Constitution surely does not vary from one State to another. The legitimate basis for traditional marriage is what matters, not recent debates over whether to adhere to it.

II. The Concept of Traditional Marriage Embodied in the Laws of Thirty-Three States Satisfies Rational Basis Review

Because traditional marriage laws do not impinge a fundamental right or burden a suspect class, they benefit from a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The laws must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" between opposite-sex couples and same-sex couples. *See id.* at 320 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). The exclusive capacity and tendency of heterosexual intercourse to produce children, and the State's need to ensure that those children are cared for, provides that rational basis.

A. The definition of marriage is too deeply imbedded in our laws, history, and traditions for a court to hold that adherence to that definition is illegitimate

As an institution, marriage has always and everywhere in our civilization enjoyed the protection of the law. Until recently, "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8

(N.Y. 2006). The Supreme Court has observed the longstanding importance of traditional marriage in its substantive due process jurisprudence, recognizing marriage as "the most important relation in life," and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888). The Court recognized the right "to marry, establish a home and bring up children" as a central component of liberty protected by the Due Process Clause, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), marriage was described as "fundamental to the very existence and survival of the race."

All of these pronouncements, recognizing the procreative function of marriage and family, implicitly contemplate and confirm the validity of the historic definition of marriage. Consequently, it is utterly implausible to suggest, as the legal argument for same-sex marriage necessarily implies, that States long-ago invented marriage as a tool of invidious discrimination based on same-sex love interest. Another rationale for state recognition of traditional marriage must exist, and it is the one implied by *Maynard*, *Meyer*, and *Skinner*: to encourage

potentially procreative couples to raise children produced by their sexual union together.

B. States recognize opposite-sex marriages to encourage responsible procreation, and this rationale does not apply to same-sex couples

Civil marriage recognition arises from the need to protect the only procreative sexual relationship that exists and to make it more likely that unintended children, among the weakest members of society, will be cared for. Rejecting this fundamental rationale undermines the existence of *any* legitimate state interest in recognizing marriages.

1. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

Civil recognition of marriage historically has not been based on state interest in adult relationships in the abstract. Marriage was not born of animus against homosexuals but is predicated instead on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental

to the very existence and survival of the race." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates a norm where sexual activity that *can* beget children should occur in a long-term, cohabitive relationship. *See, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677, (Tex. App. 2010) ("The state has a legitimate interest in promoting the raising of children in the optimal familial setting. It is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple.").

States have a strong interest in supporting and encouraging this norm. Social science research shows that children raised by both biological parents in low-conflict, intact marriages are at significantly less risk for a variety of negative problems and behaviors than children reared in other family settings. "[C]hildren living with single mothers are five times more likely to be poor than children in two-parent

households." Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 333 (New York: Crown Publishers 2006). Children who grow up outside of intact marriages also have higher rates of juvenile delinquency and crime, child abuse, emotional and psychological problems, suicide, and poor academic performance and behavioral problems at school. *See, e.g.*, Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 783-87 (2002); Lynn D. Wardle, *The Fall of Marital Family Stability & The Rise of Juvenile Delinquency*, 10 J.L. & Fam. Stud. 83, 89-100 (2007).

Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Gallagher, *supra*, at 781-82. Traditional marriage provides the opportunity for children born within it to have a biological relationship to those having original *legal* responsibility for their well-being, and accordingly is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget.

The district court erroneously concluded that "[t]he 'for-the-children' rationale . . . fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating." *Bostic*, slip op. at 32 (citation omitted). The fact that non-procreating opposite-sex couples may marry does not undermine marriage as the optimal procreative context. *See Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (confirming marriage "as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Even childless opposite-sex couples reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999).

Besides, it would obviously be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

Nor does the ideal of combining the biological with the legal disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. "Alternate arrangements, such as adoption, arise not primarily in deference to the emotional needs or sexual choices of adults, but to meet the needs of children whose biological parents fail in their parenting role." Gallagher, *supra*, at 788. The State may rationally conclude that, all things being equal, it is better for the natural parents to also be the legal parents, and establish civil marriage to encourage that result. *See Hernandez*, 855 N.E.2d at 7.

Moreover, unlike opposite-sex couples the sexual activity of same-sex couples implies no unintentional pregnancies. Whether through surrogacy or reproductive technology, same-sex couples can become

biological parents only by deliberately choosing to do so, requiring a serious investment of time, attention, and resources. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (lead opinion). Consequently, same-sex couples do not present the same potential for unintended children, and the State does not necessarily have the same need to provide such parents with the incentives of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677 ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

In brief, the mere existence of children in households headed by same-sex couples does not put such couples on the same footing as opposite-sex couples, whose general ability to procreate, even unintentionally, legitimately gives rise to state policies encouraging the legal union of such sexual partners. The State may rationally reserve marriage to one man and one woman to enable the married persons—in the ideal—to beget children who have a natural and legal relationship to each parent and serve as role models of both sexes for their children.

2. Courts have long recognized the responsible procreation purpose of marriage

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex couples with opposite-sex couples. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

Marriage exists "to encourage 'responsible procreation' by opposite-sex couples." *Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (lead opinion). This analysis is dominant in our legal system. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 477 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla.

2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 463-65 (Ariz. Ct. App. 2003); *Dean v. Dist. of Columbia*, 653 A.2d 307, 337 (D.C. 1995); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010); *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (en banc).

Accordingly, state and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *Standhardt*, 77 P.3d at 463-65 ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 680 (rejecting argument that Texas laws limiting marriage and divorce to opposite-sex couples "are explicable only by class-based animus"). The plurality in *Hernandez*, 855 N.E.2d at 8, observed that "the traditional definition of marriage is not merely a by-

product of historical injustice. Its history is of a different kind." As those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id.*

In contrast to widespread judicial acceptance of this theory, the only lead appellate opinion to say that a State's refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.).[4] That opinion rejected the responsible procreation theory as overbroad (for including the childless) and underinclusive (for excluding same-sex

[4] The Ninth Circuit held in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), that in passing Proposition 8, California voters unconstitutionally "withdrew" the label of marriage from same-sex couples after it had already been granted. *Id.* at 1086-95. The court explicitly avoided discussion of the constitutionality of marriage definitions in the first instance. *Id.* at 1064. In any case, this decision was vacated by *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

parents).[5] *Id.* at 961-62. Precise fit is ordinarily irrelevant to rational basis analysis, however, and the *Goodridge* plurality never identified an alternative plausible, coherent state justification for marriage of any type. It merely declared same-sex and opposite-sex couples equal because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id.* at 961. Having identified mutual dedication as one of the central *incidents* of marriage, however, the opinion did not explain why the State should care about that commitment in a sexual context any more than it cares about other voluntary relationships.

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[5] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Goodridge*, 798 N.E.2d at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa, New Mexico, and Vermont invalidated their States' statutes limiting marriage to the traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 476-81 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896, 904 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 880-88 (N.M. 2013); *Baker v. State*, 744 A.2d 864, 880-86 (Vt. 1999). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage. *Id.* at 452-53.

III. The District Court Failed to Address the Proper Rational Basis Issue and Offered No Limiting Principle of Marriage

The district court's arguments against the traditional marriage definition suffer from at least two incurable vulnerabilities. First, it insists that the State explain how *excluding* same-sex couples from marriage advances legitimate state interests. *E.g.*, *Bostic*, slip op. at 30 ("[The State] failed to establish how prohibiting some Virginia citizens from marrying is related rationally to [celebrating the diversity of the sexes.]"). This formulation of the issue, however, improperly presupposes a right to marriage recognition. With no fundamental right as the starting point, there is no "exclusion" that requires explaining. Second, neither the district courts nor Plaintiffs ever explain why secular civil society has any interest in recognizing marriage as a special status or offer defensible definitions of marriage as a finite set of relationships.

A. By casting the issue as a matter of government's exclusion of same-sex couples rather than government's unique interest in opposite-sex couples, the district court defies the rational-basis standard

States have compelling interests in the benefits afforded to the institution of marriage. Rather than recognize that these compelling

interests—namely, to encourage potentially procreative couples to stay together for the sake of offspring produced by their sexual union—simply do not extend to same-sex couples (which would have ended the constitutional discussion) the court imposed a different test. Rather than focus on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest, the district court focused on whether it was permissible to exclude "one segment of the Commonwealth's population from the right to marry based upon that segment's sexual orientation." *Bostic*, slip op. at 24.

This formalism equates with heightened scrutiny, not rational basis. Because no fundamental right to same-sex marriage exists (*see supra* at Part I.A.), the constitutional question can have nothing whatever to do with "denying an individual the benefits" of marriage, which inherently *presupposes* the existence of a right to such benefits. Shorn of any pre-existing right to marital recognition, the plaintiffs' "substantive" due process argument is reduced to nothing more than a general right to claim government benefits. It is no more rigorous than asking whether a State has a legitimate interest in not recognizing *any* group, including carpools, garden clubs, bike-to-work groups, or any

other associations whose existence might incidentally benefit the State, but whom the State may nonetheless choose not to recognize.

For purposes of equal protection, the lack of a fundamental right (or suspect class) requires a court to address whether there is a legitimate reason for treating two classes (same-sex couples and opposite-sex couples) differently. It is therefore critical to understand, in the first instance, *why* a State grants marriage recognition to opposite-sex couples before evaluating the comparative legitimacy of doing so without also granting the same recognition and benefits to anyone else, including same-sex couples. And when the core reason for recognizing traditional marriage (*i.e.*, ameliorating the frequent consequences of heterosexual intercourse, namely the unintended issuance of children) has no application to same-sex couples, there is a legitimate reason for government to recognize and regulate opposite-sex relationships but not same-sex relationships.

The rational-basis test requires that courts examine the issue from the State's perspective, not the challenger's perspective. *Cf. Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the

addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). The court below formalistically demanded a reason to deny access to a predetermined set of benefits. But this inquiry asks why the State may deprive a citizen of an *a priori* entitlement, and it accordingly amounts to a rejection of rational-basis review, not an application of it.

B. The district court's new definition of marriage contains no principle limiting the relationships that can make claims on the State

In light of the inability of same-sex couples to procreate, one would expect those rejecting the traditional definition of marriage to propose a new rationale for civil marriage that justifies extending it to same-sex couples. Unfortunately—but also unsurprisingly—neither plaintiffs nor the court below have offered any meaningful alternative rationale or definition of State-recognized marriage. The district court observed that "[g]ay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships." *Bostic*, slip op. at 22. It then declared that any "public commitment to form an exclusive relationship

and create a family with a partner with whom the person shares an intimate and sustaining emotional bond" is entitled to marriage recognition. *Id*. at 21-22.

This proposal for redefinition, however, in no way explains why secular civil society has any interest in recognizing or regulating marriage. Nothing in the district court's characterization inherently requires a sexual, much less procreative, component to the marriage relationship. The district court speaks of "an intimate and sustaining emotional bond," but never says why that—or exclusivity—matters to the State. If the desire for social recognition and validation of self-defined "intimate" relationships are the bases for civil marriage, no adult relationships can be excluded *a priori* from making claims upon the government for recognition. A variety of platonic relationships—even those that if sexual in nature could plainly be prohibited, such as incestuous or kinship relationships—could qualify on equal terms with sexual relationships. A brother and sister, a father and daughter, an aunt and nephew, business partners, or simply two friends could decide to live with each other and form a "family" based on their "intimate and

sustaining emotional bond," even if not sexual in nature—indeed *especially* if not sexual in nature—and demand "marriage" recognition.

For that matter, while the district court mentions a preference for "exclusivity," it offers no justification for excluding groups of three or more, whether they include sexual intercourse or not. Such groups could equally form "families" with "intimate and sustaining emotional bond[s]." The implication of the court's reasoning is that States would be required as a matter of federal constitutional law to recognize all such relationships as "marriages" if the parties so desired. Once the link between marriage and responsible procreation is severed and the commonsense idea that children are optimally raised in traditional intact families rejected, there is no fundamental reason for government to prefer couples to groups of three or more.

It is no response to say that the State *also* has an interest in encouraging those who acquire parental rights without procreating (together) to maintain long-term, committed relationships for the sake of their children. Such an interest is not the same as the interest that justifies marriage as a special status for sexual partners *as such*. Responsible *parenting* is not a theory supporting marriage for same-sex

couples because it cannot answer two critical questions: Why two people? Why a sexual relationship?

Marriage is not a device traditionally used to acknowledge acceptable sexuality, living arrangements, or parenting structures. It is a means to encourage and preserve something far more compelling and precise: the relationship between a man and a woman in their natural capacity to have children. It attracts and then regulates couples whose sexual conduct may create children in order to ameliorate the burdens society ultimately bears when unintended children are not properly cared for. Neither same-sex couples nor any other social grouping presents the same need for government involvement, so there is no similar rationale for recognizing such relationships.

CONCLUSION

The Court should reverse the judgment of the district court.

Dated: April 4, 2014

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana

By: s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

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s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

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Chantale Fiebig
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-0000

Date: April 4, 2014

s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: The State of Indiana, et al.

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

/s/ Thomas M. Fisher
(signature)

Thomas M. Fisher
Name (printed or typed)

317-232-6255
Voice Phone

Office of the Indiana Attorney General
Firm Name (if applicable)

317-232-7979
Fax Number

302 W Washington Street, IGCS 5th Floor

Indianapolis, IN 46204
Address

tom.fisher@atg.in.gov
E-mail address (print or type)

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I certify that on April 4, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Chantale Fiebig
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-0000

/s/ Thomas M. Fisher
Signature

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Date

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