No. _____

IN THE

Supreme Court of the United States

PHIL BERGER, President Pro Tempore of the North Carolina Senate; THOM TILLIS, Speaker of the North Carolina House of Representatives,

Petitioners,

v.

MARCIE FISHER-BORNE, *et al.*,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

ROBERT D. POTTER, JR.
5821 Fairview Road
Suite 207
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Additional Counsel Listed on Inside Cover

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CENTER FOR CONST'L JURISPRUDENCE
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

Counsel for Petitioners

Additional Counsel:

NOEL H. JOHNSON
JOSEPH A. VANDERHULST
ACTRIGHT LEGAL FOUNDATION
209 West Main Street
Plainfield, IN 46168
(317) 203-5599
njohnson@actrightlegal.org
jvanderhulst@actrightlegal.org

QUESTIONS PRESENTED

In *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), the Fourth Circuit Court of Appeals held, in conflict with other federal courts and contrary to rulings by this Court, (1) that this Court's decision in *Baker v. Nelson* is not binding on the lower federal courts; (2) that a state's definition of marriage as a union between one man and one woman infringes a fundamental right to marry by same-sex couples and is therefore subject to strict scrutiny; and (3) that Virginia's long-standing definition of marriage as a union between one man and one woman was unconstitutional under that standard. This Court denied petitions for certiorari in the *Bostic* case as well as similar cases from the Seventh and Tenth Circuits on October 6, 2014.

Following denial of the petition for certiorari in *Bostic*, the district courts for the Middle and Western Districts of North Carolina held in three parallel cases that North Carolina's marriage laws were unconstitutional under the Fourth Circuit's binding precedent in *Bostic*. The Sixth Circuit then *upheld* the nearly identical marriage laws of Ohio, Michigan, Kentucky, and Tennessee, and petitions for certiorari in each of those cases, as well as a petition for certiorari before judgment from a case pending in the Fifth Circuit on appeal from the decision of the Louisiana District Court upholding Louisiana's marriage law, are currently pending before this Court.

This petition presents the same issue as is presented in each of those pending petitions, namely:

1) Whether a State's decision to retain a man-woman definition of marriage is, contrary to

this Court's summary holding in *Baker v. Nelson*, 409 U.S. 810 (1972), prohibited by the Fourteenth Amendment of the Constitution?

In addition, this case presents the following additional issues:

2) Whether the Fourth Circuit's holding in *Bostic* that a State's definition of marriage as a union of a man and a woman infringes a fundamental right to marry by same-sex couples and is therefore subject to strict scrutiny—a holding that also implicates long-standing definitional restrictions such as age, number, and consanguinity—is erroneous and an impermissible intrusion on the authority of States over domestic relations law that this Court recognized and reaffirmed in *United States v. Windsor*, 133 S. Ct. 2675 (2013)?

3) Whether, even assuming strict scrutiny applies, the State's definition of marriage as a core institution between one man and one woman is constitutional because it is as narrowly tailored as privacy concerns permit to further the State's compelling interest in fostering the optimal family structure for the rearing of children that result from the unique biological complementarity of men and women?

PARTIES TO THE PROCEEDING

Petitioners: Phil Berger is the President Pro Tempore of the North Carolina Senate. Thom Tillis was the Speaker of the North Carolina House of Representatives.[1] Their status as intervenors to defend North Carolina law is authorized by N.C. Gen. Stat. § 1-72.2. They were intervenor-defendants in the Middle District cases, *Fisher-Borne v. Smith*, No. 12-00589, and *Gerber v. Cooper*, No. 14-00299, and prospective intervenor-defendants in the Western District case, *General Synod v. Cooper*, No. 14-00213. They are appellants in the lead case on appeal, *General Synod v. Tillis*, No. 14-2555, and appellants/cross-appellees in the consolidated appeals, *Fisher-Borne v. Tillis*, Nos. 14-2228 and 14-2278, and *Gerber v. Tillis*, Nos. 14-2230 and 14-2279.

Respondents: Marcie Fisher-Borne, for herself and as guardian ad litem for M.F.-B., a minor; Chantelle Fisher-Borne, for herself and as guardian ad litem for E.F.-B., a minor; Terri Beck; Leslie Zanaglio, for herself and as guardian ad litem for T.B.Z. and D.B.Z., both minors; Shana Carignan; Megan Parker, for herself and as guardian ad litem for J.C., a minor; Leigh Smith; Crystal Hendrix, for herself and as guardian ad litem for J.H.-S., a minor; Dana Draa; Lee Knight Caffery, for herself and a guardian ad litem for

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[1] Speaker Tillis was elected to the U.S. Senate on November 4, 2014, and sworn into office on January 6, 2015. His successor, Representative Tim Moore, has been designated but will not be formally elected as Speaker until January 14, 2015, at which time he will be automatically substituted in as Petitioner pursuant to Rule 35.3. In the interim, Representative Paul Stam is the Speaker Pro Tempore.

M.M.C-D. and M.L.C.-D., both minors; Shawn Long; Craig Johnson, for himself and as guardian ad litem for I.J.-L., a minor, were plaintiffs in *Fisher-Borne v. Smith*, No. 12-00589, and are appellees/cross-appellants in *Fisher-Borne v. Tillis*, Nos. 14-2228 and 14-2278.

Ellen W. Gerber; Pearl Berlin; Lyn Mccoy; Jane Blackburn; Esmeralda Mejia; Christina Ginter-Mejia, for herself and as guardian ad litem for J.G.-M., a minor, were plaintiffs in *Gerber v. Cooper*, No. 14-00299, and are appellees/cross-appellants in *Gerber v. Tillis*, Nos. 14-2230 and 14-2279.

John W. Smith, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; The Honorable David L. Churchill, in his official capacity as Clerk of the Superior Court for Guilford County; The Honorable Archie L. Smith, in his official capacity as Clerk of the Superior Court for Durham County; Willie Covington, in his official capacity as Register of Deeds for Durham County; and Jeff Thigpin, in his official capacity as the Register of Deeds for Guilford County, were defendants, and Roy Cooper, appearing in a Representative capacity on behalf of State of North Carolina, was intervenor defendant, in *Fisher-Borne v. Smith*, No. 12-00589.

Jeff Thigpin, in his official capacity as the Register of Deeds for Guilford County; John W. Smith, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; Donna Hicks Spencer, in her official capacity as the Register of Deeds for Catawba County; and Al Jean Bogle were defendants, and Roy Cooper, appearing in a Repre-

sentative capacity on behalf of State of North Carolina, was intervenor defendant, in *Gerber v. Cooper*, No. 14-00299.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioners, the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives, respectfully petition for a writ of certiorari before judgment in the consolidated cases from the Middle District of North Carolina[1] currently pending on appeal in the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the district court granting the *Fisher-Borne* and *Gerber* plaintiffs' respective motions for judgment on the pleadings and holding North Carolina's marriage laws unconstitutional is published at 14 F.Supp.3d 695 and reprinted in the Appendix ("Pet.App.") at 1a-7a. The judgment in the two cases is reprinted at 8a-10a. The order of the district court granting intervention of right is published at 14 F.Supp.3d 699 and reprinted at 11a-29a.

STATEMENT OF JURISDICTION

The judgment of the district court below was entered on October 14, 2014 (amended October 15, 2014). Pet.App. 8a. Petitioners' notices of appeal were timely filed on November 6, 2014. Pet.App. 30a, 33a. The consolidated appeals and cross-appeals

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[1] The Fourth Circuit has also consolidated a third marriage case, from the Western District of North Carolina, but at this time the only issue in that appeal is whether the district court improperly denied intervention. Petitioners are not seeking a writ of certiorari before judgment in that case.

were docketed in the Fourth Circuit in *Fisher-Borne, et al. v. Tillis, et al.*, Nos. 14-2228, 14-2230, 14-2278, and 14-2279, and then further consolidated with a parallel case from the Western District of North Carolina, *General Synod of the United Church of Christ, et al. v. Tillis, et al.*, No. 14-2225.[2] This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e). The Court of Appeals has jurisdiction under 28 U.S.C. § 1291, and jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina Const. art. XIV, § 6

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.

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[2] The district court orders in *General Synod* granting its own motion for judgment on the pleadings and denying intervention were entered October 10, 2014. Prospective Intervenors filed a timely notice of appeal from the denial of intervention and a protective notice of appeal on the merits on November 7, 2014. Pet.App.36a.

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.

STATEMENT OF THE CASE

Plaintiffs in *Fisher-Borne* filed their complaint on June 13, 2012, against various North Carolina officials, ultimately alleging in their First Amended Complaint that North Carolina's constitutional and statutory laws limiting marriage to one man and one woman were unconstitutional. Plaintiffs in *Gerber* filed their complaint on April 9, 2014, likewise alleging that North Carolina's refusal to recognize their same-sex marriages performed in other states was unconstitutional.

Proceedings in both cases were stayed pending resolution of the petitions for certiorari to the Fourth Circuit that had been filed in a similar case out of Virginia, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), and this Court's issuance of a stay in that case, *McQuigg v. Bostic*, No. 14A196, 135 S. Ct. 32 (Aug. 20, 2014).

Two days after this Court denied the petitions for certiorari in *Bostic*, the district court on October 8, 2014, lifted the stay, directed Defendants to file answers to the respective complaints, and invited Plaintiffs to file any additional motions (without briefing) they deemed necessary to bring the case to conclusion in light of the parties' agreement that *Bostic* required entry of judgment in favor of Plaintiffs.

The very next day—October 9, 2014—Petitioners Thom Tillis, then-Speaker of the North Carolina

House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, moved to intervene as Defendants in both cases to defend North Carolina's marriage laws, pursuant to Federal Rule of Civil Procedure 24 and a provision of North Carolina law expressly authorizing such intervention, N.C. Gen. Stat. § 1-72.2.

After determining that the Attorney General of North Carolina did "not intend to appeal," the district court on October 14, 2014, granted intervention as of right for the limited purposes of taking an appeal. It specifically ordered that "no further briefing will be permitted with respect to the pending Motion for Judgment on the Pleadings," and that "no further pleadings from [Intervenors] will be permitted." Pet.App. 24a, 28a-29a.

The district court then issued an opinion and judgment granting Plaintiffs' respective motions for judgment on the pleadings, declaring that, in light of the Fourth Circuit's binding precedent in *Bostic*, North Carolina's marriage laws were unconstitutional, and enjoining their enforcement.

Intervenors filed timely notices of appeal from the judgments in both cases.[3] Pet.App. 30a, 33a. The Fourth Circuit consolidated the two cases, and then further consolidated them with *General Synod v. Cooper*, No. 14-2225 (4th Cir., filed Nov. 6, 2014), a parallel appeal from a case out of the Western District

[3] Plaintiffs filed notices of cross-appeal, challenging the district court's order granting intervention.

of North Carolina likewise declaring North Carolina's marriage laws unconstitutional.[4]

INTRODUCTION

Throughout most of the recorded history of western civilization, the institution of marriage has been defined by several key components, all of which are tied to the profoundly important biological differences between men and women. The institution is centered on children, which man-woman couples are uniquely

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[4] Tillis and Berger, petitioners here, also sought, unsuccessfully, to intervene in the *General Synod* case. Although the district court held that: 1) the motion to intervene was timely; 2) that Tillis and Berger had a "significantly protectable" interest in the litigation; and 3) that "there exists a real and present potential for impairment" of that interest, it held that Tillis and Berger had not demonstrated inadequacy of representation by the existing defendants because the existing defendants had not "given up the right to appeal." Tillis and Berger have appealed from the denial of intervention, Pet.App. 36a, and the existing defendants subsequently failed to notice an appeal from the decision on the merits, a failure which can qualify as inadequacy of representation, as several courts have held or recognized. *See, e.g.*, *Ross v. Marshall*, 426 F.3d 745, 761 (5th Cir. 2005); *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980). But unless they are allowed to intervene, Tillis and Berger cannot appeal from the merits determination. Accordingly, they are not petitioning for a writ of certiorari before judgment in the *General Synod* case. Nevertheless, they have filed a protective notice of appeal from the merits judgment to preserve jurisdiction. Pet.App. 37a (citing *Brennan v. Silvergate Dist. Lodge No. 50*, 503 F.2d 800, 803 (9th Cir. 1974); *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997); and 15A Charles Alan Wright, *et al.*, Federal Practice and Procedure § 3902.1, at 113 (2d ed. 1991)).

capable of producing. It is designed to provide a structure by which to care for any children that may be created either deliberately or accidentally—again, something unique to man-woman couples. It guarantees wherever possible that the family structure in which such children are raised will have both a "masculine" and a "feminine" aspect. It is ideally monogamous, exclusive, and permanent, all of which reduce legal and social confusion about parenthood and parental responsibility.

To be sure, some societies have at one time or another deviated from one or more of these core components, but they have done so with often disastrous social consequences. Polygamous marriage was more common in ancient civilizations than it is today, for example, and it is still practiced in some parts of the world. But as former Chief Rabbi of the British Commonwealth Rabbi Lord Jonathan Sacks recently described at the International Interreligious Colloquium on the Complementarity of Man and Woman held at the Vatican in November 2014, the move from polygamous to monogamous marriage was one of the defining moments of western civilization. It repudiated relationships that were at their heart inherently unequal—paternalistically unequal between the husband and his multiple wives, and socially unequal between a man with many wives and those many "lesser" men who were unable to find even one wife as a result.[5]

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[5] Rabbi Sacks's address, as well as addresses from Pope Francis, head of the Roman Catholic Church; President Henry Eyring, First Counselor in the First Presidency of The Church of Jesus Christ of Latter-day Saints; Manmohan Singh of the World Sikh

Nearly fifty years ago in this country, many States embarked upon a grand experiment to eliminate another of the core components of the institution of marriage, namely, its permanence, by replacing the regime in which one could leave the marital relationship only for significant cause with one in which divorce could be easily obtained without demonstration of fault. As was predicted by some lonely voices at the time,[6] the consequences of the move to no-fault divorce have been devastating, to society as a whole but most profoundly to women and children.[7]

The current push to redefine marriage to encompass same-sex relationships would remove several of

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Council; Abt. Nissho Takeuchi, Sohjoh, Nichiren School Buddhism Chairperson; and several other world religious and lay leaders, all reaffirming the importance of the biological complementarity of men and women in marriage, are available at http://humanum.it/en/videos/#colloquium.

[6] *See, e.g.*, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 Stan. L. & Pol'y Rev. 135, 150 (2005) (describing the unsuccessful effort to have the Uniform Marriage and Divorce Act make dissolution of marriages more difficult when minor children were present) (citing 1 The Divorce Law Debates: Transcripts from the 1965-1973 Annual Meetings of the Uniform Law Commission 94 (Judy Parejko ed., Aug. 7, 1969)).

[7] *See*, *e.g.*, *id*. at 149-50 ("most children of divorce … generally … experience greater emotional, financial, and other forms of distress than children in intact families, and over a longer period of time") (citing, *e.g.*, Ronald L. Simons et al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared With Those in Two Parent Families*, 61 J. Marr. & Fam. 1020 (1999); Judith Wallerstein, *et al.*, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* 299-300 (2000)); *see also* Allen M. Parkman, *Good Intentions Gone Awry: No-Fault Divorce and the American Family* 93-99 (2000).

the other key components of the institution of marriage. It would remove biological complementarity, therefore depriving a significant number of children of being raised by both of their biological parents and removing them from a structured household with both masculine and feminine influences. Indeed, it would make the procreation of children secondary to the relationship, not its purpose, thereby shifting the institution from one that is child-centered to one that is adult centered. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). And as early results demonstrate from the Netherlands, which redefined marriage through legislation to include same-sex relationships roughly a decade before any jurisdiction in the United States did, such a redefinition weakens the cultural draw for at least some heterosexual couples to marry, thereby placing at much higher risk of behavioral, psychological, and physiological problems tens of thousands of children who would as a result not be raised by their biological parents in a stable marital relationship.

Preserving "the natural family" as "the environment where" children are "raise[d] and nurture[d] . . . in the healthiest possible way," because "statistics overwhelmingly say" that "there [is no] better environment for children than a low-conflict relationship with a mother and a father," was the explicit purpose advanced by the floor manager of the bill proposing North Carolina's marriage amendment.[8] As described in Section III below, that age-old intuition has

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[8] *See North Carolina Marriage Protection Amendment: Senate Debate on S.B. 514*, (Sept. 13, 2011) (floor Statement of Senator Dan Soucek, Floor Manager for S.B. 514).

been repeatedly confirmed by social science data, and it is based on the fact that at least one of the adults in a same-sex household is not the biological parent, not on any claim that homosexuals are less capable at parenting.

There is therefore a compelling case for States to adhere to the ageless wisdom of the importance to children and to society of biological marriage. Yet the Fourth Circuit's decision in *Bostic*, which the district court in the cases *sub judice* treated as binding precedent, declined to follow this Court's own binding precedent in *Baker v. Nelson*, rejected this Court's methodology for determining the existence of new fundamental rights, and then, having found a fundamental right to same-sex marriage, held that the civilizationally important interests of the State were either not compelling enough or not furthered by sufficiently narrowly-tailored state marriage laws to meet the stringent requirements of strict scrutiny. Every one of those errors warrants review by this Court, particularly when the policy judgments of the State that have been set aside address such a profoundly important and beneficial institution as marriage.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Determination in *Bostic* that this Court's Summary Disposition in *Baker v. Nelson* Is No Longer Binding on the Lower Courts, Ignores Key Language from *Hicks* and Conflicts with Decisions from the First and Sixth Circuits.

A. *Baker v. Nelson* is binding precedent for the lower courts until this Court says otherwise.

Governing Fourth Circuit precedent in *Bostic*, which the district court here felt compelled to follow, holds that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), is no longer binding on the lower courts. The Fourth Circuit did recognize that summary dispositions such as *Baker* "qualify as 'votes on the merits of a case'" that "'prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided.'" *Bostic*, 760 F.3d, at 373 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), and *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). And it further recognized that *Baker* and *Bostic* "address[ed] the same precise issues." *Id.* But the Fourth Circuit nevertheless held that *Baker* had lost its "binding force" "*regardless of whether the Court explicitly overrules the case*," because, in its view, "doctrinal developments" had undermined *Baker*'s precedential value. *Id.*, at 373-75 (quoting *Hicks*, 422 U.S., at 344 (quoting in turn *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)) (internal quotation marks omitted by Fourth Circuit, emphasis added).

Hicks does not stand for the proposition asserted by the Fourth Circuit that the lower courts are free to disregard binding precedent of this Court if, *in their view*, "doctrinal developments" have undermined the precedent. Granted, the phrase from which the words, "doctrinal developments," was pulled could support such a proposition if it stood alone. "[I]f the Court has branded a question as unsubstantial," the *Hicks* Court noted, "it remains so except when doctrinal developments indicate otherwise." *Hicks*, 422 U.S., at 344. But that phrase does not stand alone.

At the outset of the paragraph in which that phrase appears, the Court held: "We agree with appellants that the District Court erred in holding that it could disregard the decision in *Miller* [*v. California,* 418 U.S. 915 (1974)]." *Id.*, at 343-44. *Miller*, like the decision in *Baker*, was a summary dismissal following an appeal under then-28 U.S.C. § 1257(2) that the Court "had no discretion to refuse" to adjudicate, one which resulted in a merits determination that "the constitutional challenge . . . was not a substantial one." *Id.*, at 344. This Court then specifically held that "[t]he three-judge court was not free to disregard this pronouncement." *Id.*

Even more directly, the phrase from *Hicks* upon which the Fourth Circuit relied is part of a larger sentence in which this Court made clear "that the lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" *Id.*, at 344-45 (quoting with approval *Doe v. Hodgson*, 478 F.2d 537, 539 (2nd Cir. 1973)). The full passage reads:

> The District Court should have followed the Second Circuit's advice, first, in *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n. 3 (1967), that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise"; and, later, in *Doe v. Hodgson*, 478 F.2d 537, 539, cert. denied, sub nom. *Doe v. Brennan*, 414 U.S. 1096 (1973),

> that the lower courts are bound by summary decisions by this Court "until such time as the Court informs [them] that [they] are not."

Id. (brackets in original). The Fourth Circuit simply ignored each of these clear admonitions from this Court—that it is error for the lower courts to "disregard" summary dispositions of this Court; that the lower courts are "not free to disregard" pronouncements of this Court that a particular constitutional claim is not a substantial one; and that the lower courts are "bound" by such decisions "until such time as [this] Court informs [them] that [they] are not."

Rather than following this Court's "advice," the Fourth Circuit embarked upon its own review of this Court's Due Process and Equal Protection decisions since *Baker* to determine whether, *in its view*, *Baker* was no longer binding. None of the cases it considered even mention, much less overrule, *Baker*, so no credible argument could be advanced that this Court has "inform[ed]" the lower courts that *Baker* is no longer binding. Instead, the Fourth Circuit actually used the lack of reference to *Baker* in this Court's decision in *Windsor*—which did not involve the "precise issue" that was decided in *Baker*—as evidence that this Court had "abandoned" *Baker*. That is far short of the direction from this Court that *Hicks* requires before a lower court can disregard binding precedent.

B. The Fourth Circuit's rejection of *Baker* as binding authority is in conflict with decisions from the First, Sixth, and Eighth Circuits, though in agreement with decisions of the Seventh, Ninth, and Tenth Circuits.

Unfortunately, the Fourth Circuit is not alone in its "disregard" for this Court's binding precedent in *Baker*. It claimed, albeit erroneously, that "[e]very federal court to consider this issue since" this Court decided *Windsor* "has reached the same conclusion." *Bostic*, 760 F.3d, at 373 (citing two cases from the Tenth Circuit, *Bishop v. Smith*, 760 F.3d 1070, 1078–81 (10th Cir. 2014) and *Kitchen v. Herbert*, 755 F.3d 1193, 1204–08 (10th Cir. 2014), as well as nine district court decisions in other circuits); *but see Merritt v. Attorney Gen.*, No. CIV.A. 13-00215-BAJ, 2013 WL 6044329, at *2 (M.D. La. Nov. 14, 2013) (citing *Baker* for its holding that "the Constitution does not require States to permit same-sex marriages"). Since *Bostic* was decided, the Seventh Circuit has joined the ranks of courts in "disregard" of *Baker*, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), as have several additional district courts in other circuits. The Ninth Circuit, which in *Perry v. Brown* distinguished *Baker* rather than disregarding it, likewise disregarded *Baker* in its more recent same-sex marriage decision, *Latta v. Otter*. *Compare Perry v. Brown*, 671 F.3d 1052, 1082 n.14 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *with Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

On the other hand, the Sixth Circuit, as well as the district court in Puerto Rico (following pre-*Windsor* First Circuit precedent), have recognized post-*Windsor* and post-*Bostic*, like the First and Eighth Circuits recognized pre-*Windsor*, that *Baker* remains valid precedent that is binding on the lower courts. *DeBoer v. Snyder*, 772 F.3d 388, 399-402 (6th Cir. 2014); *Conde–Vidal v. Garcia–Padilla*, No. 14-1253-PG,

2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012); *McConnell v. United States*, 188 F.App'x 540, 542 (8th Cir. 2006); *see also Robicheaux v. Caldwell*, 2 F.Supp.3d 910, 922 n.14 (E.D.La. 2014) (declining to address whether *Baker* was binding because defendants in the case did not contend that it was, but nevertheless citing *Merritt* with approval).[9]

The Sixth Circuit's discussion of *Baker* is particularly persuasive because it considered the relevant passages from *Hicks* in their entirety, not selectively as the Fourth Circuit had done in *Bostic*. While a summary decision such as *Baker* "does not bind the Supreme Court in later cases," the Sixth Circuit recognized, "it does confine lower federal courts in later cases." *DeBoer*, 772 F.3d, at 400. "It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future," it added. "Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions 'until such time as the Court informs [us] that [we] are not.'" *Id.* (quoting *Hicks*, 422 U.S. at 345). Because this Court "has yet to inform" the lower courts that *Baker* is no longer

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[9] In *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012), the Second Circuit held that *Baker* did not control both because the issue in that case, a constitutional challenge to the *federal* Defense of Marriage Act, was not the "precise issue" decided in *Baker* and because in its view subsequent doctrinal developments had undermined *Baker*. When it affirmed the Second Circuit's judgment in *Windsor*, this Court did not mention *Baker*, suggesting that the former rather than the latter was the proper reason why *Baker* did not control the outcome of the case.

controlling, the lower courts "have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker*" themselves. *Id.*

Rejecting the argument accepted by *Bostic* and other courts that "doctrinal developments" authorized lower courts "to cast *Baker* aside," the Sixth Circuit relied not just on the full discussion in *Hicks*, but on this Court's decisions in *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976), *Mandel*, 432 U.S., at 176, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), and *Agostini v. Felton*, 521 U.S. 203, 237 (1997), as well. *DeBoer*, 772 F.3d, at 401. This Court "has also told [the lower courts] not to ignore its decisions even when they are in tension with a new line of cases," the Sixth Circuit noted. "'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" *Id.* (quoting *Rodriguez de Quijas*, 490 U.S. at 484).

The split between the First, Sixth, and Eighth Circuits, on the one hand, and the Fourth, Seventh, Ninth, and Tenth Circuits, on the other, about the binding force of *Baker* is alone sufficient to warrant this Court's review. *See* Rule 10(a) (considering certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (granting certiorari "to resolve disagreement among the courts of appeals on a question

of national importance"); *Fuller v. Oregon*, 417 U.S. 40, 42 (1974) (petition for certiorari granted "because of the importance of the question presented and the conflict of opinion on the constitutional question involved"). That the split is over the very authority of this Court to determine *for itself* when binding precedent is no longer binding on the lower courts makes review all the more critical. *See* Rule 10(c) (certiorari will be considered when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *see also* Rule 10(a) (certiorari will be considered when "a United States Court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"); Stephen M. Shapiro, *et al.*, *Supreme Court Practice* § 4.15, p. 276 (10th ed. 2013) ("Conflicts with Supreme Court authority . . . may demonstrate a 'departure' from 'the usual course of judicial proceedings'"); *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation"). Indeed, this Court has often summarily reversed decisions by the lower courts that fail to apply governing Supreme Court precedent. Shapiro, *et al.*, *Supreme Court Practice* § 4.5, p. 251 (citing, *e.g.*, *American Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012)).

II. The Fourth Circuit's Holding that Same-Sex Marriage Is a Fundamental Right Improperly Sidestepped this Court's Decision in *Glucksberg*, Widened an Existing Conflict Among the Circuit Courts, and Will Have Profound Consequences on State Marriage Laws.

A. The Fourth Circuit sidestepped this Court's directive in *Glucksberg* to provide "a careful description of the asserted fundamental liberty interest."

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), this Court set out the methodology that must be followed when confronting a claim for recognition of a new, unenumerated fundamental right. First, the Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.*, at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, the Court required "a 'careful description' of the asserted fundamental liberty interest" to determine whether the specific right so asserted was so deeply rooted as to be deemed fundamental. *Id.*, at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992); and *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 277-78 (1990)).

The *Glucksberg* Court expressly rejected the claim that the so-called "right to die" it had recognized in

Cruzan supported a right to assisted suicide. *Cruzan* was, the Court noted, "more precise," describing the right at issue as the "right [of competent persons] to refuse lifesaving hydration and nutrition." *Glucksberg*, 521 U.S., at 723 (quoting *Cruzan*, 497 U.S., at 279). In contrast, the specific "liberty" that the *Glucksberg* plaintiffs sought to have recognized as "specially protected by the Due Process Clause" was "a right to commit suicide which itself includes a right to assistance in doing so." *Id.* With respect to that specific "asserted right," the Court found not only that it had no place in the Nation's traditions, but that there was "a consistent and almost universal tradition that has long rejected the asserted right." *Id*.

In its *Bostic* ruling, the Fourth Circuit held that the methodology this Court required in *Glucksberg* for determining the existence of new fundamental rights "applies only when courts consider whether to recognize *new* fundamental rights," not whether to extend existing fundamental rights to new contexts. Since, in its view, the "fundamental right to marry" that was recognized by this Court in *Loving v. Virginia*, 388 U.S. 1 (1967), "encompasses the right to same-sex marriage," the Fourth Circuit held that the methodology required by *Glucksberg* was not required.

Contrary to the Fourth Circuit's conclusion, *Glucksberg* is directly on point. A "careful description" demonstrates that the right to marry has always included the man/woman-complementarity assumption, and it is that right, and that right alone, which is deeply rooted in our Nation's history and tradition. A "careful description" of the right sought below, on the other hand—a right to marry someone of the same sex—has, like the right asserted but rejected in

Glucksberg, not only had no place in the Nation's traditions, but there has been "a consistent and almost universal tradition that has long rejected the asserted right." *Glucksberg*, 521 U.S., at 723.

Moreover, the Fourth Circuit's end-run around *Glucksberg* cannot be squared with this Court's decision in *Baker v. Nelson*, which rejected the claim of a fundamental right to same-sex marriage just five years after *Loving v. Virginia* described the right to marry as fundamental. *See* Jurisdictional Statement at 3, *Baker v. Nelson*, No. 71-1027 (contending that Minnesota's marriage law "deprive[d] [a same-sex couple] of their liberty to marry . . . without due process of law under the Fourteenth Amendment"). The right recognized in *Loving*, as in every other Supreme Court case describing the right to marry as "fundamental," was premised on the unique connection to procreation that marriage between a man and a woman provides. *Loving* described marriage as "one of the 'basic civil rights of man, *fundamental to our very existence and survival*," a claim that is only true because of the institution's tie to procreation. *Loving*, 388 U.S., at 12 (emphasis added). *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942), cited in *Loving*, expressly connected marriage and procreation, stating, "Marriage and procreation are fundamental to the very existence and survival of the race."

This Court's recent decision in *Windsor* recognized this historical understanding of marriage. "The limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental." *Windsor*, 133 S. Ct. at 2689 (emphasis added); *accord id*. ("For marriage between a man and woman no doubt had been thought of by most people

as essential to the very definition of that term and to its role and function throughout the history of civilization").

Given the Fourth Circuit's disregard of the methodology required by *Glucksberg* and the intrusion on the policy-making authority of the States that flows from a "fundamental right" determination, certiorari is warranted. *See* Rule 10(c) (certiorari will be considered when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

B. There is a multifaceted conflict among the circuit courts about whether a State's man-woman definition of marriage must be subjected to heightened scrutiny.

The Fourth Circuit's determination that the right to marry someone of the same sex is a fundamental right, restrictions on which are subject to strict scrutiny, broadened a multifaceted conflict among the circuit courts. The Sixth Circuit's decision in *DeBoer* has now broadened that conflict even further.

Before the Fourth Circuit's decision in *Bostic*, only the Tenth Circuit had held that the right to marry someone of the same sex was a fundamental right protected by the Due Process Clause and subject to strict scrutiny. *Kitchen*, 755 F.3d, at 1193; *Bishop*, 760 F.3d, at 1070. The Ninth Circuit applied a less stringent but nevertheless heightened form of scrutiny in its most recent same-sex marriage case, based not on a fundamental right holding but on its conclusion that sexual orientation classifications warranted intermediate scrutiny under the Equal Protection Clause. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *cf. Baskin*,

766 F.3d, at 654, 656 (contending that such heightened scrutiny should apply, but holding that man-woman marriage laws were unconstitutional even under rational basis review).

In contrast to these "heightened scrutiny" cases, the Sixth Circuit applied rational basis review, rejecting both the claim that man-woman marriage violated a fundamental right of same-sex couples to marry and that sexual orientation was a suspect class warranting heightened scrutiny. The Sixth Circuit's holding that rational basis review applied followed a long line of cases from the courts of appeals declining to apply heightened scrutiny to sexual orientation classifications. *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).[10]

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[10] The rational basis review holdings in *High Tech Gays* and *Witt* from the Ninth Circuit have been supplanted by the subsequent *panel* decision in *Latta v. Otter*, despite the fact that under the Ninth Circuit's "law of the circuit" rule, only an en banc court

Except for the Sixth Circuit decision, all of the circuit court decisions applying mere rational basis review were issued before this Court's decision in *Windsor*, but *Windsor* did not claim to be changing the level of scrutiny applied in cases involving sexual orientation claims. In *Romer v. Evans*, 517 U.S. 620, 632 (1996), for example, this Court applied what it called a "conventional" rational basis review to a state classification based on sexual orientation, and in *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court employed the customary language of rational basis review in its decision invalidating Texas's anti-sodomy statute. *Windsor* relied on *Romer* in the only passage that even arguably concerned that standard of review it was applying: "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S., at 633); *see also id.*, at 2706 (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. . . . I would review this classification only for its rationality. . . . As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from

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can overrule a panel holding. *See, e.g.*, *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000). The same is true in the Seventh Circuit, to the extent that court's decision in *Baskin* is viewed as adopting a heightened scrutiny test, contrary to the panel holding in *Ben-Shalom*. *See Williams v. Chrans*, 50 F.3d 1356, 1358 (7th Cir. 1995).

rational-basis cases like *Moreno*."). To the extent that passage from *Windsor* can be read as applying a heightened form of scrutiny at all—a "careful consideration," as it were—it is limited to "discriminations of an unusual character," which in *Windsor* was the *federal* government intruding on state marriage laws. A *State's* decision to retain the definition of marriage that, until very recently, was universally recognized can hardly qualify as a "discrimination of an unusual character."

Nevertheless, given the disarray in the lower courts about even the basic threshold question of the applicable standard of review, certiorari is warranted.

C. Left in place, the Fourth Circuit's holding treating same-sex marriage as a fundamental right will have profound consequences for other longstanding limitations on marriage throughout the Fourth Circuit.

By expanding the "fundamental right to marry" beyond its historic confines to encompass instead an individual's "right to marry the person of his or her choice," *Bostic*, 760 F.3d, at 375, and "a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right," *id.*, at 376, the Fourth Circuit's holding in *Bostic* has also called into question a number of other, longstanding limitations on marriage that exist throughout the Fourth Circuit.

North Carolina, for example, has age, degree of consanguinity, and number restrictions on the "right to marry." It is a felony for more than two people to marry. N.C. Gen. Stat. § 14-183. Minors under the age of 14 may not marry at all, and minors between

the ages of 16 and 18 may marry only with the written consent of their parent or legal guardian. N.C. Gen. Stat. § 51-2. Minors between 14 and 16 may marry only if the female is pregnant or has given birth, or if the male is the putative father, and then only upon a judicial determination that the underage party is capable of assuming the responsibilities of marriage and that the marriage would serve his or her best interests. N.C. Gen. Stat. § 51-2.1. Fathers may not marry their daughters, mothers their sons, or sisters their brothers, even if both parties are consenting adults. N.C. Gen. Stat. § 51-3. Aunts and uncles may not marry their adult nephews and nieces, and double first cousins are likewise barred from marrying each other. *Id.*; *see also* N.C. Gen. Stat. § 14-178 (making it a felony for a person to engage in "carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece"). Each of the States in the Fourth Circuit have similar restrictions. *See, e.g.*, S.C. Code § 20-1-10 (consanguinity restrictions); Va. Code § 20-48 (age restrictions); Md. Code, Fam. Law § 2-201 (limiting marriage to "two").

If the Fourth Circuit's broad "fundamental right to marry" holding in *Bostic* stands, the State would have to prove that it has a documented compelling interest for each of these restrictions. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (noting that, under strict scrutiny, the government must rely on the law's "actual purpose" rather than hypothetical justifications). And even if the State had thought to document at the

time the restriction was adopted an interest compelling enough to meet with a court's approval, it would also have to demonstrate that the restriction is narrowly tailored to further that interest.

North Carolina's broad-based age restriction will probably not survive, for example. If the State's compelling interest in having such a restriction is in ensuring that only individuals of sufficient maturity may marry, the restriction is both over- and under-inclusive. Some girls have been deemed mature enough to make a unilateral decision to have an abortion even early in their teenage years, *see, e.g. Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 511 (1990), so surely they must be mature enough to marry. Others may not be mature enough to marry until well beyond their teenage years. That imperfect fit would likely render North Carolina's age restriction unconstitutional under strict scrutiny.

So, too, with the restrictions on consanguinity. They are probably not narrowly tailored enough to further the State's compelling interest in avoiding the genetic defects that can result from incestuous sexual relationships, given modern genetic diagnostic tools. And it is hard to see how North Carolina's limitation on marriage as between only two people even gets past the "compelling interest" hurdle, given the Fourth Circuit's reliance on such language as "the right to marry is an expansive liberty interest that may stretch to accommodate changing social norms," "the right to marry is a matter of 'freedom of choice,'" and "the right to make decisions regarding their personal relationships." *Bostic*, 760 F.3d, at 376-77. Indeed, the Fourth Circuit's expansive view could not have been more clear: "If courts limited the right to

marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed." *Id.*, at 377.[11]

The fact that the Fourth Circuit now has as governing precedent a ruling with such profound consequences on longstanding state marriage laws is another reason for this Court to grant the writ of certiorari in this case.

III. Whether a State's Man-Woman Definition of Marriage Is Sufficiently Tailored to Advance the State's Legitimate, Even Compelling Interest in Encouraging the Optimal Two-Biological Parent Family Structure for the Procreation and Rearing of Children, Is Itself an Important Issue That Has Not Been Decided by this Court.

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[11] The Fourth Circuit, apparently recognizing the implications of its broad holding, attempted to forestall this slippery slope. "Of course, [b]y reaffirming the fundamental character of the right to marry," it noted, "we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Bostic*, 760 F.3d at 377 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)). But the very next line in *Zablocki* demonstrates the futility of the Fourth Circuit's attempt to limit the impact of its fundamental rights holding: "To the contrary, reasonable regulations *that do not significantly interfere with decisions to enter into the marital relationship* may legitimately be imposed. *Zablocki*, 434 U.S. at 386-87 (citing *Califano v. Jobst*, 434 U.S. 47, 56 n.12 (1977) (emphasis added). Because each of the restrictions cited above *do* "significantly interfere with decisions to enter into the marital relationship," they are susceptible to challenge and likely to fall under *Bostic*'s holding.

Preserving "the natural family" as "the fundamental, time-tested building block of society" because it has "been shown throughout history, across cultures, across religion to be the environment where we raise and nurture children in the healthiest possible way," was the explicit purpose advanced by Senator Soucek, the floor manager of the bill proposing North Carolina's marriage amendment. This long-standing view is also confirmed by "statistics," Senator Soucek added, which "overwhelmingly say" that "there [is no] better environment for children than a low-conflict relationship with a mother and a father."[12]

The bill's sponsor, Senator Forrester, elaborated on the importance of male-female complementary in marriage. "Marriage is a foundation and institution in our society that is based on the complementary male and female union," he stated. "This provides or creates a wide variety of benefits for individuals and society that no other family form can replicate." "Moms and Dads are not interchangeable. Two men do not make a mom, two moms do not make a dad. Children need both a father and a mother."[13]

These views echo similar views expressed fifteen years earlier when the General Assembly passed the statute prohibiting North Carolina from recognizing same-sex marriages performed outside of North Carolina. As one of the sponsors of the bill stated during

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[12] *See North Carolina Marriage Protection Amendment: Senate Debate on S.B. 514* (N.C. Sept. 13, 2011) (floor statement of Senator Dan Soucek, Floor Manager for S.B. 514).

[13] *See North Carolina Marriage Protection Amendment: Senate Debate on S.B. 514* (N.C. Sept. 13, 2011) (floor statement of Senator Forrester, sponsor of S.B. 514).

Senate floor debate, marriage is "an institution we can't live without. It's an institution whose benefits we all reap every day." He added that North Carolina "spend[s] a lot of money addressing problems, a lot of which stem from the decline of that institution. So much of our welfare spending, . . . so much of our remedial education spending, all stems from that," and he announced that he supported the bill to "defend [the] institution" of marriage because he "believe[d] that same sex marriage would put [the institution of marriage] under assault."[14]

The Fourth Circuit in *Bostic* rejected similar concerns about a further decline in support for the institution of marriage that were proffered in support of Virginia's law, holding that such arguments "are based on overbroad generalizations about same-sex parents," and that "there is no link between banning same-sex marriage and promoting optimal childrearing." *Bostic*, 760 F.3d, at 384.

But the most recent social science data confirms or at least strongly supports both components of the "deinstitutionalization" risk. First, children raised in

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[14] *An Act to Provide that Marriages Recognized Outside of this State Between Persons of the Same Gender are Not Valid: Senate Debate on S.B. 1487* (N.C. June 18, 1996) (floor Statement of Senator Blust); *see also House Welfare Reform and Human Resources Committee; Hearing on H.B. 1452* (N.C. June 18, 1996) (testimony of William J. Brooks, Jr., President, North Carolina Family Policy Council) ("The protection of marriage … is about creating a future for our children." "In a time when the decline of marriage is one of our country's most destructive social problems, we are being asked by some to radically redefine marriage. On behalf of the families and the children of North Carolina, we support your efforts to support and preserve the institution of marriage by passing House Bill 1452.").

households without both biological parents—definitionally true for same-sex couples—are at more than double the risk of serious developmental problems than those raised by both of their biological parents. Second, redefining marriage away from the man-woman historical norm weakens the institutional draw for marriage among heterosexual couples and therefore deprives significant numbers of children of the well-documented benefits of being raised by their married, biological parents.

On the first point, a recent comprehensive review of longitudinal data from the Center for Disease Control's National Health Interview Survey of 1.6 million cases ("CDC Data") has demonstrated that the relative risk of clinical emotional problems, developmental problems, or related treatment services to children being raised by same-sex adults was more than twice as high—17.1% at risk vs. 7.5% at risk—as children being raised by both of their biological parents in a marital relationship. Specifically, "[f]or every measure of child emotional difficulty, children with same-sex parents are observed to have higher levels of emotional or behavioral distress than do children with opposite-sex parents. For most of the fourteen psychometric measures . . . , [the] differences between same-sex and opposite-sex families are clear, statistically significant, of substantial magnitude, and to the advantage of opposite-sex families." D. Paul Sullins, "Child emotional problems in non-traditional families," p. 11 (Oct. 3, 2014) ("Sullins"), *available at* http://ssrn.com/abstract=2500537. "[W]hen sex, age, race of child and the education and income of the parents are held constant, children in same-sex families

are at 2.36 times the risk of emotional problems compared to children in opposite-sex families." *Id*., at 13. This is not because the same-sex adults were worse at parenting as individuals, as the Fourth Circuit mischaracterized the argument, *see Bostic*, 760 F.3d, at 383-84, but because at least one of the same-sex adults was necessarily not the biological parent of the child.[15]

On the second point, whether there would be such a decline in the institution itself is also supported by recent social science. As an *amicus curiae* brief recently filed with this Court by 76 scholars of the institution of marriage discusses at length, a recent study of the effects of redefining marriage in the Netherlands—which occurred about a half decade before Massachusetts became the first State to redefine marriage in this country—shows a *decline* in marriage rates among man-woman couples in the country, especially urban areas, following the adoption of same-sex marriage, by about fifteen percent in just four years.[16] That will mean a substantial reduction in the

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[15] The risk differential between children being raised by both of their married, biological parents, and those being raised by only one biological parent in a heterosexual household, is nearly identical, according to the CDC data. *See* Sullins, *supra*, at 15.

[16] *See* Br. of *Amici Curiae* 76 Scholars of Marriage, *DeBoer v. Snyder,* Nos. 14-556, 14-562, 14-571, 14-754, 14-596 (U.S.) (citing Mircea Trandafir, The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands at 28-29 (2009), *available at* http://www.iza.org/conference_files/TAM 2010/trandafirm6039.pdf). The focus on urban areas allowed Trandafir to control for the fact that marriage rates do not decline among those for whom religion provides a strong alterna-

many social benefits—beginning with lower rates of fatherlessness—that man-woman marriage has long been known to produce.

The parallels between the no-fault divorce effort a half century ago and the current effort for same-sex marriage are uncanny. Both are premised on the claim that children would be better off if the old marital norm were abolished. The stringent rules on divorce kept some children in households where domestic violence was all too common, it was claimed, so in part for their benefit, the push was made to eliminate "for cause" requirements for divorce. Undoubtedly, some children were made better off by an easier dissolution of an abusive marriage, though it is likely that such a concern could have been addressed without destroying the permanence norm of marriage itself. The result of undermining that norm across the institutional board has been that divorce became more common and, as a result, many more children—by orders of magnitude—were made much worse off by the easy, no-fault dissolution of marriage.[17]

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tive inducement for marriage. In the Netherlands, the rural areas—known as the Dutch Bible belt—tend to be much more religious than the urban areas.

[17] *See*, *e.g.*, Douglas W. Allen & Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995-2006*, Institute for Marriage and Public Policy Research Brief 1 (Jul. 2007), *available at* http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf; Alvaré, *supra*, at 143 n.31 (*citing, e.g.*, Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. Marr. & Fam. 477, 477 (1995)).

One need not revisit no-fault divorce policy to draw valuable lessons from that experience for the same-sex marriage policy discussions. Emotional and behavioral problems among children whose parents are married are about half as frequent as among comparable children whose parents are unmarried. If, for the sake of argument, that benefit also applied to children being raise by homosexual adults, but redefining marriage to include them weakened the incentive to marry for heterosexual couples even marginally, the net result would be a substantial increase in children suffering emotional problems in our country. According to data from the CDC, about 23,000 (14.6%) of the estimated 160,000 children with same-sex couples manifest emotional/behavioral problems, compared to about 1,050,000 (4.3%) of the 24.4 million children in biological-parent married households.[18] Assuming that all same-sex parenting couples married and that doing so reduced child emotional problems as much as it does for heterosexual marriages, a mere decline of less than one percent (0.65%) in the rate of marriage among biological-parent households would result in a sufficient number of children with increased emotional/behavioral problems to more than offset the number of children benefited by the marriages of the same-sex parents.

If, as has been the typical experience following the introduction of same-sex marriage, fewer than half of

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[18] Sullins, *supra*, at 36; Gary J. Gates, "LGBT Parenting in the United States" 3 (Williams Institute, UCLA School of Law, Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-parenting.pdf.

eligible same-sex couples chose to marry[19] and the rate of heterosexual marriage declined by at least five percent, the net numerical result, even granting the unproven notion that same-sex marriage results in similar benefits to child well-being as does heterosexual marriage, would be a reduction in harm for only 839 children with same-sex parents at the expense of increased harm for 12,880 children with heterosexual parents—a net increase of over 12,000 children with emotional or behavioral problems. And if the decline in heterosexual marriage was around the 15% that the Netherlands has experienced, the net increase of children with emotional or behavioral problems would be more than 38,000. Phrased differently, the number of children who *will be harmed* by the deinstitutionalization of marriage, according to the evidence from the Netherlands, is nearly fifty times more than the children being raised by same-sex couples who *might benefit* from a redefinition of marriage.

Preventing harm to nearly 40,000 children is an unbelievably compelling governmental interest, and if, as the Netherlands experience demonstrates, that harm flows from redefining the institution of marriage, retaining the man-woman definition, as North Carolina has done, is narrowly tailored to that end because whether or not to retain a man-woman definition of marriage is a binary choice.

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[19] *See* Daphne Lofquist, *Same-Sex Couple Households* 2 (U.S. Census Bureau, Sept. 2011) (noting that 42.4% of same-sex couples living in states where same-sex marriage was available were married), *available at* http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

IV. This Case Is an Appropriate Vehicle for Addressing the "Fundamental Right" Aspect of the Fourth Circuit's Decision and Its Collateral Consequences on State Marriage Laws.

This case presents a particularly useful vehicle for addressing the standard of review question because, unlike the Sixth Circuit's decision in *DeBoer* and the District of Louisiana's decision in *Robicheaux*, the Fourth Circuit's precedent in *Bostic* led the district court in this case to treat the right to marry whomever one wants as a fundamental right. Were this Court to reject the rational basis standard of review applied in those cases—though we think those decisions were correct—a remand for consideration under heightened scrutiny would be the appropriate course, leaving the constitutional status of numerous state marriage laws in limbo even longer. But since the Fourth Circuit has already considered (and erroneously rejected, in our view) the State's interests under strict scrutiny, this Court could definitively resolve the issue by considering this case in tandem with the Sixth Circuit cases and *Robicheaux*.

CONCLUSION

The Fourth Circuit's holding that there is a fundamental constitutional right to marry whomever one chooses, which the district court in this case felt bound to follow, has undermined compellingly important policy decisions in the States of the Fourth Circuit, not just with respect to the man-woman definition of marriage, but more broadly with respect to other longstanding restrictions on marriage as well.

Certiorari is warranted to consider whether such an intrusion on the States' primary role in the determination of marriage policy can stand.

Respectfully submitted,

ROBERT D. POTTER, JR.
5821 Fairview Road
Suite 207
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

NOEL H. JOHNSON
JOSEPH A. VANDERHULST
ActRight Legal Foundation
209 West Main Street
Plainfield, IN 46168
(317) 203-5599

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
Center for Constitutional
Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(714) 628-2587
jeastman@chapman.edu

Counsel for Petitioners

APPENDICES

APPENDIX A

14 F.Supp.3d 695
United States District Court
Middle District of North Carolina

Marcie FISHER–BORNE, for herself and as guardian ad litem for M.F.-B., a minor, et al., Plaintiffs,
Plaintiffs,

v.

John W. SMITH, in his official capacity as the Director of the North Carolina Administrative Office of the Courts, et al., Defendants,
Defendants.

Ellen W. Gerber, et al.,
Plaintiffs,

v.

Roy Cooper, et al..
Defendants.

Nos. 1:12CV589, 1:14CV299.
Signed Oct. 14, 2014 [as amended Oct. 15, 2014].

Attorneys and Law Firms

Amy E. Richardson, Wiltshire & Grannis LLP, Jonathan Drew Sasser, Jeremy M. Falcone, Ellis & Winters, LLP, Raleigh, NC, Catherine M. Bradley, Daniel W. Meyler, David A. Castleman, Garrard R. Beeney, William R.A. Kleysteuber, Sullivan & Cromwell LLP, James D. Esseks, Rose A. Saxe, American Civil Liberties Union Foundation, New York, NY, Christopher A. Brook, American Civil Liberties Union

of North Carolina, Raleigh, NC, Elizabeth O. Gill, American Civil Liberties Union Foundation, San Francisco, CA, for Plaintiffs.

Charles Gibson Whitehead, Olga E. Vysotskaya De Brito, North Carolina Department of Justice, Raleigh, NC, John Mark Payne, Greensboro, NC, David Wallace Hood, Michael J. Barnett, Patrick Harper & Dixon, LLP, Hickory, NC, for Defendants.

Amended Order[1]

WILLIAM L. OSTEEN, JR., District Judge.

Plaintiffs in each of these cases have filed complaints alleging causes of action pursuant to 42 U.S.C. § 1983 challenging the constitutionality of North Carolina's laws preventing same-sex couples from marrying and prohibiting recognition of same-sex couples' lawful out-of-state marriages. (1:12CV589 (Doc. 40); 1:14CV299 (Doc. 1).) As to each of these cases, an order was entered dismissing the North Carolina Attorney General as a defendant and allowing the State of North Carolina to intervene and appear by and through the Attorney General as counsel of record. (1:12CV589 (Doc. 114); 1:14CV299 (Doc. 71).) An Answer has been filed by Defendants in both cases and on behalf of the State of North Carolina (1:12CV589 (Doc. 115); 1:14CV299 (Doc. 70)); those Answers, *inter alia*, concede that Plaintiffs are entitled to certain relief.[2] Following the filing of those Answers, Plaintiffs

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[1] This Order is amended to reflect the correct North Carolina General Statute Section 51-1.2.

[2] The parties are in agreement with respect to the dismissal of certain parties and claims (see 1:12CV589 (Docs. 112, 113, 121; 1:14CV299 (Docs. 67, 68, 77))) and this order addresses without

in both cases filed Motions for Judgment on the Pleadings (1:12CV589 (Doc. 116); 1:14CV299 (Doc. 72)), and all parties consented (1:12CV589 (Docs. 116 and 117); 1:14CV299 (Docs. 72 and 73)).

In addition to the pleadings described above, Thom Tillis, Speaker of the North Carolina House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, filed motions to intervene (1:12CV589 (Doc. 119); 1:14CV299 (Doc. 75)) and those motions have been granted on the conditions set forth in that order. (1:12CV589 (Doc. 134); 1:14CV299 (Doc. 90).)

The pleadings indicate that Plaintiffs in each of these cases has standing to bring these claims. This court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and § 1343(a)(3)(deprivation under State law of any right secured by the Constitution). Pursuant to Fed.R.Civ.P. 8(b)(6), all allegations not denied are deemed admitted.

In light of briefs and representations of the parties (1:12CV589 (Docs. 103, 104, 105, 106, 112, 113); 1:14CV299 (Docs. 56, 57, 58, 59, 67, 68)), those matters admitted by the State of North Carolina in its Answers, and the holding of the United States Court of Appeals for the Fourth Circuit in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.2014), this court finds that the relief requested by Plaintiffs in each of these cases should be granted with respect to those matters now ripe for ruling.

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analysis the dismissal of individuals and claims as agreed-upon by the parties.

Bostic addressed Virginia law and a Virginia constitutional amendment prohibiting same-sex marriages and making same sex marriages invalid. *Id*. Most importantly here, the Virginia constitutional amendment addressed in *Bostic* stated "[t]hat only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions." *Id*. at 368 (quoting Va. Const. art. I, § 15–A). The Fourth Circuit held in *Bostic* that "we conclude that the Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples' lawful out-of-state marriages." *Bostic*, 760 F.3d at 384. The Supreme Court of the United States recently denied certiorari, *Rainey v. Bostic*, No. 14–153, 2014 WL 3924685 (U.S. Oct. 6, 2014), and the Fourth Circuit Court of Appeals has issued its mandate. *Bostic v. Schaefer*, Nos. 14–1167, 14–1169, 14–1173, 2014 WL 4960335 (4th Cir. Oct. 6, 2014).

A decision by a circuit court is binding on this court. *See Allegheny Gen. Hosp. v. NLRB,* 608 F.2d 965, 970 (3rd Cir.1979) ("A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial circuit."); *United States v. Brown,* 74 F.Supp.2d 648, 652 (N.D.W.Va.1998) ("[A] district court is bound by the precedent set by its Circuit Court of Appeals, until such precedent is overruled by the appellate court or the United States Supreme Court."). As recognized by another court in this district:

> [T]he doctrine of stare decisis makes a decision on a point of law in one case a binding precedent

> in future cases in the same court, and such courts as owe obedience to the decision, until such time as the effect of the decision is nullified in some fashion: reversed, vacated, or disapproved by a superior court, overruled by the court that made it, or rendered irrelevant by changes in the positive law.

Addison v. Piedmont Aviation, Inc., 745 F.Supp. 343, 349 (M.D.N.C.1990) (quoting 1B Moore's Federal Practice ¶ 0.402[2] at 25–27). *See also Alexander v. City of Greensboro,* No. 1:09–CV–934, 2011 WL 13857, at *5 n. 5 (M.D.N.C. Jan. 4, 2011); *Baldwin v. City of Winston–Salem,* 544 F.Supp. 123, 124 (1982), *aff'd,* 710 F.2d 132 (4th Cir.1983).

This court has independently reviewed the relevant statutes and state constitutional amendments under both Virginia and North Carolina law. As stated by all parties, including the State of North Carolina, this court finds no substantive distinction between the North Carolina statutes and constitutional amendment and the statutory and constitutional provisions addressed in *Bostic v. Schaefer*. North Carolina Const. art. XIV, § 6 provides, almost identically to the Virginia constitutional amendment, that "marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State."[3] As the parties jointly submit, *Bostic v.*

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[3] North Carolina's amendment contains a provision which states "[t]his section does not prohibit a private party from entering into contracts with another private party...." North Carolina Const. art. XIV, § 6. Although the Virginia amendment does not contain similar language, this contractual language in the North Carolina amendment does not appear to this court, and has not been argued by the parties, to remove the North Carolina

Schaefer, 760 F.3d 352 (4th Cir.2014), constitutes controlling precedent as to this district court.[4]

As required by the Fourth Circuit's precedent in *Bostic,* by and with the agreement of Defendants in these cases,

IT IS HEREBY ORDERED that North Carolina Const. art. XIV, § 6, N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-1.2 are declared **UNCONSTITUTIONAL** to the extent those laws prevent same-sex couples from marrying and prohibit the State of North Carolina from recognizing same-sex couples' lawful out-of-state marriages.[5]

IT IS FURTHER ORDERED that the State of North Carolina, the Attorney General, and all officers, agents, and employees of the State of North Carolina are hereby **ENJOINED** from implementing or enforcing any provisions of North Carolina Const. art. XIV, § 6, N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-1.2 which prevent same-sex couples from marrying

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amendment and relevant statutes from the broad language of *Bostic*.

[4] *Bostic* also recognized the similarity of North Carolina's statutory and constitutional scheme. *Bostic,* 760 F.3d at 367, n. 1 ("Three other states in this Circuit have similar bans: North Carolina, N.C. Const. art. XIV, § 6; N.C. Gen.Stat. §§ 51-1, 51-1.2. . . .").

[5] Plaintiffs' proposed order contained different suggested language for this order. The language for this paragraph and the following paragraph is derived from, and in large part is identical to, the language from the Fourth Circuit's holding in Bostic, 760 F.3d at 384, and this court finds no reason at the present time to modify that language.

and prohibit the State of North Carolina from recognizing same-sex couples' lawful out-of-state marriages.

IT IS FURTHER ORDERED that Plaintiffs' claims (i) concerning the adoption laws of North Carolina (Plaintiffs' First, Second, Third, Fourth, and Fifth Claims for Relief in *Fisher–Borne v. Smith,* First Amended Complaint, 1:12CV589 (Doc. 40) (July 19, 2013); and Plaintiffs' Fourth, Fifth, Sixth, and Seventh Claims for Relief in *Gerber v. Cooper,* Complaint, 1:14CV299 (Doc. 1) (Apr. 9, 2014)), and (ii) against the Clerk of the Superior Court for Guilford County, the Clerk of the Superior Court for Durham County, and the Clerk of the Superior Court for Catawba County, are **DISMISSED WITHOUT PREJUDICE** as **MOOT** and/or **NOT RIPE.**

IT IS FURTHER ORDERED that the pending motions for preliminary injunction (1:12CV589 (Doc. 75); 1:14CV299 (Doc. 3)) are **DENIED** as **MOOT.**

IT IS FURTHER ORDERED that any claim by Plaintiffs for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 is severed and will be considered upon appropriate motions of the parties.

A judgment shall be entered contemporaneously with this Order.

This the 15th day of October, 2014.

/s/ William L. Osteen, Jr.
United States District Judge

APPENDIX B

In the United States District Court
For the Middle District of North Carolina

Marcie FISHER–BORNE, for herself and as guardian ad litem for M.F.-B., a minor, et al., Plaintiffs,
Plaintiffs,

v.

John W. SMITH, in his official capacity as the Director of the North Carolina Administrative Office of the Courts, et al., Defendants,
Defendants.

Ellen W. Gerber, et al.,
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v.

Roy Cooper, et al..
Defendants.

Nos. 1:12CV589, 1:14CV299.
Oct. 14, 2014 [as amended Oct. 15, 2014]

AMENDED JUDGMENT[1]

For the reasons set forth in the Order filed contemporaneously with this Judgment,

IT IS THEREFORE ORDERED AND ADJUDGED that North Carolina Const. art. XIV, § 6,

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[1] This Judgment is amended to reflect the correct North Carolina General Statute Section 51-1.2.

N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-1.2 are declared **UNCONSTITUTIONAL** to the extent those laws prevent same-sex couples from marrying and prohibit the State of North Carolina from recognizing same-sex couples' lawful out-of-state marriages.

IT IS FURTHER ORDERED AND ADJUDGED that the State of North Carolina, the Attorney General, and all officers, agents, and employees of the State of North Carolina are hereby **ENJOINED** from implementing or enforcing any provisions of North Carolina Const. art. XIV, § 6, N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-1.2 which prevent same-sex couples from marrying and prohibit the State of North Carolina from recognizing same-sex couples' lawful out-of-state marriages.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' claims (i) concerning the adoption laws of North Carolina (Plaintiffs' First, Second, Third, Fourth, and Fifth Claims for Relief in Fisher-Borne v. Smith, First Amended Complaint, 1:12CV589 (Doc. 40) (July 19, 2013)); and Plaintiffs' Fourth, Fifth, Sixth, and Seventh Claims for Relief in Gerber v. Cooper, Complaint, 1:14CV299 (Doc. 1) (Apr. 9, 2014)), and (ii) against the Clerk of the Superior Court for Guilford County, the Clerk of the Superior Court for Durham County, and the Clerk of the Superior Court for Catawba County, are **DISMISSED WITHOUT PREJUDICE** as **MOOT** and/or **NOT RIPE.**

IT IS FURTHER ORDERED AND ADJUDGED that the pending motions for preliminary injunction (1:12CV589 (Doc. 75); 1:14CV299 (Doc. 3))

are **DENIED** as **MOOT**.

Any claim by Plaintiffs for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 is severed and will be considered upon appropriate motions of the parties.

This the 15th day of October, 2014.

/s/ William L. Osteen, Jr.
United States District Judge

APPENDIX C

In the United States District Court
For the Middle District of North Carolina

Marcie FISHER–BORNE, for herself and as guardian ad litem for M.F.-B., a minor, et al., Plaintiffs,
Plaintiffs,

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John W. SMITH, in his official capacity as the Director of the North Carolina Administrative Office of the Courts, et al., Defendants,
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Ellen W. Gerber, et al.,
Plaintiffs,

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Roy Cooper, et al..
Defendants.

Nos. 1:12CV589, 1:14CV299.
Oct. 14, 2014 [as amended Oct. 15, 2014]

ORDER

OSTEEN, JR., District Judge

Presently before this court is a motion to intervene by two parties, Thom Tillis, Speaker of the North Carolina House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate (collectively "Movants"). (1:12CV589 (Doc. 119); 1:14CV299 (Doc. 75).) In light of the positions of the parties and the procedural posture of this case, this

court finds no just reason for delay with respect to this ruling. After considering their entitlement to intervention as of right or, alternatively, permissive intervention, this court grants the parties' Motion to Intervene on the limited terms set forth herein.

I. INTERVENTION AS OF RIGHT

In order to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a party must (1) make a timely motion to intervene, (2) have an interest in "the subject of the action," (3) be "so situated that the disposition of the action may . . . impair or impede the applicant's ability to protect that interest," and (4) show that he is not adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2); *Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 477 (M.D.N.C. 2005).

This court finds the motion to intervene is timely. In determining whether a motion to intervene is sufficiently timely, this court must weigh "how far the suit has progressed," the "prejudice any resulting delay may cause the other parties," and "why the movant was tardy in filing its motion." *Alt v. United States Envtl. Prot. Agency*, 758 F.3d 588, 591 (4th Cir. 2014). The cases in which Movants hope to intervene have been in front of this court for several months and over two years, respectively. Nonetheless, Defendants in both cases have only recently filed Answers, and more importantly, Movants sought to intervene within three days of the Supreme Court denying certiorari in *Bostic v. Schaefer*. *See Schaefer v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014) (denying certiorari in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)). It was only after the Supreme Court denied

the petition in Bostic that Defendants began to concede relief, arguably resulting in Movants' heightened concern with defense of the North Carolina law. In light of the limited nature of the intervention which will be allowed, the intervention will not substantially delay these proceedings. Therefore, Movants have established that their motion is timely.

Second, this court agrees with Movants that their interest is sufficient in these cases to support intervention. Movants' interest must be "significantly protectable" to come within the meaning of Rule 24(a)(2), meaning that the interest must be more than a general concern with the subject matter. See *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Despite the recognition that general concerns are not "significantly protectable," the Supreme Court has held that "certain public concerns may constitute an adequate 'interest' within the meaning of [Rule 24(a)(2)]." *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967)).

Courts have recognized that legislators have an interest in defending the constitutionality of legislation passed by the legislature when the executive declines to do so, even when a taxpayer may not have a protectable interest in making the same argument. *See, e.g., Revelis v. Napolitano*, 844 F. Supp. 2d 915, 924-25 (N.D. Ill. 2012). Similar to the facts in this case, in *Revelis*, a select group of congressional leaders was authorized by the United States House of Representatives to defend the constitutionality of the Defense of Marriage Act ("DOMA") after Attorney General Eric Holder declared his intention not to defend DOMA in subsequent legal challenges. *Id*. The *Revelis* court

found that the legislators' interest was sufficient to justify intervention as of right. In North Carolina, the General Assembly provides a similar mechanism through which the Speaker of the House and President Pro Tempore of the Senate may defend laws passed by the North Carolina General Assembly. See N.C. Gen. Stat. § 1-72.2. Movants are in front of this court based on rights conferred by that statute.

In determining Movants' interest, of particular significance to this court is the fact that the issues raised in Bostic and this litigation are not solely same-sex marriage, but include issues with respect to the constitutional relationship between the judiciary, the duly-elected state representatives, and to the vote of the people in a democratic process. That issue is recognized by the dissenting opinions in *Bostic* and *Kitchen*. The dissent in *Bostic* concludes:

> The U.S. Constitution does not, in my judgment, restrict the State's policy choices on this issue. If given the choice, some states will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

Bostic, 760 F.3d at 398 (Niemeyer, J., dissenting).

Similarly, the dissent in *Kitchen* concludes:

> Though the Plaintiffs would weigh the interests of the state differently and discount the procreation, child-rearing, and caution rationales, that prerogative belongs to the electorate and their representatives.

Kitchen v. Herbert, 755 F.3d 1193, 1240 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in

part). As certain as it is that Plaintiffs have the right to advocate for what they believe is just for the individual parties, others may also have a substantial interest in defending that which they believe to be a power and prerogative that belongs to the States, the citizens, and their duly-elected representatives.

Accordingly, this court finds that, as authorized representatives of the legislature, Movants' desire to defend the constitutionality of legislation passed by the legislature is a protectable interest in the subject matter of this litigation.

The third factor requires this court to determine whether the Movants are "so situated that the disposition of the action . . . may impair or impede the applicant's ability to protect that interest." In this case, the interest identified by Movants is affected by the Fourth Circuit's decision in *Bostic*, which is the law of the circuit and binding on this lower court in light of the denial of *certiorari*. The potential for impairment in this district court is neither heightened nor lowered by Movants' participation or non-participation in light of representation being afforded that interest by North Carolina's Attorney General, as more fully discussed *infra*. However, also as more fully discussed *infra*, preserving the right to appeal this decision does have a direct effect on the Movants' ability to protect their interest.

Finally, and critically, Movants must show that they are not adequately represented by an existing party. "Representation is generally considered adequate if no collusion is shown between the representative and an opposing party, if the representative does

not represent an interest adverse to the proposed intervenor and if the representative has been diligent in prosecuting the litigation." *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982).

In both cases before this court, the State Defendants are represented by the North Carolina Attorney General's Office. Under North Carolina law, it is the duty of the Attorney General:

> To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

N.C. Gen. Stat. § 114-2(1).

In their motion to intervene, Movants make no claims of collusion between the Attorney General and an opposing party nor do they claim an adverse interest. Movants claim inadequate representation in part because the Attorney General did not plan to "distinguish *Bostic* on the grounds that outcome-determinative concessions made by the Attorney General of Virginia in that case have not been made by North Carolina in these cases." (Proposed Defendant-Intervenors' Mem. of Law in Supp. of Mot. for Intervention ("Intervenors' Mem.") 1:12CV589 (Doc. 120) at 15; 1:14CV299 (Doc. 76) at 15.) The North Carolina statutory and constitutional provisions at issue in the cases before this court are notably similar to the Virginia statutory and constitutional provisions deemed unconstitutional in *Bostic*. *See Bostic*, 760 F.3d at 367 n.1. As a result, *Bostic* is binding precedent on this

court.

> [T]he doctrine of stare decisis makes a decision on a point of law in one case a binding precedent in future cases in the same court, and such courts as owe obedience to the decision, until such time as the effect of the decision is nullified in some fashion: reversed, vacated, or disapproved by a superior court, overruled by the court that made it, or rendered irrelevant by changes in the positive law.

Addison v. Piedmont Aviation, Inc., 745 F. Supp. 343, 349 (M.D.N.C. 1990) (quoting 1B *Moore's Federal Practice* ¶ 0.402[2] at 25–27.). Although Movants make allegations with respect to the process pursuant to which *Bostic* was decided, those allegations do not present a substantial justification pursuant to which this court may disregard *Bostic*.

The First Circuit has noted that "there may be occasions when courts can—and should—loosen the iron grip of *stare decisis*." *United States v. Reveron Martinez,* 836 F.2d 684, 687, n.2 (1st Cir. 1988). However, any such departure "demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984). *Eulitt v. Maine Dep't of Educ.*, 307 F. Supp. 2d 158, 161 (D. Me. 2004), *aff'd on other grounds sub nom. Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004). Special justification arises if a district court "had been faced with a 'different set of facts' and 'newly crafted set of legal rules' and therefore, the issue was one of 'first impression' for the Circuit." *Id.* at 161 (citing *Gately v. Massachusetts*, 2 F.3d 1221, 1228 (1st Cir. 1993)). As stated earlier, the facts and law are virtually indistinguishable between *Bostic*

and the cases before this court. The Court of Appeals for the Fourth Circuit can overrule *Bostic*, but absent "special justification," which is not present here, this court cannot.

Furthermore, the record before this court indicates that the Attorney General has in fact vigorously pursued North Carolina's defense of the laws challenged in this action prior to the decision in *Bostic*. In opposing Plaintiffs' motion for a preliminary injunction, Defendants filed extensive briefs and made compelling arguments in those briefs. (*See, e.g.*, State Defs.' Resp. in Opp'n to Movants' Mot. for Prelim. Inj. 1:12CV589 (Doc. 88) at 6-10; 1:14CV299 (Doc. 33) at 6-10; State Defs.' Mem. of Law in Supp. of Mot. to Dismiss Complaint ("Defs.' Mem.") 1:12CV589 (Doc. 28) at 8-13; 1:14CV299 (Doc. 38) at 8-13.) It appears that each of those briefs appropriately presented and argued the same issues upon which all of the relevant cases relied, including but not limited to, *United States v. Windsor*, 570 U.S. ____, 133 S. Ct. 2675 (2013); *Washington v. Glucksberg*, 521 U.S. 702 (1997); and *Baker v. Nelson*, 409 U.S. 810 (1972). The fact that *Bostic* has resolved these issues as a matter of law contrary to the State's position does not diminish the quality of the arguments advanced by the State Defendants.

Movants, whether intending directly or by implication, make a further suggestion with respect to the recent concessions by the State Defendants in their answer. Movants open their brief as follows:

> In part based on concessions made by the Attorney General of Virginia after he switched sides in the *Bostic* case, the Fourth Circuit ruled that

> Virginia's marriage laws were unconstitutional, and on October 6, 2014, the Supreme Court denied the three petitions for writ of certiorari that had been filed in the case. *Rainey v. Bostic*, 2014 WL 3924685 (U.S., Oct. 06, 2014); *Schaefer v. Bostic*, 2014 WL 4230092 (U.S., Oct. 06, 2014); and *McQuigg v. Bostic*, 2014 WL 4354536 (U.S., Oct. 06, 2014). On the same day that the ruling in *Bostic* was issued by the Fourth Circuit, the Attorney General of North Carolina — a named defendant and also counsel for the other state defendants in these cases — announced that he would "stop making arguments" in defense of North Carolina's marriage laws and that "the State of North Carolina will not oppose the case moving forward." Press Conference of Attorney General Roy Cooper, July 28, 2014, *available at* http://www.wral.com/news/state/nccapitol/video/13846923/.

(Intervenors' Mem. 1:12CV589 (Doc. 120) at 6-7; 1:14CV299 (Doc. 76) at 6-7.)[1]

The suggestion, at least in this court's opinion, is that *Bostic* was wrongly decided because the Virginia attorney general improperly conceded important points of law; the structure of the paragraph appears to further imply that North Carolina's Attorney General is now following a similar path of improperly conceding important points of law. This court disagrees with that implication and is not persuaded that the

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[1] All citations in this Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

Attorney General has inadequately represented Movants' interests thus far.

First, it is important to note here that the North Carolina Attorney General's concession came only after *Bostic* became final. Prior to that time, the North Carolina Attorney General defended the relevant laws. The Attorney General's argument in support of the motion to dismiss relied upon *Baker v. Nelson*, 409 U.S. 810 (1972) (*see* Defs.' Mem. 1:14CV299 (Doc. 38) at 10), contrary to Movants' description of the alleged position of the Virginia Attorney General in *Bostic* (*see* Intervenors' Mem. 1:12CV589 (Doc. 120) at 15; 1:14CV299 (Doc. 76) at 15). In this case, the North Carolina Attorney General also cited and relied upon *Washington v. Glucksberg*, 521 U.S. 702 (1997), as well as a number of other cases in support of the State of North Carolina's motion to dismiss (*see* 1:14CV299, Defs.' Mem. (Doc. 38) at 11), contrary to Movants' allegations as to the Virginia Attorney General. Thus, here, unlike Movants contend as to Virginia, the Attorney General did assert the defenses which perhaps Virginia did not.

Second, Movants' challenge to the manner in which the Virginia Attorney General may have argued *Bostic* fails to recognize the independence of the United States Court of Appeals for the Fourth Circuit and the fact that the Virginia Attorney General was not the only party defending Virginia's ban. The identification of counsel in *Bostic*, as appearing in the published opinion, lists a multitude of counsel appearing in various capacities. Counsel for Movants (John C. Eastman, Center for Constitutional Jurisprudence, Chapman University Dale E. Fowler School of Law) is

listed as appearing on behalf of Amici Virginia Catholic Conference, LLC, and the Center for Constitutional Jurisprudence. The lengthy list of parties and counsel in *Bostic* suggests to this court that Movants' argument focusing on one party, as opposed to all of the Virginia ban's defenders, does not in any way undermine the decision itself nor does it suggest this court should find any circumstance upon which to disregard *Bostic*.

Movants, as directed by this court, have filed Defendants-Intervenors' Answer and Defenses ("Intervenors' Answer") (1:12CV589 (Doc. 125); 1:14CV299 (Doc. 81)). Movants raise several objections and defenses, including an argument that this court does not have subject-matter jurisdiction as dictated by *Baker v. Nelson*, 409 U.S. 810 (1972). Movants suggest consideration of a district court opinion that recently upheld a state marriage law, *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014). Movants also cite a recent order from a Supreme Court Justice "staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny." (Intervenors' Answer 1:12CV589 (Doc. 125) at 7; (Intervenors' Mem. 1:12CV589 (Doc. 120) at 7-8; 1:14CV299 (Doc. 76) at 7-8.)

This court requested responses to this argument from Plaintiffs and the North Carolina Attorney General. (*See* 1:12CV589 (Doc. 127); 1:14CV299 (Doc. 83).) Those responses were timely filed. In his response, the Attorney General cites *General Synod of the United Church of Christ v. Cooper*, No. 3:14-CV-213 (W.D.N.C. October 10, 2014), and alleges that "[a]lthough the right to any appeal has not been waived, the binding opinion of the Fourth Circuit

Court of Appeals in *Bostic* addressed and rejected viable defenses of North Carolina's marriage laws." (See 1:12CV589 (Doc. 132) at 4; 1:14CV299 (Doc. 87) at 4.) This court construes the Attorney General's response to suggest that perhaps the State does not intend to appeal because of the conclusive nature of the *Bostic* decision in the circuit court and the Supreme Court. However, that response, without further analysis of the waiver issue particularly in light of the supplemental briefs, does not fully address whether Movants have an interest in preserving the right to appeal and whether those rights will be impaired if intervention is not permitted.

Plaintiffs have also responded to this court's inquiry; the following is their summary of that response:

> More specifically and in response to the Court's questions regarding the Intervention Motion, the Attorney General has not waived his rights to appeal to the Fourth Circuit or to the United States Supreme Court. Instead, in the reasonable exercise of litigation judgment (presumably based, at least in part, on the unanimous view of each of the four courts of appeals which have found discriminatory marriage laws to be unconstitutional), the Attorney General presently has chosen not to waste the state's limited resources on pursuing what would ultimately be a futile appeal. Putative Intervenors cannot demonstrate that such an exercise of litigation judgment constitutes inadequate representation, especially given the high degree of deference afforded in particular to the litigation judgment of states' attorneys

general.

(Pls.' Resp. to Court's Oct. 10 Order (Pls.' Resp.") 1:12CV589 (Doc. 131) at 8-9; 1:14CV299 (Doc. 88) at 8-9.) Plaintiffs cite two circuit cases in support of their argument that the State has not waived its right to appeal, *United States v. Evans*, 404 F.3d 227, 236 (4th Cir. 2005) and *Wells v. Shriners Hosp.*, 109 F.3d 198, 199 (4th Cir. 1997). (*Id.* at 14.) However, neither of these cases directly addresses the factual and procedural history present in either of these cases, wherein initial objections to the requested relief were followed by concessions (albeit legally defensible concessions) to the requested relief.

This court called for supplemental briefs from the parties because of the express language of the State Defendants' concession of relief. That language, quite properly recognizing applicable law, states that "Plaintiffs should be afforded appropriate relief in accordance with the law as described by the Fourth Circuit Court of Appeals in *Bostic v. Schaefer*." (State Defs.' Answer and Defenses 1:12CV589 (Doc. 104) at 16; 1:14CV299 (Doc. 70) at 16).) Movants' proposed answer, on the other hand, objects to the application of *Bostic*, arguably expressly preserving an objection to that opinion. Because "the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies,'" *Flast v. Cohen*, 392 U.S. 83, 94 (1968), this court was uncertain that a case or controversy between the parties would still exist as suggested by Movants once this court grants the requested relief. "[B]ecause [t]his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate, [l]itigation may become moot during the pendency of an appeal." *United States v.*

Hardy, 545 F.3d 280, 283 (4th Cir. 2008) (alteration in original) (internal quotations marks omitted) (citations omitted).

Both parties in this case cite this court to the well-reasoned opinion from the Western District of North Carolina addressing similar issues in that case. *See General Synod*, No. 3:14-CV-213 (W.D.N.C. Oct. 10, 2014). This court agrees with the holding of the *General Synod* court, and with respect to the waiver issue, finds it compelling. *See id*. (Doc. 121) at 5 ("[T]he court has considered proposed intervenors' argument that the Attorney General has improperly given up the right to appeal this court's final decision; however, the court does not read the pleadings that broadly."). Although this court is not sufficiently familiar with the underlying pleadings in *General Synod* to fully determine the applicability of the holding to this case, the pleadings in this case may very well be sufficient to preserve that right as recognized in *General Synod*. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). However, in light of the supplemental briefs filed in this case and the presence of what appears to be a recognition by all parties that the State does not intend to appeal, this court is confronted with an additional issue that was not presented by the State and the plaintiffs to the court in *General Synod*. As a result, this court does not find it necessary to resolve the question of whether an appeal has been waived in light of the additional findings hereinafter.

Plaintiffs argue that the "Attorney General's decision not to pursue a wasteful and futile appeal amounts to mere 'disagreement over how to approach the conduct of the litigation [and] is not enough to rebut the presumption of adequacy.' *Stuart*, 706 F.3d at 353; *see also id*. at 354." (Pls.' Resp. 1:12CV589 (Doc. 131) at 19; 1:14CV299 (Doc. 88) at 19.) Perhaps so. However, in terms of the pending motion to intervene, it may also suggest that Movants are not adequately represented by existing parties, *see* Fed. R. Civ. P. 24(a)(2); *Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 477 (M.D.N.C. 2005), to the extent Movants intend to exercise whatever remaining right to appeal exists and the Attorney General has concluded the State does not. In allowing intervention in the context of an injunction prohibiting a religious group from displaying a menorah on city property and the city not appealing the decision, the Sixth Circuit found that the "decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest." *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990); *see also H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 88 (2nd Cir. 1986) (noting, in dicta, "[w]here issues relating to the appellate process create a divergence of interests between the party representing the would-be intervenor's interest and the would-be intervenor, intervention for the purpose of protecting the latter's appellate rights may be appropriate").

In *United States v. American Telephone & Telegraph Co.*, the Court of Appeals for the District of Columbia Circuit framed the issue as follows: "The deci-

sive question, then, is whether a divergence of interests solely at the appeal stage can justify intervention for the limited purpose of taking an appeal from a lower court ruling. Commentators cite cases going either way on this question, depending on the particular facts." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). The District of Columbia Circuit concluded that "[u[nder *Smuck v. Hobson* this divergence of interests, manifested in the Government's refusal to appeal, is evidence of inadequate representation." *Id*. at 1294.

As recognized by the Court of Appeals for the Sixth Circuit:

> [A] decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest. The Secretary of State has not sought interlocutory review of the preliminary injunction as it relates to two of the three temporarily invalidated provisions, and Michigan's attorney general has not appealed at all. While passively tolerating a preliminary injunction pending a final resolution of the merits may serve the interests of the State of Michigan, it cannot be said to represent the Chamber's interests, in view of its concern with timeliness. The decision not to appeal certain aspects of the district court's preliminary injunction may amount to sound litigation strategy and a prudent allocation of Michigan taxpayers' money, but this decision also further illustrates how the interests of the state and of the Chamber diverge. The State of Michigan has already demonstrated that it will not adequately represent and protect the interests held

> by the Chamber. Accordingly, the Chamber has made a sufficient showing in this regard.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1248 (6th Cir. 1997) (internal quotation marks omitted) (citing *Ams. United*, 922 F.2d at 306).

Plaintiffs argue this issue is settled and that an appeal is meritless. (Pls.' Resp. 1:12CV589 (Doc. 131) at 15; 1:14CV299 (Doc. 88) at 15 ("*Bostic* unequivocally held that Virginia's constitutional and statutory prohibition of same-sex marriage in Virginia . . . violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution; there is no argument that this analysis would not apply to North Carolina's constitutional and statutory prohibition of same-sex marriage.").) Plaintiff is correct; *Bostic* resolved the matter in this district court. However, there is still some disagreement between some judges and courts on issues relevant to these cases. The rulings in *Bostic* and *Kitchen*, as thoughtful as they are, contain dissenting opinions that also employ careful reasoning and thoughtful analysis on the constitutional issues, including whether strict scrutiny or rational basis review applies and how the courts should weigh the various policy considerations and arguments. In *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), a district court upheld Louisiana's same-sex marriage ban in a well-reasoned opinion, concluding in part "that Louisiana's laws are rationally related to its legitimate state interests." *Id.* In *Deboer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), a district court in Michigan struck down Michigan's same-sex marriage ban, but did so pursuant to a rational basis test without reaching the question of whether strict scrutiny applies.

This court does not suggest either position, to appeal or not to appeal, as substantively meritorious, only that the existence of any continuing right may be complicated by whatever continuing force any remaining cases might have as well as applicable jurisdictional and jurisprudential requirements.

Nevertheless, notwithstanding some of the ongoing cases on a national level, this discussion is merely academic in this court. The United States Court of Appeals for the Fourth Circuit has issued its ruling in *Bostic*. As recognized by the district court in *General Synod*, this district court, sitting in North Carolina and the Fourth Circuit, is bound to apply that law. The parties to this case have the right to expect nothing less, whether they agree with the law or not. The issue presently before this court is solely whether to permit intervention for the purpose of preserving and taking an appeal.

Although it is a very close issue, this court concludes that the motion to intervene should be granted, but only for the purpose of lodging an objection and preserving that objection to this court's application of *Bostic*. In reaching this conclusion, this court is not expressing an opinion on the relative merits or demerits of any appeal, only that there is an appeal right that a party with arguable standing and interest has sought to preserve.

Intervention will be substantially limited in this court. Specifically, this court will order the filing of the proposed answer (1:12CV589 (Doc. 125); 1:14CV299 (Doc. 81)) setting forth the answer and objections in this case. In light of the clear import of *Bostic*, no further briefing will be permitted with respect

to the pending Motion for Judgment on the Pleadings (1:12CV589 (Doc. 116); 1:14CV299 (Doc. 72)) and the response filed by the State of North Carolina (1:12CV589 (Doc. 122); 1:14CV299 (Doc. 78)). Both the motion and response accurately state the law of this circuit, and no further pleadings from Movants will be permitted.

III. CONCLUSION

In conclusion, this court finds that Movants' motion to intervene should be allowed, but only for the limited purposes expressed herein.

IT IS THEREFORE ORDERED that the Motion for Intervention (1:12CV589 (Doc. 75); 1:14CV299 (Doc. 119)) is **GRANTED** for the limited purposes expressed herein.

IT IS FURTHER ORDERED that Movants' answers and defenses in each of these two cases are deemed **TIMELY FILED**.

IT IS FURTHER ORDERED that Movants' objections to this court's jurisdiction, to the application of *Bostic*, and to the grant of the pending motion for judgment on the pleadings are **NOTED** and **OVERRULED**.

This the 14th day of October, 2014.

/s/ William L. Osteen, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARCIE FISHER-BORNE, *et al.*, *Plaintiffs*, v. JOHN W. SMITH, *et al.*, *Defendants*, and THOM TILLIS, North Carolina Speaker of the House of Representatives and PHIL BERGER, President Pro Tempore of the North Carolina Senate, *Intervenor-Defendants*.	Case No.: 1:12-cv-00589

INTERVENOR-DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given under Fed. R. App. P. 3 that Intervenor-Defendants Thom Tillis, North Carolina Speaker of the House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, on behalf of themselves, and their members and constituents ("Movants"), hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order and judgment of the United States District Court for the Middle District of North Carolina dated October 14, 2014 [Dkt. ## 135, 136], and as

amended on October 15, 2014 [Dkt. ## 138, 139], declaring unconstitutional and permanently enjoining enforcement of Article XIV, Section 6 of the North Carolina Constitution and related statutes, N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-1.2.

Undersigned counsel does not believe that the district court placed any limits on the issues or arguments Intervenor-Defendants may raise on appeal. See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992). If the United States Court of Appeals for the Fourth Circuit, however, believes that the district court did impose any such limits, then Intervenor-Defendants also appeal to the United States Court of Appeals for the Fourth Circuit from any limitations contained in the order of the United States District Court for the Middle District of North Carolina dated October 14, 2014 allowing intervention of right. [Dkt. #134].

Respectfully submitted, this the 6th day of November, 2014.

John C. Eastman
Lead Counsel
CA State Bar No. 193726
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Dr.
Orange, CA 92866
(877) 855-3330
(714) 844-4817 Fax
jeastman@chapman.edu

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr.
Attorney at Law
NC State Bar No. 17553
5821 Fairview Road, Suite 207
Charlotte, NC 28209
(704) 552-7742
(704) 552-9287 Fax
rdpotter@rdpotterlaw.com

Attorneys for
Intervenor-Defendants

Noel Johnson
WI State Bar No. 1068004
Joseph Vanderhulst
IN State Bar No. 28106-02
ACTRIGHT LEGAL FOUNDATION
209 West Main Street
Plainfield, IN 46168
(317) 203-5599
(888) 815-5641 Fax
njohnson@actrightlegal.org
jvanderhulst@actrightlegal.org

CERTIFICATE OF SERVICE

I hereby certify that on 11/6/2014, I electronically filed the foregoing NOTICE OF APPEAL, in the cases of *Fisher-Borne v. Smith*, No. 1:12-cv-00589 with the clerk of the Court for the United States District Court for the Middle District of North Carolina Circuit by using the CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: 11/6/2014

/s/ Robert D. Potter, Jr.

Robert D. Potter, Jr.
Attorney at Law
NC State Bar No. 17553
5821 Fairview Road, Suite 207
Charlotte, NC 28209
(704) 552-7742
(704) 552-9287 Fax
rdpotter@rdpotterlaw.com
On Behalf of Counsel for Intervenor-Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ELLEN W. GERBER, *et al.*, *Plaintiffs*, v. ROY COOPER, *et al.*, *Defendants*, and THOM TILLIS, North Carolina Speaker of the House of Representatives and PHIL BERGER, President Pro Tempore of the North Carolina Senate, *Intervenor-Defendants*.	Case No.: 1:14-cv-00299

INTERVENOR-DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given under Fed. R. App. P. 3 that Intervenor-Defendants Thom Tillis, North Carolina Speaker of the House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, on behalf of themselves, and their members and constituents ("Movants"), hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order and judgment of the United States District Court for the Middle District of North Carolina dated October 14, 2014 [Dkt. ## 91, 92], and as amended on October 15, 2014 [Dkt. ## 94, 95], declar-

ing unconstitutional and permanently enjoining enforcement of Article XIV, Section 6 of the North Carolina Constitution and related statutes, N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-1.2.

Undersigned counsel does not believe that the district court placed any limits on the issues or arguments Intervenor-Defendants may raise on appeal. See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992). If the United States Court of Appeals for the Fourth Circuit, however, believes that the district court did impose any such limits, then Intervenor-Defendants also appeal to the United States Court of Appeals for the Fourth Circuit from any limitations contained in the order of the United States District Court for the Middle District of North Carolina dated October 14, 2014 allowing intervention of right. [Dkt. #90].

Respectfully submitted, this the 6th day of November, 2014.

John C. Eastman
Lead Counsel
CA State Bar No. 193726
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Dr.
Orange, CA 92866
(877) 855-3330
(714) 844-4817 Fax
jeastman@chapman.edu

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr.
Attorney at Law
NC State Bar No. 17553
5821 Fairview Road, Suite 207
Charlotte, NC 28209
(704) 552-7742
(704) 552-9287 Fax
rdpotter@rdpotterlaw.com

Attorneys for
Intervenor-Defendants

Noel Johnson
WI State Bar No. 1068004
Joseph Vanderhulst
IN State Bar No. 28106-02
ACTRIGHT LEGAL FOUNDATION
209 West Main Street
Plainfield, IN 46168
(317) 203-5599
(888) 815-5641 Fax
njohnson@actrightlegal.org
jvanderhulst@actrightlegal.org

CERTIFICATE OF SERVICE

I hereby certify that on 11/6/2014, I electronically filed the foregoing NOTICE OF APPEAL, in the cases of *Gerber v. Cooper*, No. 1:14-cv-00299 with the clerk of the Court for the United States District Court for the Middle District of North Carolina Circuit by using the CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: 11/6/2014

/s/ Robert D. Potter, Jr.

Robert D. Potter, Jr.
Attorney at Law
NC State Bar No. 17553
5821 Fairview Road, Suite 207
Charlotte, NC 28209
(704) 552-7742
(704) 552-9287 Fax
rdpotter@rdpotterlaw.com

On Behalf of Counsel for Intervenor-Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, *et al.*, *Plaintiffs*, v. DREW RESIGNER, Register of Deeds for Buncombe County, *et al.*, *Defendants*, and ROY COOPER, Attorney General of North Carolina, *Intervenor*. and THOM TILLIS, North Carolina Speaker of the House of Representatives and PHIL BERGER, President Pro Tempore of the North Carolina Senate, *Proposed Intervenor-Defendants*.	Case No.: 3:14-cv-213

PROPOSED INTERVENOR-DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given under Fed. R. App. P. 3 that Proposed Intervenor-Defendants Thom Tillis, North Carolina Speaker of the House of Representatives, and Phil Berger, President Pro Tempore of the

North Carolina Senate, on behalf of themselves, and their members and constituents ("Movants"), hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order of the United States District Court for the Western District of North Carolina dated October 10, 2014 (Dkt. #120), denying Proposed Intervenors' Motion to Intervene.

Proposed Intervenors' also hereby notice an appeal from the District Court's order and judgment dated October 10, 2014 (Dkt. ##121, 122), granting its own motion for judgment on the pleadings and declaring unconstitutional and permanently enjoining enforcement of Article XIV, Section 6 of the North Carolina Constitution, North Carolina General Statute § 51-1 *et seq.*, and any other source of state law that operates to deny same-sex couples the right to marry in the State of North Carolina or prohibits recognition of same-sex marriages lawfully solemnized in other States, Territories, or a District of the United States, or threatens clergy or other officiants who solemnize the union of same-sex couples with civil or criminal penalties. The notice of appeal from the final judgment is a protective notice of appeal pursuant to *Brennan v. Silvergate Dist. Lodge No. 50, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 503 F.2d 800, 803 (9th Cir. 1974) and *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997). *See also* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902.1, at 113 (2d ed.1991) ("If final judgment is entered with or after the denial of intervention, ... the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed").

Respectfully submitted, this the 7th day of November, 2014.

/s/ John C. Eastman
John C. Eastman
CA State Bar No. 193726
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Dr.
Orange, CA 92866
(877) 855-3330
(714) 844-4817 Fax
jeastman@chapman.edu
Lead Counsel for Proposed Intervenor-Defendants

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr.
Attorney at Law
NC State Bar No. 17553
5821 Fairview Road, Suite 207
Charlotte, NC 28209
(704) 552-7742
(704) 552-9287 Fax
rdpotter@rdpotterlaw.com

Attorney for Proposed Intervenor-Defendants

Noel Johnson
WI State Bar No. 1068004
Joeseph Vanderhulst
IN Bar No. 28106-02
ACTRIGHT LEGAL FOUNDATION
209 West Main Street
Plainfield, IN 46168
(317) 203-5599
(888) 815-5641 Fax
njohnson@actrightlegal.org
jvanderhulst@actrightlegal.org
Attorneys for Proposed Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on 11/7/2014, I electronically filed the foregoing NOTICE OF APPEAL with the Clerk of the Court for the United States District Court for the Western District of North Carolina Circuit by using the CM/ECF system

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: 11/7/2014

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr.
NC State Bar No. 17553
Attorney at Law
5821 Fairview Road, Suite 207
Charlotte, NC 28209
(704) 552-7742
(704) 552-9287 Fax
rdpotter@rdpotterlaw.com

Attorney for Proposed Intervenor-Defendants