UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
1:14-cv-299

ELLEN W. GERBER, et al., Plaintiffs, v. ROY COOPER, in his official capacity as the Attorney General of North Carolina, et al, Defendants.	)	**STATE DEFENDANTS' RESPONSE IN OPPOSITION TO MOVANTS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs (for the purposes of this Response, collectively referred to as the "Movants") in the instant matter filed a motion for a preliminary injunction on April 9, 2014. [DE 3]. Defendants ROY A. COOPER, in his official capacity as the North Carolina Attorney General, JOHN W. SMITH, in his official capacity as the Director of North Carolina Administrative Office of the Courts, (for the purposes of this Response, collectively referred to as the "State Defendants"), and AL JEAN BOGLE, in her official capacity as the Clerk of Superior Court for Catawba County, by and through the undersigned attorneys, submit the following Response in opposition to Movants' motion for preliminary injunction. By virtue of this response, State Defendants make a limited appearance only, and do not waive any other defense they might have, either pursuant to Rule 12(b) of the Federal Rules of Civil Procedure or other applicable law.

In addition to the foregoing argument, the State Defendants also rely on arguments propounded in their motion to stay proceedings and the supporting brief, which are incorporated herein by reference. [DE 23, 24].

INTRODUCTION

On April 9, 2014, Movants asked this Court to take the extraordinary step of issuing a preliminary mandatory injunction that would undo North Carolina General Statutes and a Constitutional Amendment which define marriage as a legal union between one man and one woman. That motion should be denied because (1) the injunction sought by Movants will significantly alter the *status quo*, (2) in the absence of clear binding authority by the Fourth Circuit and the Supreme Court of the United States, Movants cannot show that they will likely prevail on the merits, and (3) Movants' stated harm is outweighed by the harm to the public if State officials are enjoined from enforcing the democratically ratified State laws and Constitution.

STANDARD FOR PRELIMINARY INJUNCTION

Federal courts are under no duty to issue requested injunctive relief for every supposed violation of law. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). Instead, injunctions are extraordinary, equitable remedies, that do not issue "as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The party requesting the preliminary injunction bears a heavy burden of persuasion on all the requisite factors. *Boyd v. Steckel*, 753 F. Supp. 2d 1163 (M.D. Ala. 2010); *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342 (4th Cir. 2010), *vacated on other grounds*, *Real*

Truth About Obama, Inc. v. Federal Election Com'n, 559 U.S. 1089 (2010); *Hardin v. Houston Chronicle Publishing Co.*, 572 F.2d 1106, 1107 (5th Cir. 1978).

In order to prevail in their request for a preliminary injunction, Movants must clearly establish that they are likely to suffer irreparable harm; that the balance of the hardships tips in their favor; that the injunction is in the public interest; and, that they are likely to succeed on the merits. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7 (2008). "[T]he standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts." *The Real Truth About Obama, Inc.*, 575 F.3d at 347. In keeping with *Winter*, the Fourth Circuit found in *The Real Truth About Obama* that a plaintiff must show that he will "likely succeed on the merits" regardless of whether the balance of hardships weighs in his favor. *Id.* at 346. This burden requires more than simply showing that "grave or serious questions are presented." *Id.* at 347. Moreover, the plaintiff must make a clear showing that he will likely be irreparably harmed absent preliminary relief. *Id.* The averment that the plaintiff's harm might simply outweigh the defendant's harm is insufficient. *Id.* The showing of irreparable injury is mandatory even if the plaintiff has already demonstrated a strong showing on the probability of success on the merits. *Id.* Third, the Court must give "particular regard" to the "public consequences" of any relief granted. *Id.* Most importantly, there exists no flexible interplay between the factors, but instead, all four elements of the test must be satisfied. *Id.*

Preliminary injunctions are considered "extraordinary" and "drastic" remedies, and should be the exception rather than the rule. *Wheelihan v. Bingham*, 345 F. Supp. 2d 550 (M.D.N.C. 2004), quoting *Sun Microsystems, Inc. v. Microsoft Corp*, 333 F. 3d 517 (4th Cir. Md. 2003). When, as here, "a

preliminary injunction goes beyond the *status quo* and seeks to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed on the moving party is increased." *Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC,* 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009) (internal citations omitted). For such mandatory injunctions, relief should be granted "[o]nly in rare instances." *Harris v. Wilters,* 596 F.2d 678, 680 (5th Cir. 1979); *see also Mercedes-Benz,* 605 F. Supp. 2d at 1196; *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) ("the authority of the district court judge to issue a preliminary injunction, especially a mandatory one[,] should be sparingly exercised").

As described *infra*, Movants have failed to meet their extraordinarily high burden to justify the mandatory remedy sought by them. An alteration of the existing *status quo* is not warranted at this point of litigation. Juxtaposed with the public harm and public interests, the interests of individual Movants should not serve as the predicate for undoing the definition of marriage that has been memorialized by the North Carolina General Assembly, and has been approved by the voters of this State. Further, Movants have not demonstrated a likelihood of success on the merits. Finally, recent actions by the United States Supreme Court serve to affirm the State Defendants' position in opposition to the requested injunction. Specifically, in an unusual event, the Supreme Court intervened and ordered a stay of a permanent injunction granted to the plaintiffs in a case that challenged the constitutionality of Utah's same-sex marriage laws. That intervention signals the lower federal courts to proceed cautiously when addressing similar requests for injunctive relief. *Herbert v. Kitchen*, 134 S.Ct. 893 (Jan 6, 2014). By itself, the Supreme Court's order should preclude Movants' attempt to obtain the injunctive relief in the instant case. In isolation, any of the above factors warrant a denial of Movants' motion for

preliminary injunction; together, these factors pose an insurmountable obstacle under the standard annunciated in *Winter*.

ARGUMENT

I. THE INJUNCTION SOUGHT BY MOVANTS WILL SIGNIFICANTLY ALTER THE UNCONTESTED *STATUS QUO*.

The purpose of a preliminary injunction is to preserve the *status quo* between the parties; to preserve the relative position of the parties prior to the challenged action, pending the resolution of the action on its merits. *See*, *e.g.*, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *AttorneyFirst, LLC v. Ascension Entm't, Inc.*, 144 Fed. Appx. 283, 287 (4th Cir. 2005). Requests which seek to disturb the *status quo* should be denied by trial courts, and court rulings that alter that *status quo*, prior to a final determination on the merits, have amounted to an abuse of discretion. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-809 (9th Cir. Cal.), *cert. denied*, 375 U.S. 821 (1963); *Bell Atl. Business Sys. Servs. v. Hitachi Data Sys. Corp.*, 856 F. Supp. 524, 525 (N.D. Cal. 1993).

It is uncontested that North Carolina has never recognized marriage as a union between individuals of the same sex. With their litigation, Movants seek to alter the *status quo* and nullify North Carolina's historical definition of marriage, which was popularly re-affirmed by the State's voters. To alter the definition of marriage, by means of injunctive relief granted prior to the final determination of this action on merits, and prior to the Fourth Circuit's and the United States Supreme Court's guidance on this important social issue, is not in keeping with the applicable jurisprudence or the Supreme Court's preferred deliberative process. Movants' motion should be denied on this basis alone.

II. IN THE ABSENCE OF CLEAR AND BINDING PRECEDENT FROM THE FOURTH CIRCUIT COURT OF APPEALS, AND THE SUPREME COURT OF THE UNITED STATES, MOVANTS CANNOT SHOW THAT THEY WILL LIKELY PREVAIL ON THE MERITS.

A. Binding Supreme Court Precedent Forecloses Movants' Claims.

Movants' claims that North Carolina's marriage and adoption laws are unconstitutional are precluded by the doctrine of federalism, and want of a federal question as construed in *Baker v. Nelson*, 409 U.S. 810 (1972).

The U.S. Constitution grants enumerated powers to the federal government, and reserves the remaining powers to the States. *Gregory v. Ashcroft*, 501 U.S. 452, 457-458 (1991). "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

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

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. *See Williams v. North*

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

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

Movants seek to avoid the consequences of federalism by alleging in their complaint that North Carolina's marriage laws violate the Fourteenth Amendment. Although Movants assert the existence of federal question under the U.S. Constitution in their complaint, the Supreme Court has specifically refused to disregard the limits of federal jurisdiction with respect to the issue of same-sex marriage. In dismissing those plaintiffs' appeal challenging the constitutionality of Minnesota's laws defining marriage as a union between persons of the opposite sex, the Supreme Court concluded that Constitutional challenges to state laws prohibiting same-sex marriage do not present a federal question. *Id*. Such "dismissal for want of a substantial federal question, is a disposition on the merits," and "the lower courts are bound by summary decisions by this Court 'until such time as the [Supreme] Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

In its recent opinion implicating the issue of same-sex marriage, the Supreme Court further affirmed the significance of States' rights and the important role of federalism when it invalidated the federal designation of marriage, in large part, due to the failure to defer to a State's respective

definition. *Windsor*, 133 S. Ct. at 2689-693. The Supreme Court has not ruled that state laws defining marriage as unions between a man and a woman are unconstitutional, or that such issues even implicate "a substantial federal question." Moreover, States continue to maintain constitutional powers that are embodied by the concept of federalism to define their domestic and marital policies. In light of these principles, Movants have failed to demonstrate that they are likely to prevail on the merits of this case.

B. The Supreme Court's Intervention Into *Herbert v.Kitchen* Supports The State Defendants' Position That The Extraordinary Remedy Of Injunctive Relief Is Not Warranted Herein.

The United States Supreme Court's order issuing a stay of the district court's injunction in *Herbert v. Kitchen*, and several recent district courts' stays on their rulings regarding injunctive relief in same-sex marriage, pending review by federal appellate courts, further supports the State Defendants' argument that Movants' motion for preliminary injunction should be denied. *Bostic v. Rainey*, 2014 U.S. Dist. LEXIS 19080 (E.D. Va., Feb 14, 2014), *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *Deleon v. Perry*, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014), *Love v. Beshear*, 2014 U.S. Dist. LEXIS 36076 (W.D. Ky. March 19, 2014). As one of the district courts emphasized in its analysis of the stay in *Herbert v. Kitchen*, "the Supreme Court has sent a strong message by its unusual intervention and order in that case. It cannot be easily ignored." *Love v. Beshear*.

Further, as the State Defendants have argued in their motion to stay proceedings pending the resolution of *Bostic v. Rainey*, the grant of a preliminary injunction or continued litigation at this

point would create a state of legal ambiguity and confusion, and could soon be overruled, modified, or remanded. [DE 23, 24]. Therefore, Movants' application for preliminary injunction should be denied prior to a ruling from the Fourth Circuit and the Supreme Court, even if Movants' case facially appears compelling to this Court, as "[i]t is best that these momentous changes occur upon full review, rather than risk premature implementation of confusing changes. That does not serve anyone well." *Love v. Beshear*.

C. Movants Otherwise Failed To Show That They Are Likely to Succeed On The Merits.

Many other courts have concluded that the historical definition of marriage rationally serves society's interests. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1095 (D. Haw. 2012) (quoting *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982)); see *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. Ct. App. 2006); *In re Kandu*, 315 B.R. 123, 140 (W.D. Wash 2004); *Wilson v Ake*, 354 F. Supp. 2d 1298, 1305-06 (M.D. Fla., 2005); *Smelt*, 374 F. Supp. 2d at 879; *Conaway v. Deane*, 932 A.2d 571, 619 (Md. 2007) (evaluating challenge under Maryland Constitution); *Lewis v. Harris*, 908 A.2d 196, 210-211 (N.J. 2006) (evaluating challenge under New Jersey constitution); *In re J.B.*, 326 S.W.3d 654, 675 (Tex. App. 2010). In its *Windsor* opinion, the Supreme Court reaffirmed that States possess "full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Windsor*, 133 S. Ct. at 2691 (2013) (citing *Haddock v. Haddock*, 201 U. S. 562, 575 (1906)). No federal court of appeals has issued an opinion on the constitutionality of same-sex marriage, and the ultimate resolution of

this issue is simply unknown. Given the lack of appellate guidance, deferential treatment of legislative definitions concerning social issues, and the Supreme Court's repeated acknowledgment of a State's sovereignty in the regulation of their own domestic and marital affairs, Movants have failed to show that their likelihood of success is high.

III. MOVANTS' STATED HARM IS OUTWEIGHED BY THE HARM TO THE PUBLIC IF STATE OFFICIALS ARE ENJOINED FROM ENFORCING THE DEMOCRATICALLY RATIFIED STATE LAWS AND AMENDMENT TO THE STATE CONSTITUTION.

Movants have failed to establish that they will likely suffer an irreparable harm if their motion for preliminary injunction is denied or stayed until the Fourth Circuit's impending opinion in *Bostic*. The potential harm Movants may suffer if a stay is granted is a delay in their ability to marry or have marriages immediately recognized in North Carolina. That harm is not irreparable. If the Fourth Circuit resolves the same-sex issue raised in *Bostic* in favor of those plaintiffs, Movants may be able to marry, or have their existing marriages recognized, at that time. In contrast, a decision in favor of Movants in their instant motion would constitute a fundamental shift away from the historical definition of marriage. That definition should not be disturbed without full appellate review.

As the Supreme Court has recognized, "extending constitutional protection to an asserted right or liberty interest, . . . to a great extent, place[s] the matter outside the arena of public debate and legislative action. *Washington v. Glucksberg*, 421 U.S. 702, 720 (2009). Any decision by this Court to change the historical definition of marriage would deprive the State's citizens from democratically deliberating and deciding the important public policy questions involved with same-sex marriage.

"[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

In the event of a judgment in favor of Movants, an additional threat of harm exists for same-sex couples who may proceed to marry during the pendency of an appeal. Upon appeal, the validity of these marriages would be rendered legally uncertain. Should the State Defendants' successfully appeal, those couples will suffer significant harm when their marriages are declared invalid *ab initio*. This Court should refrain from issuing an order that may be soon subject to a reversal by the Fourth Circuit, especially when that order will render a profound effect not only upon Movants, but upon citizens of North Carolina: "[u]nder such circumstances, rights once granted could be cast in doubt." *Love v. Beshear*.

The State would also face the administrative and financial burdens associated with issuing licenses which may later be declared invalid. Private businesses and governmental institutions will be impacted by a decision prohibiting the State from enforcing its marriage laws, especially those entities where marital status is pivotal, including the health insurance industry, banks, creditors, estate planners and others. Actions taken in reliance upon a marriage that, ultimately may be invalid or not recognized, would undoubtedly impact the public at large. These complex and potentially unnecessary ramifications can easily be avoided by denying Movants' motion for preliminary injunction, and granting a stay requested by State Defendants in their Motion to Stay. [DE 23, 24].

CONCLUSION

For the foregoing reasons, this Court should deny Movants' motion for preliminary injunction and order a stay of all proceedings pending the Fourth Circuit's opinion in *Bostic*. Alternatively, the State Defendants respectfully request the Court to stay the judgment on any decision potentially unfavorable to the State pending appeal of that decision to the Fourth Circuit.

Respectfully submitted, this the 28th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2014, I electronically filed the foregoing **STATE DEFENDANTS' RESPONSE** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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