UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, et al.,

Plaintiffs,

Civil Action No. 12-cv-10285
HON. BERNARD A. FRIEDMAN

vs.

RICHARD SNYDER, et al.,

Defendants.
_____/

OPINION AND ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT

I. Introduction and Facts

Plaintiffs April DeBoer and Jayne Rowse (collectively "plaintiffs") commenced this action against Richard Snyder and Bill Schuette, in their respective official capacities as Governor of the State of Michigan and Michigan Attorney General (collectively "defendants"), on the ground that their enforcement and defense of section 24 of the Michigan Adoption Code (hereinafter "section 24"), Mich. Comp. Laws § 710.24, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[1] Plaintiffs further challenge the validity of Michigan's constitutional prohibition against same-sex marriage (hereinafter the "Michigan Marriage Amendment" or "MMA"), Mich. Const. Art. I, § 25, and statutory provisions barring the same, Mich. Comp. Laws §§ 551.1-551.4, as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

[1] The amended complaint added former Oakland County Clerk, Bill Bullard, Jr. as a party defendant. As a result of the November 2012 election, Lisa Brown was elected as the Oakland County Clerk/Register of Deeds and replaced Mr. Bullard on January 1, 2013.

Currently before the Court is plaintiffs' motion for summary judgment [docket entry 67]. Defendants filed a response [docket entry 74] and plaintiffs filed a reply [docket entry 78]. Defendants then cross-moved for summary judgment [docket entry 69]. Plaintiffs filed a response [docket entry 76] and defendants filed a reply [docket entry 79].[2] The Court heard oral argument on October 16, 2013.

The underlying facts are not in dispute. Plaintiffs are an unmarried same-sex couple residing in Hazel Park, Michigan. They have lived together for the past six years and jointly own their residence. Both women are state-certified foster parents. DeBoer is a nurse in the neonatal intensive care unit at Hutzel Hospital and Rowse is an emergency room nurse at Henry Ford Hospital, both located in Detroit. In November 2009, Rowse, as a single person, legally adopted child N. In October 2011, also as a single person, she legally adopted child J. DeBoer, as a single person, adopted child R in April 2011. Plaintiffs seek to jointly adopt the three children, but section 24 and the Michigan Marriage Amendment operate in tandem to prevent them from doing so. The former restricts adoptions to either single persons or married couples and the latter restricts the state's legal definition of marriage to heterosexual couples. Section 24 does not allow for the joint adoption of a child by two unmarried parents.[3]

In their motion for summary judgment, plaintiffs contend that the MMA violates the Equal

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[2] Defendant Lisa Brown filed a brief in support of plaintiffs' motion for summary judgment [docket entry 68] along with response and reply briefs [docket entries 75 and 80] corresponding to defendants' cross motion for summary judgment and opposition papers.

[3] Section 24 sub-section (1) provides in relevant part: "if a person desires to adopt a child . . . that person, together with his wife or her husband, if married, shall file a petition with the court of the county in which the petitioner resides or where the adoptee is found . . ."

Protection Clause regardless of the level of constitutional scrutiny applied by the Court.[4] Assuming that the rational basis test applies, plaintiffs assert that the MMA is not rationally related to any conceivable legitimate governmental purpose. Plaintiffs further urge the Court to invalidate the MMA on substantive due process grounds because it violates their fundamental right to marry. Plaintiffs raise the same equal protection and due process arguments against section 24 of the Michigan Adoption Code.[5]

Defendants counter that plaintiffs' equal protection claims fail because plaintiffs cannot demonstrate that the MMA lacks a rational relationship to any legitimate state interest. Defendants

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[4] Courts employ a three-tiered framework for evaluating whether a provision of law offends equal protection principles. The most rigorous tier is "strict" scrutiny, which is reserved for laws that either affect fundamental rights or discriminate against "suspect classes" such as racial, ethnic or religious minorities. See Plyler v. Doe, 457 U.S. 202, 216-217 (1982); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to racial classification); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to classification based upon national origin). A more relaxed form of inquiry is "intermediate" or "heightened" scrutiny. Courts have applied this standard to laws that discriminate on the basis of gender, alienage or illegitimacy, also known as "quasi-suspect classes." See Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to classification based upon illegitimacy); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-724 (1982) (applying intermediate scrutiny to gender classification). Finally, the least exacting tier is denominated "rational basis" review. For the most part, the rational basis test is used to assess the propriety of legislation that does not implicate fundamental rights or suspect/quasi-suspect classes. Currently, the Sixth Circuit Court of Appeals does not consider gays or lesbians a suspect or quasi-suspect class. See Davis v. Prison Health Servs., 679 F.3d 433, 438 (6th Cir. 2012); Scarborough v. Morgan County Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006).

[5] The Court expresses no view on the constitutionality of section 24. The statute's language limits those eligible to adopt children to single persons and married couples regardless of sexual orientation or gender. It does not prohibit same-sex partners from marrying and, thereafter, adopting children. While plaintiffs make a colorable claim that they and their children are, in fact, injured by their ineligibility to petition for joint adoption, such injury is not attributable to defendants' enforcement and defense of section 24. Plaintiffs may not jointly adopt their children because they are not married. And plaintiffs may not marry because any legal form of same-sex union in the state of Michigan is prohibited by the MMA. Thus, the relief plaintiffs request hinges on the constitutional validity of the MMA.

also contend that the MMA does not violate due process because the law does not recognize a fundamental right to marry another individual of the same gender.

II. Summary Judgment Standard

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the Court construes all facts in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). There are no genuine issues of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Id. at 587. If the movant carries its burden of showing an absence of evidence to support a claim, then the nonmovant must demonstrate by affidavits, depositions, answers to interrogatories and admissions that a genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 324-325 (1986).

III. Analysis

Assuming, without deciding, that the appropriate level scrutiny in this case is rational basis review, a triable issue of fact exists regarding whether the alleged rationales for the MMA serve a legitimate state interest.[6] Under the rational basis test, the Court must determine whether the MMA

[6] While the instant dispute must be adjudicated under the federal constitution, the Court, at this time, reserves decision on the broader constitutional question of whether the MMA is subject to heightened scrutiny because it encroaches upon a fundamental right under the Due Process or Equal Protection Clauses of the Fourteenth Amendment. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

proscribes conduct in a manner that is rationally related to a legitimate governmental purpose. See Vance v. Bradley, 440 U.S. 93, 97 (1979); Guzman v. United States Dep't of Homeland Sec., 679 F.3d 425, 432 (6th Cir. 2012). When applying this standard, courts will not invalidate a provision of law on equal protection grounds "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a reviewing court] can only conclude that the government's actions were irrational." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000). "The government has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data." Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000). Instead, it is incumbent upon plaintiffs to refute "any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

Nonetheless, the rational justification of the MMA must be rooted "in the realities of the subject [being] addressed . . ." Heller v. Doe, 509 U.S. 312, 321 (1993). And when a provision of law adversely affects a group that has endured "historic patterns of disadvantage," courts make "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." Massachusetts v. United States Dep't of Health and Human Servs., 682 F.3d 1, 11 (1st Cir. 2012); see also United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (invalidating the Defense of Marriage Act on the ground that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

Defendants offer several grounds for Michigan's exclusive recognition of heterosexual marriages. These fall under four distinct categories: (1) providing children with "biologically connected" role models of both genders that are necessary to foster healthy psychological development; (2) forestalling the unintended consequences that would result from the redefinition of marriage; (3) tradition or morality; and (4) promoting the transition of "naturally procreative relationships into stable unions." To survive summary judgment, plaintiffs must raise a triable issue of fact as to each of defendants' asserted justifications for the MMA. Plaintiffs have met this burden.

In response to defendants' contention that only heterosexual marriages can provide children with the appropriate gender role-modeling required for healthy psychological development, plaintiffs submit the affidavit of Dr. Jeanne Howard, Co-Director of the Center for Adoption Studies at Illinois State University. She attests that:

> For almost three decades researchers have compared outcomes of children raised by same sex parents to those raised by opposite sex parents. In large and small studies, studies of lesbians and of gay men, studies of families formed through birth, and adoption and assisted technology, all studies consistently have found no differences for children in psychological adjustment, gender identification, school performance, self-esteem, anxiety, depression, behavior problems, social relationships and emotional problems, cognitive functioning, level of investment and quality of parent/child relationship.

Pls.' Br. Ex. 6 at ¶6A (emphasis added). Furthermore, Dr. Howard noted that in her professional opinion:

> the evidence clearly demonstrates that gays and lesbians have equal parenting skills to their heterosexual counterparts. As adoption expert Dr. David Brodzinsky notes . . . "the data are unequivocal in showing that lesbian and gay-headed households show patterns of psychological social, and academic adjustment similar to their peers raised by straight parents . . . In addition, . . . [on

> gay or lesbian adoptive families] the results are consistent with the findings of previous research: lesbian and gay adoptive parents and their children show patterns of adjustment similar to those of heterosexual adoptive parents and their children."

Id. at ¶6E (emphasis added).[7] After reviewing the record, including Dr. Howard's affidavit, the Court concludes that a genuine issue of material fact exists with respect to defendants' gender role-modeling justification for the MMA.

Nor is the Court persuaded that a rational trier of fact could not find in plaintiffs' favor based upon defendants' other justifications for the MMA, all of which have been rejected by other courts in recent years. See Windsor, 133 S. Ct. at 2694 (ruling the Defense of Marriage Act unconstitutional although "over 1,000 statutes and numerous federal regulations . . . pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits" would be affected); Lawrence v. Texas, 539 U.S. 558, 583 (2003) (holding that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause."); Windsor v. United States, 833 F. Supp. 2d 394, 404 (S.D.N.Y. 2012) (stating that "[i]t does not follow from the exclusion of one group from federal benefits (same-sex married persons) that another group of people (opposite-sex married couples) will be incentivized to take any action, whether that is marriage or procreation."); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 999-1000 (N.D. Cal. 2010) (finding that California's constitutional amendment prohibiting same-sex marriage did not "make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents."). Whether any of these justifications can survive rational basis review in the present

[7] The *amici curiae* briefs filed on behalf of plaintiffs cite to numerous similar experts who arrive at the same conclusion.

case must be determined after a trial.

Regarding plaintiffs' motion for summary judgment, although counsel cites to relevant case law issued by persuasive authorities, the Court may not simply adopt the findings of fact and conclusions of law previously issued in other proceedings. See Weinstein v. Islamic Republic of Iran, 175 F. Supp. 2d 13, 16-17 (D.D.C. 2001); see also Cactus Corner, LLC v. United States Dep't of Agric., 346 F. Supp. 2d 1075, 1099 (E.D. Cal. 2004) (stating that "[e]ven where, under the doctrine of *stare decisis*, a court is generally compelled to abide by conclusions of law made in prior proceedings of higher courts, a court cannot take judicial notice of another court's determination of the truth of those facts."). Rather, the parties must be afforded the opportunity to develop their own record in this matter with the benefit of calling witnesses and subjecting them to cross-examination. Accordingly,

IT IS ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendants' cross motion for summary judgment is denied.

IT IS FURTHER ORDERED that the parties shall exchange final witness lists no later than thirty (30) days from the date of this opinion and order.

IT IS FURTHER ORDERED that the parties shall appear for trial on Tuesday, February 25, 2014, at 9:00 a.m.

Dated:
Detroit, Michigan

BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE