UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

ELLEN GERBER, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 14-cv-_____

ROY COOPER, in his official capacity as the Attorney General of North Carolina, *et al.*,

Defendants.

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

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PRELIMINARY STATEMENT

In the nine months following the Supreme Court's ruling in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), holding that the federal government could no longer disregard the legal marriages of same-sex couples, nine district courts have struck down marriage bans.[1] No courts have ruled the other way. Meanwhile, three North Carolina families, one elderly and the others unwell, are suffering irreparable harm.

Plaintiffs Ellen W. Gerber and Pearl Berlin, Lyn McCoy and Jane Blackburn, and Esmerelda Mejia and Christina Ginter-Mejia are same-sex couples who were lawfully married in Maine, Washington, D.C., and Maryland, respectively. Plaintiff J.G.-M. is Ms. Ginter-Mejia's seven-year-old adopted son, raised jointly by Plaintiffs Mejia and Ginter-Mejia. All three families live in North Carolina, and seek recognition of their marriage by their state, and the multiple psychological and economic benefits such recognition brings. Plaintiffs Mejia and Ginter-Mejia additionally seek legal recognition of their parent-child relationship by the State of North Carolina. Plaintiffs—all in long-term, loving and committed relationships—include a decorated war veteran and others who honorably serve and contribute to their communities in numerous ways. Yet, North Carolina law treats them as second-class citizens, penalizing them each day by denying recognition of their

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[1] *DeBoer* v. *Snyder*, 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014) (Michigan); *Tanco* v. *Haslam*, 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (Tennessee); *De Leon* v. *Perry*, SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (Texas); *Lee* v. *Orr*, 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (Illinois); *Bostic* v. *Rainey*, 2:13-CV-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (Virginia); *Bourke* v. *Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (Kentucky); *Bishop* v. *United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (Oklahoma); *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (Ohio); *Kitchen* v. *Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (Utah).

marriages and refusing to legally recognize a mother's relationship with her son. This motion, and the complaint filed on April 9, 2014, seek to eliminate the daily indignities and detriments Plaintiffs suffer solely because of their sexual orientation as a result of the North Carolina laws at issue which violate their constitutional rights.

Each Plaintiff faces circumstances warranting preliminary relief. As explained in greater detail, *infra*, Dr. Berlin is 89 years old and suffers from complex seizures and blood clots that cannot be treated. Ms. Blackburn is 66 years old and has Stage IV cancer. Ms. Mejia, a war veteran, suffers from cancer and currently lives with significant lung damage and a replacement liver that requires her to take immunosuppressive drugs. In light of their age and medical conditions, Dr. Berlin, Ms. Gerber, and Ms. Mejia 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; Ms. Mejia's son would also be deprived of the important benefits that flow to children, particularly to children of veterans, by virtue of legal parentage. They also 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. They suffer daily from economic deprivations that cannot be remedied retroactively and, unless granted the relief sought herein, face the prospect of having lived their lives without community recognition that their relationships have equal worth as those of other loving couples.

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

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

Irreparable Harm. In the event that any of the Plaintiffs pass away before a final judgment in this case, they will never receive the relief to which they are entitled, and their ability to optimally address medical needs and the right to receive important economic benefits as any other married couple—including protections that apply after one spouse or parent dies—will be forever lost and the deprivation will become permanent. The treatment of these couples as second-class citizens continually subjects them to indignities that are irreparable and cannot be fully compensated by money damages. *Windsor*, 133 S. Ct. at 2694; *Tanco*, 2014 WL 997525, at *7.

Balance of Equities. In contrast to the great harm Plaintiffs suffer daily and would permanently suffer should any Plaintiff pass away before they prevail on the merits, the State would encounter no inconvenience by extending marriage rights to Plaintiffs and other same-sex couples. The State is not harmed by being enjoined from "enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Centro Tepeyac* v. *Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013).

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

STATEMENT OF THE FACTS

I. North Carolina's Marriage Laws.

On May 8, 2012, section 6 of Article XIV of the North Carolina Constitution was amended to exclude same-sex couples from the freedom to marry in North Carolina and to bar recognition of valid marriages from other jurisdictions ("Amendment One"), which provides in part :

> Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.

N.C. Const. art. XIV, § 6 (as amended); *see also* N.C. Gen. Stat. §§ 51-1, 51-1.2. The effect of Amendment One and North Carolina's marriage statutes is identical to the numerous state marriage bans enjoined or struck down by courts following *Windsor*.

Many of the justifications offered in support of Amendment One were based on a desire to denigrate same-sex relationships and same-sex couples:

- "[Y]ou cannot construct an argument for same sex-marriage that would not also justify philosophically the legalization of polygamy and adult incest"; "In countries around the world where they legitimized same-sex marriage, marriage itself is delegitimized." (Compl. ¶ 28(a).)
- "We need to reach out to them and get them to change their lifestyle back to the one we accept"; "[The City of Asheville, North Carolina is] a cesspool of sin." (Compl. ¶ 28(b).)
- "[Y]ou don't rewrite the nature of God's design for marriage based on the demands of a group of adults." (Compl. ¶ 28(c).)
- Marriage by same-sex individuals "undermines the marriage culture by making marriage a meaningless political gesture, rather than a child-affirming social construct"; "We will have an inevitable increase in . . . all of the documented social ills associated with children being raised in a home without their married biological parents." (Compl. ¶ 28(d).)
- North Carolina residents were urged "to contribute money, 'so we can confront the devils against us on the other side.'" (Compl. ¶ 28(e).)

Amendment One and the North Carolina marriage statute, N.C. Gen. Stat. § 51-1, deny recognition and respect to the adult Plaintiffs' lawful marriages, along with the marriages of other same-sex couples conferred by other jurisdictions. *See* N.C. Gen. Stat. § 51-1.2 ("Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."). In contrast, North Carolina recognizes marriages of heterosexual spouses from other jurisdictions. *See*, *e.g.*, *Parker* v. *Parker*, 46 N.C. App. 254, 258 (1980).

II. North Carolina's Adoption Laws.

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

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

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

III. The Moving Plaintiffs.

Lennie Gerber and Pearl Berlin have been committed to each other for 48 years and were legally married in Maine on September 10, 2013. (Affidavit of Pearl Berlin, dated April 8, 2014 ("Berlin Aff.") ¶¶ 5-6.) Dr. Berlin is 89 years old and suffers from serious medical conditions that could cut her life short. (Berlin Aff. ¶ 3.) She suffers complex partial seizures, the treatment for which impacts her balance and weakens her body. (Berlin Aff. ¶ 8.) Dr. Berlin recently fell and hit her head. (Affidavit of Ellen Gerber, dated April 8, 2014 ("Gerber Aff.") ¶ 11.) Dr. Berlin also suffers from blood clots, but her doctors are concerned that blood thinners would further impair her balance. (Berlin Aff. ¶ 8.) As a result of these conditions, Dr. Berlin has been hospitalized three times in the past two years. (Gerber Aff. ¶ 11.)

Lyn McCoy and Jane Blackburn have been committed to each other for 23 years and were legally married in Washington D.C. on August 27, 2011. (Affidavit of Jane Blackburn, dated April 8, 2014 ("Blackburn Aff." ¶¶ 4-5.) Ms. Blackburn has Stage IV breast cancer that has spread to her bones. (Blackburn Aff. ¶ 7.) The couple is hopeful about Ms. Blackburn's prognosis, but Stage IV cancer is widely considered to be imminently life-threatening. (Blackburn Aff. ¶ 8.)

Esmerelda Mejia and Christina Ginter-Mejia have been committed to each other for over 20 years and were legally married in Maryland on August 21, 2013. (Affidavit of Esmerelda Mejia, dated April 8, 2014 ("Mejia Aff.") ¶¶ 5-7.) They welcomed J.G.-M. into their family September 21, 2007, after both Ms. Mejia and Ms. Ginter-Mejia underwent careful scrutiny in order to become certified as foster parents. (Affidavit of Christina Ginter-Mejia, dated April 8, 2014 ("Ginter-Mejia Aff.") ¶¶ 14-16.) Although both Ms. Mejia and Ms. Ginter-Mejia share equally in all of their parental responsibilities, Ms. Mejia cannot obtain legal recognition of her relationship with her son and all the

benefits such recognition brings because North Carolina does not recognize her marriage to Ms. Ginter-Mejia, and the state limits stepparent adoptions to couples who are legally married under the laws of North Carolina. (Mejia Aff. ¶¶ 10, 25-26.)

Ms. Mejia is a decorated war veteran of the Army, retiring with the rank of major, designated 100% disabled by the military. (Mejia Aff. ¶¶ 4, 17.) In 1992 she was diagnosed with cervical cancer and underwent a hysterectomy. (Mejia Aff. ¶ 11.) In 1996, she had to undergo surgery for a tumor in her left lung; the accompanying radiation treatment led to liver failure in 2008. (Mejia Aff. ¶ 12.) Her subsequent liver transplant requires her to take immunosuppressive drugs, exacerbating any other illnesses. (Mejia Aff. ¶¶ 13-14.) Along with remaining lung and liver problems, because of the trauma caused by her prior ailments and treatments, new health issues arise daily and she visits the emergency room a few times per year. (Mejia Aff. ¶ 15.) As a veteran, Mejia's legally-recognized children would be entitled to significant benefits, including if she were to pass away before the children reach the age of majority. (Mejia Aff. ¶¶ 28-29.) Because J.G.-M.. is not her legal child, he is ineligible for these protections. *Id.*

These three families live in a constant state of uncertainty and fear about their ability to exercise their proper role as each other's spouse, parent, and medical proxy, or to be allowed access during medical procedures and emergencies. Although the couples have taken steps to attempt to alleviate this uncertainty, they live with the risk that, should Dr. Berlin, Ms. Blackburn, or Ms. Mejia be forced to seek emergency treatment, their spouses' visitation and other rights could be denied. If any were to die, their relationships with their spouses (and, for one family, their child) would never be legally recognized in North Carolina. Plaintiffs respectfully submit that the Court may take judicial notice of the severe harm of having lived in a loving and committed relationship—

in two instances for several decades—and yet facing the end of life knowing that your community which you have honorably served refuses to recognize the worth and solemnity of that relationship in ways it does for others. Death certificates and other documents that record aspects of one's life in perpetuity will never reflect either the relationship that Plaintiffs truly had and/or that they passed away with a loving spouse unless Plaintiffs are afforded the relief sought by this motion.

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

- Plaintiffs have never been able to file joint tax returns or avail themselves of the tax benefits that North Carolina confers upon married couples.
- Plaintiffs would not be entitled to the default protections of North Carolina's inheritance laws if one of them predeceases the other.
- Plaintiffs receive significantly fewer benefits from their retirement plans, which they would otherwise be afforded if North Carolina recognized their marriage.
- Plaintiffs are ineligible for important federal protections that are available only to couples whose marriages are legally recognized by their home state, including the ability to take time off of work to care for a sick spouse under the Family & Medical Leave Act ("FMLA") (29 C.F.R. § 825.122(b)), and access to a spouse's social security benefits. 42 U.S.C. § 416(h)(1)(A)(i).
- If one of them dies without the state recognizing their marriage, the surviving spouse will not only suffer the indignity of not being recognized as a spouse on the death certificate, but will never be able to recoup many of the benefits to which they would have been entitled if their lawful marriage was recognized by the State in which they live.

QUESTION PRESENTED

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

ARGUMENT

I. Legal Standard.

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

II. Success on the Merits.

Plaintiffs are likely to succeed in striking down North Carolina's ban on same-sex marriage as violating the Equal Protection and Due Process Clauses of the United States Constitution, based on established legal principles, including those most recently illuminated by the Supreme Court in *Windsor*. In *Windsor*, the Court struck down the provision of the federal Defense of Marriage Act ("DOMA") that barred the federal government from recognizing valid marriages of same-sex couples on the ground that the law violated the Due Process Clause. 133 S. Ct. at 2695-96. The Court found that "the principal purpose and the necessary effect of [the failure to recognize lawful marriages was] to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695. The Court based its decision in part on the fact that DOMA "instruct[ed] all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Finding no sufficient justification for this infringement of plaintiffs' constitutional rights, the Court held that "[b]y seeking to displace

this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of" due process and equal protection guaranteed by the Constitution. *Id*. Following *Windsor*, district courts have uniformly concluded that bans on marriage for same-sex couples cannot pass constitutional muster. *See supra* note 1.

A. <u>Violation of Equal Protection Amendment One is discriminatory</u>.

Heterosexual persons may marry the partner of their choice; Amendment One declares that gay persons may not. And heterosexual couples who marry out of North Carolina can return to the state, confident that their marriages will be respected. Gay and lesbian couples cannot. Moreover, the statements proffered in support of Amendment One, even beyond the face of the ban and the lack of any rational connection to a valid state interest, demonstrate that its passage was motivated by animus. *See supra* at 4-5; *see also Windsor*, 133 S. Ct. at 2694. As such, the discriminatory marriage ban is subject to heightened scrutiny, although the ban would fail under any standard of review.[3]

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[3] Similarly, the adoption statutes, in tandem with the marriage statutes, discriminate based on sexual orientation by precluding same-sex couples from securing the protections of a second 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.G.-M. are doubly disadvantaged—their parents are unable to marry and provide important tangible and dignitary protections to their family that come through marriage, and they cannot be adopted by both parents, ostensibly because those parents are unmarried. *See Windsor*, 133 S. Ct. at 2694. The Supreme Court has long recognized that laws that treat children differently based on their parents' status—*i.e*., on the basis of illegitimacy—are subject to heightened scrutiny. *See Weber* v. *Aetna Cas. & Sur. Co*., 406 U.S. 164, 175–76 (1972); *Mills* v. *Habluetzel*, 456 U.S. 91, 99-102 (1982).

Numerous federal and state courts have recently recognized that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny based on the following four-factor test: (1) whether the class has been historically "subjected to discrimination"; (2) whether the class is "a minority or politically powerless"; (3) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society" and (4) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Windsor* v. *U.S.*, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)), *aff'd Windsor*, 133 S. Ct. 2675; *accord*, *e.g.*, *Windsor*, 699 F.3d at 181-85. It "is easy to conclude that homosexuals have suffered a history of discrimination," *Windsor*, 699 F.3d at 182, and, likewise, that gays and lesbians historically did and still do lack power in the political process, *id*. at 184; *see also Pedersen* v. *Office of Pers. Mngmt.*, 881 F. Supp. 2d 294, 314-15 (D.Conn. 2012) (recounting history of discrimination against homosexuals). There is no legitimate opposition to the scientific consensus that homosexuality is both immutable, *see Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921,966 (N.D.Cal. 2010), and bears no relation to an individual's ability to contribute to society or, in particular, "the characteristics relevant to the ability to form successful marital unions," *Perry*, 704 F. Supp. 2d at 967.

Classifications that disadvantage a suspect class are "treated as presumptively invidious" and must be "precisely tailored to serve a compelling government interest" to pass constitutional muster. *Plyler* v. *Doe*, 457 U.S. 202, 216-17 (1982). While the Fourth Circuit has previously subjected claims of sexual orientation discrimination to rational basis review, *see Veney* v. *Wyche*, 293 F.3d 726, 732-34 (4th Cir. 2002) and *Thomasson* v. *Perry*, 80 F.3d 915, 928

(4th Cir. 1996), these decisions predate *Windsor* and *Lawrence v. Texas*. *See generally Windsor*, 133 S. Ct. 2675; *Lawrence* v. *Texas,* 539 U.S. 558 (2003) (overturning *Bowers* v. *Hardwick,* 478 U.S. 186 (1986), the then-controlling Supreme Court authority relating to sexual orientation discrimination). *Veney* and *Thomasson* rely on outdated Supreme Court precedent and are inconsistent with both more recent Supreme Court jurisprudence and the well-reasoned decisions from other jurisdictions.

As set forth in Section II.B.3, *infra*, denigrating and refusing to recognize same-sex marriages fails to pass any level of constitutional scrutiny.

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

1. The Marriage Ban Violates Plaintiffs' Fundamental Rights

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Supreme Court repeatedly has made clear that the "right to marry is of fundamental importance for *all* individuals," even those who have not traditionally been perceived as eligible to exercise that right. *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (emphasis added); *see also id.* at 388-90 (state cannot impose unreasonable barriers on remarriage); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971) (same). The reasoning of these cases applies with equal force to claims of the related right to recognition of a marriage. *See Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013) (plaintiffs' right to remain married, "a fundamental liberty interest appropriately protected by the Due Process Clause," was violated by anti-recognition laws).

As the Supreme Court recently explained in *Windsor*:

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

133 S. Ct. at 2692 (quoting Lawrence, 539 U.S. at 567); *see Obergefell* v. *Kasich*, 2013 WL 3814262, at *6-7 (S.D. Ohio July 22, 2013) (rejecting argument that plaintiffs had asserted a new right—there, the right to the description of one's marital status on a death certificate).

Plaintiffs seek to have their marriages recognized to express (and have their community recognize and celebrate) the nature, depth, and quality of their lifelong commitment to each other in the way that they, their family, friends, and society best understand. (Compl. ¶¶ 109-110, 137, 141-3.) They wish to protect each other, and their children, in a host of tangible ways through a marriage recognized by their community. (Compl. ¶¶ 111-112(a)-(d), 115, 124-129, 138-139(a)-(e), 146-147(a)-(e), 149-163.) Above all, Plaintiffs love each other and wish to spend the rest of their lives publicly committed to each other in a relationship recognized and respected by the State. (Compl. ¶¶ 110, 133, 141.) They seek urgent relief from this Court because of their fear that due to ill-health, they may not be able to do so in their lifetimes. By denying Plaintiffs this recognition, North Carolina denies their relationships the same status and dignity afforded to heterosexual citizens and the benefits of marriage—legal, social, and financial.[4]

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[4] *See, e.g.*, *Turner* v. *Safley*, 482 U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock)."); *Massachusetts* v. U.S. *Dep't of Health & Human Servs.*, 682 F.3d 1, 11

As the Supreme Court recognized in the context of DOMA, North Carolina's statute "tells those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor*, 133 S. Ct. at 2694. By denying Plaintiffs' recognition of their marriages, North Carolina discriminates against Plaintiffs and impinges on their right to marriage and to enjoy the benefits that legal recognition of marriage confers. *See Obergefell*, 962 F. Supp. 2d at 978. Because North Carolina's failure to recognize Plaintiffs' marriages causes North Carolina to "intrud[e] into—and in fact eras[e]—Plaintiffs' already-established marital and family relations," the marriage ban infringes Plaintiffs' liberty interests protected by the Due Process Clause and must face heightened scrutiny. *Id.* at 979.

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

"The liberty interest . . . of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *see Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503-6 (1977) (recognizing fundamental right to family integrity). The Fourth Circuit has recognized that the constitutional right to familial liberty can be implicated both by "governmental attempts to interfere with particularly intimate family decisions," and "government actions that sever, alter, or otherwise affect the parent/child relationship." *Hodge* v. *Jones*, 31 F.3d 157, 163 (4th Cir. 1994). North Carolina's adoption laws do both by refusing to recognize—and interfering with—Plaintiffs' decisions

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(1st Cir. 2012) ("Loss of survivor's social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans.").

regarding the care of their children. (Mejia Aff. ¶¶ 18-27, Ginter-Mejia Aff. ¶¶ 17-22.) Along with North Carolina's marriage ban, prohibiting second parent adoption "humiliates tens of thousands of children now being raised by same-sex couples . . . [and] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct at 2694.

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

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

In summarizing the landscape of the last half-century of Supreme Court decisions, including *Windsor*, one district court aptly noted: "Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled." *Bourke*, 2014 WL 556729, at *12. Other district courts have agreed that the

"rising tide of persuasive post-*Windsor* federal caselaw" requires "no leap to conclude that the plaintiffs here are likely to succeed in their challenge to [the state's] Anti-Recognition Laws." *Tanco*, 2014 WL 997525, at *6. In fact, to Plaintiffs' knowledge, following the Supreme Court's decision in *Windsor* no lower federal court has upheld a same-sex marriage prohibition. In each case, the court faced laws causing deprivations and indignities identical to those caused by North Carolina's and concluded that they fail (or are likely to fail) constitutional scrutiny.[5]

To the extent the State seeks to defend the ban as advancing the welfare of minors, that argument is fundamentally flawed. *See Bishop*, 962 F. Supp. 2d at 1291-95 (the "exclusion of same-sex couples [from marriage] is 'so attenuated' from any of [the asserted] goals that the exclusion cannot survive rational basis review")(internal citations omitted); *Kitchen*, 961 F. Supp. 2d at 1215 (finding State's "arguments as unpersuasive as the Supreme Court found them [in the context of interracial marriage] fifty years ago" and that "the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens"). Children raised by same-sex couples in North Carolina—like J.G.-M.—are damaged by the refusal to respect their parents' relationship, not helped. *Cf. Perry,* 704 F. Supp. 2d at 1000 ("The only rational conclusion in light of the evidence is that [California's marriage ban] makes it less likely that California children will be raised in stable households" by preventing same-sex couples from marrying). And multiple courts have found that even assuming some connection between a marriage ban and whether or not children are raised by same-sex couples, there is

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

absolutely no scientific basis to conclude that gay and lesbian parents provide an inferior environment for children. *See DeBoer*, 2014 WL 1100794, at *2-10, *12 (rejecting the "small number of outlier studies in support of the optimal child-rearing rationale"); *Golinski* v. *U.S. Off. Of Pers. Mgmt*, 824 F. Supp. 2d 968, 991 (N.D.Cal. 2012) ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.").

Because North Carolina's marriage ban, like those rejected by other post-*Windsor* courts, is clearly drawn solely for "the purpose of disadvantaging the group burdened by the law," *Romer,* 517 U.S. at 633, and Defendants can provide no legitimate state interests that are served by the laws, Plaintiffs are likely to succeed in demonstrating that the laws cannot pass constitutional muster. *See Obergefell*, 962 F. Supp. 2d at 996 ("Even if it were possible to hypothesize regarding a rational connection between Ohio's marriage recognition bans and some legitimate governmental interest, *no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans… to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community*.") (emphasis in the original).

III. Plaintiffs Meet the Requirements to Obtain Preliminary Relief.

A. Irreparable Harm - Denial of a Fundamental Right Constitutes Irreparable Harm.

Fourth Circuit law has confirmed that deprivation of a constitutional freedom, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club* v. *Miller*, 637 F.3d 291, 302 (4th Cir. 2011) (holding violation of First Amendment constituted *per se* irreparable injury) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)); *Henry* v. *Greenville Airport Comm'n*, 284 F.2d

631, 633 (4th Cir. 1960) (injunction must be granted "to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right").

Plaintiff couples have been in stable, loving relationships for decades. They are similarly situated in all relevant respects to different-sex couples whose validly contracted out-of-state marriages are recognized. But for the fact that they are same-sex couples, the state would regard their marriage as valid, a "differentiation [that] demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. One court explained recently:

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

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

Plaintiffs' Medical Conditions. In addition to the continuing harms set forth above, Dr. Berlin, Ms. Blackburn, and Ms. Mejia have serious, life-threatening medical issues that make it likely that they will suffer irreparable harm unless their motion for preliminary relief is granted. There would be no way to rectify the denial of their constitutional rights throughout their lives together because nothing can later compensate the damage done if the relationship is not ratified before one party passes. *See Obergefell* 2013 WL 3814262, at *7 ("Mr. Arthur's harm is irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away.").

B. Federal and State Benefits Attendant to Marriage and/or Adoption. In addition to the irreparable harms described above, Plaintiffs are currently being denied state and federal benefits and protections that cannot later be recouped. North Carolina's exclusion of same-sex couples from marriage deprives such couples from many legal protections available to married spouses, including benefits available under tax laws, inheritance laws, retirement benefits, and insurance laws and contracts. (Complaint ¶¶ 151 (a)-(q).); *see Windsor*, 133 S. Ct. at 2691 (a state's "definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities")(internal quotation marks and citation omitted). Even certain federal protections are available only to couples whose marriages are legally recognized by their home state. *See De Leon*, 2014 WL 715741, at *25.

These are real, present and not abstract concerns—in 2008, Ms. Mejia received a liver transplant following a coma induced by liver failure. (Mejia Aff. ¶ 13.) During the coma, and her extended stay at the hospital following the transplant and the numerous complications caused, Ms. Ginter-Mejia's state employer did not grant her a single day of sick leave to care for her wife. (Ginter-Mejia Aff. ¶ 20.) Moreover, as a veteran, Ms. Mejia receives benefits because she is classified as 100% disabled, including death benefits and a pension for surviving spouses and children, as well as a college scholarship program. (Mejia Aff. ¶¶ 17-18.) If Ms. Mejia's relationships with her wife and son are not legally recognized before her death, they will never be eligible to recoup these benefits. (*Id.)* Depriving same-sex couples of the freedom to marry and adopt undermines those families' financial security and their ability to achieve life goals both as families and as individuals. *See, e.g., De Leon,* 2014 WL 715741, at *24-25

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

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

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

Conclusion

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

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