UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

ELLEN GERBER, *et al.*, Plaintiff, v. ROY COOPER, in his official capacity as the Attorney General of North Carolina, *et al.*, Defendants.	CIVIL ACTION NO. 14-cv-00299

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY

Pursuant to Rule 7.3 of the Local Rules of Civil Practice for the Middle District of North Carolina, the Plaintiffs submit this consolidated reply brief in support of their motion for a preliminary injunction (Dkt. No. 4) and in opposition to Defendants' Motion for a Stay (Dkt. No. 24).[1] The Plaintiffs incorporate their Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, April 9, 2014. (Dkt. No. 4.)

[1] On April 29, 2014, Plaintiffs' counsel emailed Defendants' counsel proposing that Plaintiffs submit such a consolidated brief for the convenience of the court and asking if Defendants objected to such an approach. Of the defendants who responded, none objected.

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INTRODUCTION

Plaintiffs—three married lesbian couples in North Carolina—brought this case and moved for preliminary relief based on life-threatening medical conditions from which one member of each couple suffers. Whether the age of Plaintiff Dr. Berlin—89 and suffering from seizures and blood clots—or the cancer and other ailments that have struck Plaintiffs Blackburn and Mejia, each couple legitimately fears that justice delayed truly will be justice denied. Defendants have put up roadblocks to even allowing Plaintiffs the opportunity to have their day in court. This time, Defendants point to the potential that the Fourth Circuit in *Bostic*, in addressing Virginia's ban on same-sex marriage, may settle questions relevant to Plaintiffs' claims. But Plaintiffs' challenge to North Carolina's adoption laws are not the issue in *Bostic*, and our system is predicated on citizens' ability to vindicate their rights in the district courts. Whatever merits there may be in staying *relief* that may be granted when plaintiffs have had an opportunity to be heard and have prevailed on their claims, there is absolutely no merit or justification to stay this matter and deprive Plaintiffs even of their ability to attempt to prove their claims. Such a stay is in fact the same as a denial of their motion—as the stay continues the harm Plaintiffs suffer each day—and it is a denial without even addressing the merits of Plaintiffs' claim. *See Carson* v. *American Brands, Inc*., 450 U.S. 79, 83-84 (1981).

Plaintiffs are entitled to a preliminary injunction against North Carolina's refusal to recognize their out-of-state marriages, and the State's categorical prohibition against Plaintiff Mejia

adopting the son she is raising.[2] The multiple papers filed by Defendants—the State Defendants' Response in Opposition to the Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 33) ("Defs' PI Opp."), their Brief in Support of their Motion to Stay (Dkt. No. 24) ("Motion to Stay"), and Defendant Donna Hicks Spencer's Memorandums of Law in Opposition to the Preliminary Injunction and in Support of the State Defendants' Motion to Stay (Dkt. Nos. 31, 32) do not even purport to rebut the irreparable harms that Plaintiffs will continue to suffer in the absence of an injunction. Nor do Defendants present any convincing argument that Plaintiffs are unlikely to succeed on the merits, especially considering (1) the import of the Supreme Court's decision in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), that discriminatory laws depriving same-sex families of the same recognition as heterosexual couples raise serious Constitutional issues and (2) that all nine district courts to rule on the constitutionality of state marriage bans since *Windsor* have struck down those bans as being unconstitutional. (Opening Br. at 1 n.1.) Finally, Defendants have not identified any harm or prejudice to the State if a preliminary injunction issues regarding State respect for Plaintiffs' marriages, and certainly no harm that outweighs what Plaintiffs suffer each day. Plaintiffs' motion should therefore be heard, and granted for several reasons:

First, in attempting to delay this Court's review of Plaintiffs' motion for a preliminary injunction, Defendants' motion for a stay flips the normal functioning of the federal court system on its head by asking a district court to stay consideration of a case because the appellate court might

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[2] Defined terms herein have the meanings ascribed to them in the Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, dated April 9, 2014 (Dkt. No. 4) ("Opening Brief" or "Opening Br."). All of the arguments presented by the Plaintiffs in their Opening Brief are fully incorporated herein.

give guidance on the matter sometime in the future, rather than the ordinary process by which district courts rule on the issues before them in light of appellate and other precedent then existing. *See John Hancock Life Ins. Co. U.S.A.* v. *JP Morgan Chase & Co.*, 938 F. Supp. 2d 440, 445 (S.D.N.Y. 2013). The appeal at issue, *Bostic* v. *Schaefer*, Case No. 14-1167, has not even been argued, does not contain a challenge to an adoption ban, and Defendants' concede that no litigant "can rightly claim to know how the Court of Appeals will assess this issue in *Bostic*." (Motion to Stay at 5.) Indeed, how long do Defendants contend Plaintiiffs should wait? Until a panel decision? Until the Circuit decides whether to hear the matter en banc? Until an en banc decision? Until the Supreme Court decides to hear the issue? Until the Supreme Court issues an opinion? The matter is ripe for this Court's adjudication, and Plaintiffs' claims heard and their motion granted. Plaintiffs simply seek that the Court rule on the motion for a preliminary injunction currently before the Court before the passage of time results in relief forever being denied.

Second, Defendants fundamentally misconstrue the standard for preliminary relief. The test is not, as Defendants suggest, whether the injunction sought by the Moving Plaintiffs will significantly alter the *status quo*. (Defs' PI Opp. at 5.) Rather, as the Fourth Circuit recently explained, district courts have discretion to enter mandatory preliminary injunctions when, as here, there are continual deprivations of constitutional rights. *Pashby* v. *Delia*, 709 F.3d 307, 319-20 (4th Cir. 2013).

Third, Defendants do not dispute—and indeed make no mention of—the irreparable harms that the Plaintiff families will suffer if their motion for a preliminary injunction (the "PI Motion")

is denied and the *status quo* is maintained. As Plaintiffs explained in their Opening Brief, all Plaintiffs are suffering serious and irreparable harm as a result of North Carolina's refusal to recognize their marriages, and the Ginter-Mejia family suffers as a result of North Carolina's refusal to legally recognize Plaintiff Mejia's relationship with her son, J.G.-M. Defendants do not contest that each Plaintiff suffers from the indignities of the State proclaiming that Plaintiffs' long-standing and loving relationships are unworthy of the recognition afforded other couples, and Defendants likewise do not rebut the substantial harm that will fall on Plaintiff J G.-M. if he is unable to enter into a legal parent-child relationship with his mother Plaintiff Mejia. Consequently, Plaintiffs' showing of irreparable harm is conceded. *See Brand* v. *N.C. Dep't of Crime Control & Pub. Safety*, 352 F. Supp. 2d 606, 618 (M.D.N.C. 2004).

Fourth, Defendants' argument that Plaintiffs are unlikely to prevail on the merits of their claim ignores an unbroken line of cases establishing just the opposite. Defendants cite two case, *Veney* v. *Wyche*, 293 F.3d 726, 732-34 (4th Cir. 2002), and *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996), for the proposition that North Carolina's marriage ban will survive constitutional scrutiny. (Motion to Stay at 2.) But those cases relied on *Bowers* v. *Hardwick,* 478 U.S. 186 (1986), which was overruled by the Supreme Court in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), as wrong when it was decided, and regardless of whether those cases survived *Lawrence* they certainly have been superseded by *Windsor*. Plaintiffs' likelihood of success is demonstrated by the *unanimous* district court rulings against bans on same-sex marriage following *Windsor* (*see* Opening Br. 1 n.1), including the most recent decision three weeks ago in Ohio, *Henry* v. *Himes*, 2014 WL 1418395, at *18 (S.D. Ohio Apr. 14, 2014).

The Ginter-Mejia family Plaintiffs also have shown a likelihood of success on their adoption claim. As Plaintiffs have shown (Opening Br. at 5,10,18-19), there simply is no state justification for discriminating against same-sex families and denying parents an opportunity to adopt the child they are raising and thereby form the legal relationship with their child on which so many benefits depend.

Accordingly, Plaintiffs' motion for a preliminary injunction should be granted, and Defendants' motion to stay the proceedings should be denied.

PROCEDURAL BACKGROUND

Moving Plaintiffs incorporate their description of the procedural and factual background of this case in their Opening Brief. (Opening Br. at 4-8.) On April 11, 2014, this Court granted Plaintiffs' motion for expedited briefing (Dkt. No. 11) in part and instructed the parties to brief, in particular, whether consideration of Plaintiffs' motion for a preliminary injunction should be stayed pending the Fourth Circuit's decision in *Bostic* v. *Schaefer*, Case No. 14-1167 (4th Cir. 2014), which appeals a Virginia District Court's ruling that Virginia's ban on same-sex marriage was unconstitutional. (Dkt. No. 16.) Despite the Court's Order to address the stay issue in the context of Plaintiff's motion, the State Defendants filed a motion to stay the proceedings on the same basis. (Dkt. No. 23, 24.) On April 25, 2014, the Court entered a Text Order indicating that the Court would consider Defendants' motion to stay the proceedings after Plaintiffs had the opportunity to respond. On April 28, 2014, the State Defendants filed their opposition to Plaintiffs' motion for a preliminary injunction (Dkt. No. 33), and Defendant Donna Hicks Spencer filed a brief in support of the motion to

stay on April 25, 2014 and a brief in opposition to Plaintiffs' motion for a preliminary injunction on April 28, 2014. (Dkt. Nos. 31, 32.)

Plaintiffs respectfully submit the instant brief as Plaintiffs' opposition to Defendants' motion to stay as well as Plaintiffs' reply to Defendants' oppositions to Plaintiffs' motion for a preliminary injunction.

ARGUMENT

I. DEFENDANTS FAIL TO CARRY THEIR HEAVY BURDEN TO DEMONSTRATE A CLEAR CASE OF HARDSHIP OR INEQUITY REQUIRED FOR A STAY TO ISSUE.

Defendants request that the Court stay all proceedings in this case, including Plaintiffs' motion for a preliminary injunction, until the Fourth Circuit decides the appeal in *Bostic*, if (as opposed to remand or other action) and until that occurs. (Motion to Stay, at 3.) A party seeking to obtain a stay must demonstrate "a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Williford* v. *Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (quoting *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). Here, it is uncontested Plaintiffs continue to suffer irreparable harm on a daily basis, *see infra* Part III, and therefore Defendants bear the heavy burden to justify their request for a stay with "clear and convincing circumstances" that show the hardships they will suffer simply from addressing Plaintiffs' claims "outweigh[] potential harm to the party against whom it is operative." *Id*. District courts generally consider three factors to determine whether to grant a stay: (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." *White* v. *Ally*

Fin. Inc., 969 F. Supp. 2d 451, 462 (S.D. W. Va. 2013) (citing *Williford,* 715 F.2d at 127); *Murphy-Pittman* v. *DePuy Orthopaedics, Inc.,* 2012 WL 6588697, at *1 (D.S.C. Dec. 17, 2012) (same). None of these factors counsels in favor of granting a stay here.

Judicial Economy. The question of whether North Carolina may deny Plaintiff Mejia the right to adopt her son consistent with the Constitution is not before the Court in *Bostic*. Even if the decision's analysis provides guidance that is helpful here, the decision may not be the last word on even the marriage question.

The fact that an appellate court may act in the future does not justify issuing a stay that would cause harm to others. As one district court following the *Williford* case explained, "avoiding further unnecessary litigation expenses and achieving judicial economy by avoiding a potentially unnecessary judicial ruling, falls far short of a 'clear case of hardship or inequity.'" *Baltimore Gas & Elec. Co.* v. *United States*, 133 F. Supp. 2d 721, 730 (D. Md. 2001) (citing *Williford*, 715 F.2d at 127); *see also John Hancock Life Ins.*, 938 F. Supp. 2d at 445 (acknowledging the possibility that the Court of Appeals may give guidance in the future but issuing a ruling nevertheless). Further, although Defendants maintain that "a decision in *Bostic* may well control the disposition of this case, or alternatively, require amended briefing and the re-composition of arguments," (Motion to Stay at 5), they also admit that litigants cannot "rightly claim to know how the Court of Appeals will assess this issue in *Bostic*, what the parameters of the opinion will be, or what analytical impact the opinion will have on the various Courts in the Fourth Circuit." (*Id*.) Plaintiffs are not asking the Court to predict what the Fourth Circuit will do in *Bostic,* rather they are asking the Court to grant them a preliminary injunction based on the law as it exists today. Indeed, the fact

that the Meija family also challenges North Carolina's restrictions on Ms. Meijia's ability to adopt the son she is raising, which is not at issue in *Bostic*, demonstrates that this case presents unique issues that *Bostic* is unlikely to resolve.

Hardship to the Moving Party. Defendants argue that the absence of a stay may result in "various administrative and financial burdens . . . in an uncertain legal environment." (Motion to Stay at 6.) Courts are no strangers to legal uncertainty, particularly in matters of constitutional importance and matters of rapidly-evolving opinions, as the case is here. Defendants point to no reason why the Plaintiff families must wait for the rest of the federal court system to resolve the issue. Nine district courts already have spoken, and have done so in one way: state marriage bans are unconstitutional. And, as Moving Plaintiffs noted in their Opening Brief, "a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Centro*, 722 F.3d 184, 191 (4th Cir. 2013) (quoting *Giovani Carandola, Ltd.* v. *Bason*, 303 F.3d 507, 521 (4th Cir. 2002)).[3]

Potential Prejudice to the Non-Moving Party. Even if Defendants could establish that they would face hardship by litigating this case in the absence of a stay, such hardship must outweigh the potential prejudice to Plaintiffs' families. Defendants' alleged inconveniences do not

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[3] It is irrelevant that the law was passed by popular referendum; unconstitutional laws, however they come to be, must be struck down. *See Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . ."); *DeBoer* v. *Snyder*, 2014 WL 1100794, at *16 (E.D. Mich. Mar. 21, 2014) ("The popular origin of the [amendment] does nothing to insulate the provision from constitutional scrutiny.").

even come close. As Plaintiffs explained in their Opening Brief, if Plaintiffs' motion for preliminary relief is granted Plaintiffs will face their mortality knowing that at last their relationship is respected by the State, they will no longer suffer the fear that they will be unable to care for their spouse because of state law, and Plaintiff J.G.-M. will recover the benefits to which he is entitled as the legal son of Ms. Mejia. (Opening Br. at 2, 6-8; Dkt. No. 5, Affidavit of Pearl Berlin, dated April 8, 2014 ("Berlin Aff.") ¶ 3; Dkt. No. 8, Affidavit of Jane Blackburn, dated April 8, 2014 ("Blackburn Aff.") ¶¶ 3, 9; Dkt. No. 9, Affidavit of Esmerelda Mejia, dated April 8, 2014 ("Mejia Aff.") ¶¶ 10, 25-26.)

A stay is not justified in the face of these deprivations. As the Supreme Court has explained, "the denial of necessary medical benefits during the months pending filing and disposition of a petition for writ of certiorari could well result in . . . death or serious medical injury . . . . The balance of equities therefore weighs in favor of the respondents" and against granting a stay. *Blum* v. *Caldwell*, 446 U.S. 1311, 1316 (1980). As explained herein, Defendants do not contest the irreparability of this harm, nor do they explain how the potential uncertainty faced by the State outweighs the cloud of uncertainty that lingers over the legal status of Plaintiffs' families every day of their lives.

Other Stays in Marriage Cases Did Not Delay Decisions. To support their argument that the pending appeal in *Bostic* justifies a stay, Defendants cite a number of cases concerning marriage bans where stays *after judgment* were issued. (Motion to Stay at 4) But Defendants are not asking for the same type of stay. In each of the cases Defendants cite, the district court ruled on the merits, overturned the marriage bans, and stayed only the *effect of the judgment*, not the action itself. *See Perry* v. *Brown*, 671 F.3d 1052, 1070 (9th Cir. 2012); *Bostic* v.

Rainey, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014); *Bishop* v. *U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1261 (N.D. Okla. 2014). While Plaintiffs respectfully submit that an injunction, if granted, should not be stayed, the cases which stay *relief* that is granted do not support preventing Plaintiffs from even having their case heard. In fact, *no* court considering a challenge to a state marriage or marriage recognition ban has granted the delay and extraordinary relief sought by Defendants here to prevent Plaintiffs from having their claims heard.

Further, in three cases not cited by Defendants from the Sixth Circuit, district courts in Tennessee and Kentucky issued decisions respecting out-of-state marriages and a district court in Michigan overturned a same-sex marriage ban, notwithstanding the fact that the *Obergefell* v. *Wymyslo*, Case No.14-3057, concerning Ohio's marriage ban, was pending before the Sixth Circuit. *Bourke* v. *Beshear*, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), *Tanco* v. *Haslam*, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeBoer* v. *Snyder*, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014). Similarly, the fact that a case attempting to invalidate Virginia's marriage ban is pending before the Fourth Circuit does not require this Court to postpone issuing a decision on North Carolina's ban on recognizing Plaintiffs' marriages or adjudicating the claims regarding North Carolina's unconstitutional adoption laws.

II. CONTRARY TO DEFENDANTS' CONTENTION, A PRELIMINARY INJUNCTION MAY ALTER THE *STATUS QUO* WHEN NECESSARY TO PREVENT IRREPARABLE HARM

Defendants contend that "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." (Defs' PI Opp. at 5.) But Defendants fail

to explain that preserving the *status quo* is not the *only* purpose of a preliminary injunction, which can also issue to alter the *status quo* if the relevant elements are satisfied, as they are here. The Fourth Circuit recently explained that while courts may issue "prohibitory" preliminary injunctions that preserve the *status quo*, courts may also issue mandatory preliminary injunctions "that do not preserve the *status quo*." *Pashby*, 709 F.3d at 319-20 (citing *Wetzel* v. *Edwards*, 635 F.2d 283, 286 (4th Cir. 1980)). Defendants' suggestion that "Movants' motion should be denied on this basis alone" simply because "Movants seek to alter the status quo," (Defs' PI Opp. at 5) is simply incorrect under Fourth Circuit precedent that allow injunctions to alter the *status quo*. Indeed, if Defendants are correct, preliminary relief could never be issued when an unconstitutional law is challenged.

While it is true that a heightened standard of review is applied when the Court of Appeals reviews a mandatory preliminary injunction, *Pashby*, 709 F.3d at 320, the appellate standard of review does not affect this Court's ability to prevent the injustices which are occurring each day. Whatever standard the Court of Appeals may apply if this issue comes before it, that does not affect this Court's evaluation of whether a preliminary injunction is warranted under the four-factor test set forth in *Musgrave* and similar cases. *WV Ass'n of Club Owners* v. *Musgrave*, 553 F.3d at 292, 298 (4th Cir. 2009) ("In order to receive a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'") (citation omitted). The request for a stay should be denied, and as Plaintiffs

have demonstrated in their Opening Brief and set forth further below, under the well-established legal standard for granting preliminary relief, this Court should issue a preliminary injunction.

III. DEFENDANTS DO NOT CONTEST PLAINTIFFS' SHOWING OF IRREPARABLE HARM

Defendants do not address any of the irreparable harms Plaintiffs allege that they currently do and will continue to suffer absent an injunction. (*See* Opening Br. at 2, 6-8, 18-20.) Defendants' argument—that the only "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…" (Defs' PI Opp. at 10.)—ignores the multiple affidavits Plaintiffs have submitted establishing real, concrete, serious and irreparable harms related to the lack of recognition of their marriages and the categorical denial of adoption. (*See*, *e.g.*, Blackburn Aff. ¶¶ 9-14; Mejia Aff. ¶¶ 13-29; Dkt. No. 10, Affidavit of Christina Ginter-Mejia, dated April 8, 2014 ("Ginter-Mejia Aff.") ¶¶ 9-13, 17-22; Dkt. No. 5, Affidavit of Ellen Gerber, dated April 8, 2014 ("Gerber Aff.") ¶¶ 3, 14-17.) Defendants simply fail to address any of them. Because "a party who fails to address an issue has conceded the issue," Plaintiffs have thus demonstrated irreparable harm for the purposes of this motion. *Kinetic Concepts, Inc.* v. *Convatec, Inc.,* 2010 WL 1667285, at *8 (M.D.N.C. Apr. 23, 2010) (collecting cases); *see also Brand*, 352 F. Supp. 2d at 618 (collecting cases).

The harm Plaintiffs suffer can only be remedied by granting Plaintiffs the injunction they seek. Beyond the fact that a deprivation of a constitutional freedom "for even minimal periods of time, unquestionably constitutes irreparable injury," *Legend Night Club* v. *Miller*, 637 F.3d 291, 302 (4th Cir. 2011), Plaintiffs suffer considerable and ongoing irreparable harm daily. Dr. Berlin, Ms. Blackburn, and Ms. Mejia have serious, life-threatening medical issues that make it likely that they

will suffer irreparable harm if forced to wait for a final judgment. (*See* Opening Br. at 2, 6-8; Berlin Aff. ¶¶ 3, 8, 11; Blackburn Aff ¶¶ 7-8; Mejia Aff. ¶¶ 11-15.) Dr. Berlin, Ms. Blackburn, and Ms. Mejia all have a substantial fear that one of them could pass away before their marriage is recognized by North Carolina, depriving them forever of the dignity and social recognition that state recognition affords (*see* Berlin Aff. ¶ 3; Blackburn Aff ¶ 3; Mejia Aff. ¶ 3); and Ms. Mejia's son also is continually deprived of the important benefits that flow to children, particularly to children of veterans, by virtue of legal parentage. (Mejia Aff. ¶¶ 25, 28-29.) Those benefits are lost each day that relief is not granted.

Moreover, the Plaintiffs all fear—based on experience—that their right to care for one another in medical emergencies will be denied because North Carolina refuses to recognize their marriage. (Berlin Aff. ¶ 9; Dkt. No. 7, Affidavit of Lyn McCoy, dated April 8, 2014 ("McCoy Aff.") ¶ 10; Ginter-Mejia Aff. ¶¶ 19-20.) Additionally, Ms. Mejia is often faced with situations where her rights as J.G.-M.'s parent are not recognized, and she is prevented by North Carolina law from assuming the parental responsibilities that she otherwise would be able to exercise. (Mejia Aff. ¶¶ 25, 28-29; Ginter-Mejia Aff. ¶¶ 18, 21.) Ms. Mejia is J.G.-M.'s full-time caregiver, and she worries that she will not be able to make important decisions for him, for instance, at his school, in a medical situation or when they are traveling. (Mejia Aff. ¶ 25.) These harms, not contradicted by Defendants, demonstrate that Moving Plaintiffs currently do and will continue to suffer serious, immediate and irreparable harm absent an injunction.

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Defendants dispute only in passing that Plaintiffs are likely to succeed on the merits of their claims. As explained in Plaintiffs' Motion, Plaintiffs are likely to succeed in striking down North Carolina's ban on recognition of same-sex marriage and second parent adoptions as violating the Equal Protection and Due Process Clauses of the United States Constitution, based on established legal principles, including those most recently illuminated by the Supreme Court in *Windsor*. (*See* Opening Br. at 9-17.) In *Windsor*, the Court struck down the provision of the federal Defense of Marriage Act that barred the federal government from recognizing valid marriages of same-sex couples on the ground that the law violated the Due Process Clause. 133 S. Ct. at 2695-96. The Court found that "the principal purpose and the necessary effect of [the failure to recognize lawful marriages was] to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695. Finding no sufficient justification for this infringement of plaintiffs' constitutional rights, the Court held that "[b]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of" due process and equal protection guaranteed by the Constitution. *Id*. at 2696.

Following *Windsor*, district courts have uniformly concluded that bans on marriage for same-sex couples cannot pass constitutional muster.[4] In fact, since Moving Plaintiffs filed their

[4] *Henry* v. *Himes*, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014) (Ohio); *DeBoer* v. *Snyder*, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014) (Michigan); *Tanco* v. *Haslam*, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (Tennessee); *De Leon* v. *Perry*, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (Texas); *Lee* v. *Orr*, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (Illinois); *Bostic* v. *Rainey*, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (Virginia); *Bourke* v. *Beshear*, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (Kentucky); *Bishop* v. *U.S. ex rel. Holder*, 962 F.

preliminary injunction motion, another district court in Ohio declared Ohio's ban on recognition of such marriages from other states unconstitutional while an appeal of that issue was pending in the Sixth Circuit. *See Henry*, 2014 WL 1418395, at *18.

In their Opening Brief Plaintiffs show conclusively that, particularly in light of *Windsor*, Amendment One and the North Carolina marriage and adoption statutes violate the Equal Protection and Due Process clauses of the United States Constitution. (*See* Opening Br. at 10-17.) Amendment One is clearly discriminatory; it declares that heterosexual persons may marry the partner of their choice, but gay and lesbian persons may not. *See* N.C. Const. art. XIV, § 6; N.C. Gen. Stat. §§ 51-1, 5-1.2. It also allows heterosexual couples who marry outside of North Carolina to return to the state, confident that their marriages will be respected, *see*, *e.g.*, *Parker* v. *Parker*, 46 N.C. App. 254, 258 (1980), while gay and lesbian couples cannot.

Denying gay and lesbian couples, like the Plaintiffs, the fundamental right to marriage and its recognition cannot meet any level of constitutional scrutiny. (*See* Opening Br. at 10-17; *see also Windsor* v. *U.S.*, 699 F.3d 169, 181 (2d Cir. 2012); *Loving* v. *Virginia*, 388 U.S. 1, 8-10 (1967); *Obergefell,* 962 F. Supp. 2d 968, 995-96 (S.D. Ohio 2013). Moreover, the statements proffered in support of Amendment One, even beyond the face of the ban and the lack of any rational connection to a valid state interest, demonstrate that its passage was motivated by animus.

Supp. 2d 1252 (N.D. Okla. 2014) (Oklahoma); *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (Ohio); *Kitchen* v. *Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (Utah).

(*See* Opening Br. at 4; Complaint ¶ 28(a)-(e).)[5]

Defendants offer no justification for the law sufficient to withstand even rational basis review. (*See* Opening Br. at 15-17; Defs' PI Opp. at 8-10.); *see also Obergefell*, 962 F. Supp. 2d at 995 ("[*N]o hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans … to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community*.") (emphasis in the original). Defendants' only defense of the law on the merits is an interest in preserving the "historical definition of marriage" (Defs' PI Opp at 9) which, by itself, is not sufficient to withstand even rational basis scrutiny. *See Heller* v. *Doe*, 509 U.S. 312, 326 (1993) (holding tradition alone does not satisfy rational basis review); *DeBoer*, 2014 WL 1100794, at *14 (noting "traditional notions of marriage are often enmeshed with the moral disapproval of redefining marriage to encompass same-sex relationships," and that "many federal courts have noted that moral disapproval is not a sufficient rationale for upholding a provision of law

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[5] The adoption statutes, in tandem with the marriage statutes, discriminate based on sexual orientation by precluding same-sex couples from securing the protections of a second parent adoption for their children, while allowing families headed by heterosexual couples to obtain those protections. *See Collins* v. *Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (restricting benefits to married people is sexual orientation discrimination where state law prevents same-sex couples from marrying). Children of gay and lesbian parents like J.C. are doubly disadvantaged—their parents are unable to marry and provide important tangible and dignitary protections to their family that come through marriage, and they cannot be adopted by both parents, ostensibly because those parents are unmarried. *See Windsor*, 133 S. Ct. at 2694. The Supreme Court has long recognized that laws that treat children differently based on their parents' status—*i.e*., on the basis of illegitimacy—are subject to heightened scrutiny. *See Weber* v. *Aetna Cas. & Sur. Co*., 406 U.S. 164, 175–76 (1972); *Mills* v. *Habluetzel*, 456 U.S. 91, 98-102 (1982).

on equal protection grounds").[6]

CONCLUSION

While Plaintiffs cannot contest that the ultimate decision in *Bostic*—whenever that may issue—may provide guidance on some of the issues pending before the Court, other issues presented here are assuredly not pending in *Bostic.* Moreover, delaying even the resolution of Plaintiffs claims for an unknown period of time itself creates harms on a daily basis that—in light of the medical conditions of certain Plaintiffs—may never be rectified. Similarly, benefits denied to J.G,-M.—benefits he would receive each day if his parents were heterosexual—are gone and cannot be restored as each day passes. Plaintiffs should no longer be deprived of their day in court to vindicate their constitutional rights. For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be granted, and the Defendants' Motion to Stay should be denied.

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[6] For the reasons stated in Part I, *supra*, the balance of the equities and the public interest also weigh in favor of an injunction.

Dated: May 5, 2014
Raleigh, North Carolina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been filed electronically with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Plaintiff's counsel of record.
This the 5th day of May, 2014.

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