UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors,

Plaintiffs,

v

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan, BILL SCHUETTE, in his official capacity as Michigan Attorney General, and BILL BULLARD, JR., in his official capacity as Oakland County Clerk,

Defendants.

No. 2:12-cv-10285-BAF-MJH

HON. BERNARD A. FRIEDMAN

MAG. MICHAEL J. HLUCHANIUK

STATE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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STATE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendants, Richard Snyder, in his official capacity as Governor of the State of Michigan, and Bill Schuette, in his official capacity as the Michigan Attorney General (State Defendants), through their attorneys, Joseph E. Potchen and Tonya C. Jeter, move under Federal Rule of Civil Procedure 12(b)(1) and (6) to dismiss Plaintiffs' Amended Complaint and state as follows:

1. Plaintiffs April DeBoer and Jayne Rowse individually and as next friend of three minor children originally filed this lawsuit against Governor Snyder and Attorney General Schuette in their official capacities. The original complaint alleged that Michigan's adoption law, Mich. Comp. Laws § 710.24, which restricts adoptions to single individuals or married couples, violates the U.S. Constitution's Equal Protection Clause because it results in the disparate treatment of children of unmarried parents and of unmarried parents seeking to jointly adopt.

2. State Defendants filed a Motion to Dismiss because (A) Plaintiffs lack standing, (B) adoption laws and decisions regarding the best interests of children are uniquely within the province of the State and, (C) Plaintiffs failed to state sufficient facts showing that Michigan's Adoption Code, specifically Mich. Comp. Laws § 710.24, violates the Fourteenth Amendment's Equal Protection Clause.

3. On August 29, 2012, this Court held oral argument on the State Defendants' Motion to Dismiss. At the close of the argument, the Court offered Plaintiffs the opportunity to amend their complaint to challenge Michigan's Constitutional Amendment which defines marriage as "the union of one man and one woman." Mich. Const. art. I, § 25.

4. Later, despite State Defendants' objection, this Court granted Plaintiffs leave to file an amended complaint to add a second count challenging Michigan's Constitutional Amendment regarding marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. Plaintiffs' Amended Complaint added a new Defendant, Oakland County clerk, Bill Bullard, Jr.

5. On October 5, 2012, after a status conference, this Court entered an order granting all Defendants thirty (30) days from date of service of the Plaintiffs' Amended Complaint upon the new party, Defendant Bullard, to file their respective motions to dismiss.

6. On October 5, 2012, this Court also entered an order incorporating by reference all prior filings in this matter and preserving the arguments contained therein.

7. State Defendants now move to dismiss Plaintiffs' Amended Complaint.

8. The standing and abstention arguments raised in the State Defendants' earlier motion apply to Plaintiffs' challenge to Michigan's Marriage Amendment, and State Defendants adopt those arguments in this Motion.

9. Also, Plaintiffs' Amended Complaint should be dismissed for three additional reasons.

10. First, Plaintiffs' constitutional challenge to Michigan's Marriage Amendment fails for want of a substantial federal question. *See Baker v. Nelson*, 409 U.S. 810 (1972), recently followed by the Hawaii District Court in *Jackson v.*

Abercrombie, 2012 U.S. Dist. LEXIS 111376 (D. Haw. August 8, 2012). Regulation of marriage has long been regarded as a virtually exclusive province of the States. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

11. Second, even if Plaintiffs' claims could survive *Baker*, they fail to state sufficient facts showing that Michigan's Constitutional Amendment regarding marriage violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Plaintiffs' claims do not involve a fundamental right or a suspect class. Their claims are therefore subject to rational basis review, and Plaintiffs fail to allege facts showing Michigan's law does not meet that test. Consequently, Plaintiffs fail to state a claim upon which relief can be granted, and this action should be dismissed in accordance with Fed. R. Civ. P. 12(b)(6).

12. Finally, Plaintiffs request improper declaratory and injunctive relief. Plaintiffs' requested declaratory relief would needlessly increase friction between our federal and state courts. Plaintiffs' requested injunctive relief incorrectly seeks to enjoin conduct of non-parties to this lawsuit. And since Plaintiffs' seek relief that is more in the nature of a mandamus action, such relief is outside this Court's jurisdiction. Actions for mandamus must be brought in the Michigan Court of Appeals or state Circuit Court.

13. On October 24, 2012, State Defendants sought concurrence pursuant to Local Rule 7.1(a) from Plaintiffs' counsel, which was denied, necessitating this Motion.

14. For the reasons set forth in this Motion and the following Brief in Support, the State Defendants request that this Court grant their Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). The State Defendants reserve the right to adopt any arguments that may be set forth in Defendant Bullard's Motion to Dismiss.

WHEREFORE, State Defendants Snyder and Schuette respectfully request this Court to grant their Motion to Dismiss Plaintiffs' Amended Complaint, award the State Defendants attorneys' fees and costs, and grant such further relief this Court deems just and equitable.

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Attorney General

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/s/ Tonya C. Jeter (P55352)
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Dated: November 7, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R, R.D.-R., and J.D.-R, minors,

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STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

CONCISE STATEMENT OF ISSUES PRESENTED

I. Regulation of marriage has long been regarded as a virtually exclusive province of the states. In *Baker v. Nelson*, 409 U.S. 810 (1972), not a single justice found a constitutional challenge to Minnesota's opposite-sex definition of marriage substantial enough to afford plenary review. That case remains good law and controls the outcome in this action. Federal appellate courts have uniformly shielded state and local marriage laws from Fourteenth Amendment challenges for decades. Should Plaintiffs' constitutional challenge to Michigan's marriage amendment be dismissed for want of a substantial federal question?

II. The allegations contained in Count II of Plaintiffs' Amended Complaint fail to establish any violation of their Equal Protection or Due Process rights under the Fourteenth Amendment. Since their claims do not involve a fundamental right or a suspect class, Plaintiffs' claims are subject to rational basis review. Plaintiffs fail to allege facts showing that Michigan lacks a rational basis for its long-standing recognition of opposite-sex marriages. In fact, Michigan's Marriage Amendment, § 25 of article I of Michigan's Constitution, fosters the State's legitimate interest in promoting responsible natural procreation, which in turn, promotes raising children in a home environment with both a mother and a father. Should Plaintiffs' Amended Complaint be dismissed because they fail to state a viable claim upon which relief may be granted?

III. Plaintiffs request inappropriate declaratory and injunctive relief and this Court lacks jurisdiction over the relief sought. Plaintiffs' requested declaratory relief would needlessly increase friction between our federal and state courts. Plaintiffs' requested injunctive relief improperly seeks to enjoin conduct of non-parties to this lawsuit. Moreover, Plaintiffs' seek relief that is more in the nature of a mandamus action. Actions for mandamus must be brought in the Michigan Court of Appeals or State Circuit Court. Should Plaintiffs' Amended Complaint be dismissed since the requested relief is outside this Court's jurisdiction?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Fed. R. Civ. P. 12 (b)(1)

Fed. R. Civ. P. 12 (b)(6)

Mich. Const. art. I, § 25

I.

Baker v. Nelson, 409 U.S. 810 (1972)

Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006)

Jackson v. Abercrombie, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012)

Sosna v. Iowa, 419 U.S. 393 (1975)

II.

F.C.C. v. Beach Communications., Inc., 508 U.S. 307 (1993)

Hadix v. Johnson, 230 F.3d 840 (6th Cir, 2000)

Heller v. Doe, 509 U.S. 312 (1993)

Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006)

Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250 (6th Cir. 2006)

Washington v. Glucksberg, 521 U.S. 702 (1997)

III.

Detroit Newspaper Publishers Ass'n. v. Detroit Typographical Union No. 18, 471 F.2d 872 (6th Cir. 1972)

Grand Trunk Western RR Co v. Consol. Rail Corp, 746 F.2d 323 (6th Cir. 1984)

Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003)

INTRODUCTION

The U.S. Constitution does not require states to redefine marriage to include same-sex couples. There is no fundamental right to marry a person of the same-sex, and nothing in the U.S. Constitution requires or permits federal courts to invalidate a state's decision defining civil marriage as the union of one man and one woman. Plaintiffs' disagreement with Michigan's constitutional Marriage Amendment and their attempt to have this Court require Michigan to change its pronouncements regarding the social institution of marriage is a wide departure from the common understanding of what the U.S. Constitution is for – to restrain federal government overreach rather than to provoke it.

This is not an issue of first impression. Regulation of marriage has long been regarded as a virtually exclusive province of the states. In *Baker v. Nelson*, the U.S. Supreme Court decided that the Fourteenth Amendment did not create a right to same-sex marriage, and that such a claim did not even raise a substantial federal question. Nothing the U.S. Supreme Court has said before or after that decision casts the slightest doubt on its holding.

Aside from the binding precedent of *Baker*, Plaintiffs fail to state a viable Equal Protection or Due Process claim. Under rational basis review, it is plain that Michigan's Marriage Amendment bears a reasonable relation to legitimate state interests. Michigan supports natural procreation and recognizes that children benefit from being raised by parents of each sex who can then serve as role models of the sexes both individually and together in matrimony. Plaintiffs fail to allege facts showing there is no rational basis for these legitimate state interests.

Finally, Plaintiffs request inappropriate declaratory and injunctive relief. The declaratory relief sought in the Amended Complaint would needlessly increase friction between our federal and state courts. The injunctive relief sought improperly requests this Court to enjoin conduct of non-parties to this lawsuit. Plaintiffs fail to set forth sufficient facts showing that the extraordinary and drastic relief sought in their complaint is appropriate under the circumstances. And since Plaintiffs' seek relief that is more in the nature of a mandamus action, such relief is outside this Court's jurisdiction. An action for mandamus against a state officer must be commenced in the Michigan Court of Appeals or in the State Circuit Court.

STATEMENT OF FACTS

A. Relevant factual background regarding Count II[1]

Plaintiffs, April DeBoer and Jayne Rowse, are an unmarried couple who have resided together for six years (Amended Complaint (AC), ¶ 8). In February 2007, Ms. DeBoer and Ms. Rowse participated in a commitment ceremony (AC, ¶ 15). They have not been denied any marriage license, but apparently claim that such an attempt would be denied since they are a same-sex couple.

They allege that Michigan's Constitutional Amendment regarding marriage, Mich. Const. art. I, § 25, lacks a rational basis and violates the U.S. Constitution's Equal Protection Clause because it results in the disparate treatment of same-sex, unmarried couples (AC, ¶¶ 29, 32). They also allege that Michigan's Marriage

[1] For the purposes of this Motion only, State Defendants accept these factual statements in Plaintiffs' Amended Complaint.

Amendment violates the U.S. Constitution's Due Process Clause because it unconstitutionally burdens the exercise of fundamental rights. (AC, ¶ 34).

B. Michigan's marriage laws

Throughout history and across cultures, marriage has been understood and defined to mean a union between one man and one woman. *Hernandez v. Robles*, 855 N.E.2d 1, at 361 (N.Y. 2006):

> Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted.

At least 38 states, including Michigan, still accept this definition. In fact, 29 states have placed language defining marriage as the union of a man and a woman in their state constitutions. Twenty-six of the states with constitutional marriage definitions also have statutory provisions adopting this language. Another nine states have statutory language defining marriage in a similar way. *See*, Attachment 1, "State Laws Limiting Marriage to Opposite-Sex Couples," National Conference of State Legislatures, May 15, 2012, http://www.ncsl.org/issues-research/human-services/state-doma-laws.aspx; *see* also *Jackson v. Abercrombie*, 2012 U.S. Dist. LEXIS 111376, at *28 (D. Haw. Aug. 8, 2012).

Here, on November 2, 2004, the citizens of the State of Michigan voted and approved an amendment to the Michigan Constitution that provides:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose. [Mich. Const. art I, § 25.]

The Amendment took effect on December 18, 2004.

In addition to this amendment, Michigan has various statutes governing the definition of marriage, including Mich. Comp. Laws § 551.1 through Mich. Comp. Laws § 551.9 (Mich. Comp. Laws § 551.6 and 551.8 have been repealed). For example, these statutes:

(1) require that spouses be of the opposite sex, Mich. Comp. Laws § 551.1;

(2) provide that marriage requires the consent of the parties, Mich. Comp. Laws § 551.2;

(3) list blood relations that one cannot marry, Mich. Comp. Laws § 551.3 & § 551.4;

(4) prohibit bigamy, Mich. Comp. Laws § 551.5; and

(5) set the minimum age for marriage at 16 years of age, Mich. Comp. Laws § 551.51.

Notwithstanding that Michigan has never recognized a same-sex marriage; Plaintiffs now seek to circumvent these laws and Michigan's traditional view of marriage by seeking relief in this Court.

ARGUMENT

I. Binding Supreme Court precedent precludes review of Plaintiffs' claims.

A. The U.S. Supreme Court's dismissal for want of a substantial federal question in *Baker v. Nelson* confirms that neither the Due Process Clause nor the Equal Protection Clause bars states from limiting marriage to one man and one woman.

Regulation of marriage is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). It has been long settled that "[t]he State … has [the] absolute right to prescribe the conditions upon with the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878), overruled on other grounds by *Sheaffer v. Heitner*, 433 U.S. 186 (1977).

For decades, federal appellate courts have uniformly shielded state and local marriage laws from Fourteenth Amendment challenges. *See*, e.g., *Jackson v. Abercrombie*, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012) (upholding Hawaii's traditional marriage definition); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006)(upholding Nebraska's traditional marriage law); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), aff'd 673 F.2d 1036 (9th Cir. 1982) (upholding Colorado's traditional definition of marriage); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (*per curiam*) (upholding the District of Columbia's traditional marriage law).

Those holdings follow from *Baker v. Nelson*, 409 U.S. 810 (1972), which dismissed a challenge to Minnesota's traditional marriage law for want of a substantial federal question. In *Baker*, the U.S. Supreme Court ruled that neither the Due Process Clause nor the Equal Protection Clause bars the states from limiting marriage to one man and one woman. *Baker* remains binding law, as the First Circuit Court of Appeals recognized earlier this year. Even as it found the federal Defense of Marriage Act (DOMA) invalid on other grounds, the court held that "*Baker* is precedent binding on us . . . [and] limit[s] the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." *Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 3 (1st Cir. 2012), petition for cert. filed 6/29/12.[2]

Baker originated in Minnesota state court. A county clerk denied a marriage license to Baker and another man "on the sole ground that petitioners were of the same sex, it being undisputed that there were otherwise no statutory impediments to a heterosexual marriage by either petitioner." *Baker v. Nelson*, 291 Minn. 310, 311 (1971).

The men sued, contending the denial violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Baker*, 291 Minn. at 312. They lost and appealed.

On appeal, the Minnesota Supreme Court rejected the contention that limiting marriage to one man and one woman violated federal due-process or equal-

[2] The State Defendants do not necessarily agree with the entire holding of *Massachusetts v. United States Dep't of HHS*.

protection principles. It specifically held there is no fundamental right to same-sex marriage, that the traditional definition of marriage effects no "invidious discrimination," and that the definition easily survives rational basis review. *Baker*, 291 Minn. at 313-14. Invoking the U.S. Supreme Court's then-mandatory appellate jurisdiction[3], the men sought review.

Their request presented the following questions: whether denial of same-sex marriage "deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment" and whether the denial "violates their rights under the equal protection clause of the Fourteenth Amendment." *See* Jurisdictional Statement, *Baker v. Nelson*, No. 71-1027, at 3.3 (Attachment 2 is a complete copy of appellants' jurisdictional statement. The questions presented are at page 3.)

The Supreme Court summarily dismissed the appeal. Its full ruling states: "The appeal is dismissed for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). This ruling definitively establishes that neither the Due Process Clause nor the Equal Protection Clause bars the states from limiting marriage to one man and one woman. This ruling is binding on this Court and dispositive of this case.

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[3] Under 28 U.S.C. § 1257(2) as in effect at the time, the Court "had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). This appeal as of right was eliminated by the Supreme Court Case Selections Act (Public Law 100-352), which became law on June 27, 1988. *See Wilson v. Ake*, 354 F.Supp.2d 1298, 1304 (M.D.Fla. 2005).

The summary dismissal of an appeal for want of a substantial federal question is a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Such dismissals "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

The Hawaii District Court in *Jackson*, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012) recently followed *Baker*'s holding when it dismissed a similar challenge to Hawaii's marriage laws. In *Jackson*, Plaintiffs sued Hawaii's Governor and the Director of Hawaii's Department of Health challenging both article I, § 23 of the Hawaii Constitution, which provides that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples," and a Hawaii statute which states that a valid marriage contract shall be only between a man and woman. Hawaii Revised Statutes § 572-1. Plaintiffs claimed that Hawaii's marriage laws violated the Equal Protection and Due Process Clauses of the U.S. Constitution. In granting the motion to dismiss, the Court rejected all of Plaintiffs' arguments which claimed that the facts and law at issue in *Baker* were different:

> Consequently, the relevant facts of this case are substantially similar to that raised in *Baker*, which necessarily decided that a state law defining marriage as a union between a man and woman does not violate the Equal Protection Clause. This issue did not merely "lurk in the record," but was directly before the Supreme Court. *Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court. [*Jackson*, 2012 U.S. Dist. LEXIS 111376, at 54.]

As in *Jackson*, Plaintiffs' Amended Complaint here involves "the precise issues presented and necessarily decided by" *Baker v. Nelson*. Exactly as in *Baker*,

the adult Plaintiffs cannot marry only because their chosen partner is of the same sex. (AC, ¶ 16). Exactly like *Baker*, Plaintiffs in this case allege that denial of same-sex marriage deprives them of certain benefits in violation of the Equal Protection Clause of the Fourteenth Amendment and without due process of law under the Fourteenth Amendment. (AC, ¶¶ 27-34). Accordingly, exactly like *Baker*, these claims should be dismissed for failure to raise a substantial federal question.

Even more recently, in *Windsor v. United States*, 2012 U.S. App. LEXIS 21785 at *37-8 (2nd Cir., Oct. 18, 2012),[4] the Second Circuit Court of Appeals, in deciding a DOMA challenge, acknowledged that it is not the role of the federal government to intrude on a state's definition of marriage:

> To the extent that there has ever been "uniform" or "consistent" rule in federal law concerning marriage, it is that marriage is "a virtually exclusive province of the States." *Sosna*, 419 U.S. at 404. As the Supreme Court has emphasized, "the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. . . . [T]he Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S. Ct. 525, 50 L. Ed. 867, 4 Ohio L. Rep. 69 (1906) (emphasis added), overruled on other grounds by *Williams v. State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

B. Neither *Romer v. Evans* nor *Lawrence v. Texas* has eroded *Baker's* controlling ruling. In neither case did the Court inform lower courts that they are no longer bound by *Baker*.

Plaintiffs may rely upon *Romer v. Evans,* 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003) to assert that because of doctrinal changes in the Supreme Court's Due Process Clause analysis, this Court is not bound by the

[4] The State Defendants do not agree with the entire holding of *Windsor*.

Supreme Court's summary dismissal in *Baker*. Such an argument, however, misses the mark.

Romer had nothing to do with the constitutionality of the traditional definition of marriage. In *Romer*, the U.S. Supreme Court applied rational basis review to invalidate an "unprecedented" state constitutional amendment that barred homosexuals from seeking any protection under state or local anti-discrimination statutes or ordinances. *Romer,* 517 U.S. at 633. The classification "was drawn for the purpose of disadvantaging the group burdened by the law," and was motivated by nothing more than "a bare ... desire to harm a politically unpopular group." *Romer*, 517 U.S. at 633-34 (citations omitted).

In contrast, the Michigan Marriage Amendment did not seek to disadvantage a particular group, but rather focused on supporting the traditional definition of marriage. Michigan has never legalized same-sex marriages. By maintaining the historical definition of marriage and prohibiting the recognition of similar unions to marriage for any purpose, the amendment prevents the State from elevating other similar unions—unions that imitate marriage—from being accorded the same unique status of legal marriage in Michigan. Keeping the *status quo* regarding marriage does not mean the amendment was initiated to harm any other groups. The primary supporters of the amendment did not run a "gay-bashing" campaign targeted against lesbians, gays, and bisexuals, but instead engaged in a spirited public debate with supporters of same-sex marriage about the role of the courts and the meaning of marriage. *See* Michigan House Fiscal Agency, Analysis of Ballot

Proposal 04-2 http://www.house.mi.gov/hfa/PDFs/ballot04-02.pdf, Attachment 3. *See* also *Massachusetts*, 682 F.3d at 16 (observing that the desire to promote traditional marriage is not the same as "mere moral disapproval of an excluded group').

Lawrence is even more off target. In *Lawrence*, the U.S. Supreme Court held that the government cannot criminalize private, consensual, adult homosexual sodomy. At the same time, however, the Court specifically informed lower courts that that case did "not involve whether the government must give formal recognition to any relationship that homosexual persons may seek to enter." *Lawrence,* 539 U.S. at 578. Justice O'Connor's concurring opinion reiterated the point:

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group. [*Id.* at 585.]

The Eleventh Circuit concurred in this view of *Lawrence* in *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804, 818 (11th Cir. 2004). In holding that a state may constitutionally prohibit practicing homosexuals from adopting children, the court observed that *Lawrence* simply does not address "the affirmative right to receive official and public recognition" for a relationship." *Id*. at 817.

C. *Perry v. Brown* does not control because the Ninth Circuit specifically declined to address the broader issue presented here.

The Ninth Circuit decided *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), on a very narrow issue. It did not touch the question of whether maintaining the traditional definition of marriage violates the Constitution. Rather, the outcome of the case hinged on whether it was unconstitutional to "take away" rights previously given to a group, namely homosexuals and lesbians.

"Prior to November 4, 2008, the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike." *Perry,* 671 F.3d at 1063. The California Supreme Court explicated this right in *In re Marriage Cases*, 43 Cal.4th 757; 76 Cal.Rptr.3d 683; 183 P.3d 384 (2008). Some 18,000 same-sex couples were married in the wake of that ruling.

In response, California voters passed Proposition 8, a constitutional amendment that stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right—the right to obtain and use the designation of "marriage" to describe their relationships. Nothing more, nothing less. *Id*. at 1063. The amendment did not nullify same-sex marriages that had already been performed. *Strauss v. Horton*, 46 Cal.4th 364; 93 Cal.Rptr.3d 591; 207 P.3d 48 (2009).

The *Perry* plaintiffs filed a federal law challenge to Proposition 8. Because of the "unique and strictly limited effect of Proposition 8" as described in *Strauss*, the *Perry* Court could and specifically did decline to decide the broader question at issue

in our case—"[w]hether under the Constitution same-sex couples may ever be denied the right to marry, a right that has long been enjoyed by opposite-sex couples." *Perry,* 671 F.3d 1064.

Thus, in *Perry*, the Ninth Circuit made clear it was not addressing the constitutionality of a state law that maintained the state's historical definition of marriage as being between a man and a woman. Instead, it was "considering the constitutional question of the validity of Proposition 8's elimination of the rights of same-sex couples to marry . . . ." Since the Court did not "address the question of the constitutionality of a state's ban on same-sex marriage," it did not deal with *Baker*. *Perry*, 671 F.3d at 1082 n. 14. In his opinion concurring in part and dissenting in part, Judge Smith agreed: "The equal protection question raised in this case seems to be distinguishable from the precise issues presented and necessarily decided in *Baker*, especially when the equal protection issue is framed as San Francisco advocates." But Judge Smith emphasized that *Baker* remains good law. *Id*. at 1099.

Unlike in Michigan, in California, the State allowed homosexuals and lesbians to marry—at least for more than a 100 days. They also allowed homosexuals and lesbians "all" of the rights, including the right to jointly adopt, that were provided to married heterosexual couples. Then Proposition 8 passed. The State took away from homosexuals and lesbians only the right to call their relationships "marriage." Homosexuals and lesbians, however, retained all of the other rights/benefits associated with the term marriage; again, all of those benefits

were in California statutes. Clearly, our case is very different. Unlike in California, Michigan has never sanctioned same-sex marriage. Rather, it has consistently followed the traditional definition of marriage.

This Court is bound by *Baker*. Since Plaintiffs' constitutional challenge to Michigan's Marriage Amendment fails for want of a substantial federal question, their case should be dismissed, with prejudice.

II. Plaintiffs' Amended Complaint fails to state facts establishing any viable claim upon which relief may be granted. The limitation of marriage licenses to opposite-sex couples does not violate the Plaintiffs' constitutional rights.

A. Plaintiffs fail to state a viable equal-protection claim.

Plaintiffs do not allege that the Michigan Marriage Amendment creates any impermissible classification based on their gender. The reason for this is simple. Men and women enjoy equal rights to obtain a license to marry a person of the opposite sex; neither sex is advantaged or disadvantaged in the consideration of the license application. Each sex is equally prohibited from precisely the same conduct i.e., marriage to a person of the same sex.

As the classification Plaintiffs challenge is not based on gender, it must be drawn on the basis of sexual orientation. The Sixth Circuit has not recognized sexual orientation, and more specifically, homosexuality, as a suspect classification. Thus, Plaintiffs' equal protection challenge is subject to rational basis review. *Scarbrough v. Morgan County Bd. of Educ.,* 470 F.3d 250, 261 (6th Cir. 2006); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). "On rational-basis review," a challenged statute enjoys "a strong presumption of validity, and those

attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Communications., Inc.,* 508 U.S. 307, 314-315 (1993). Alternatively, a plaintiff must demonstrate the challenged government action was "motivated by animus or ill-will." *Scarbough,* 470 F.3d at 260-61. These judicial restraints have added force "where the legislature must necessarily engage in a process of line-drawing." *Beach Communications,* 508 U.S. at 315 (internal quotes and citations omitted).

In situations like this case, courts have developed less restrictive standards for reviewing the constitutionality of a state's action. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (illustrating and describing a "two-tier" analysis of equal-protection doctrine). The test employed, "rational basis" review, affords wide latitude to social and economic legislation. "The Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061, 1071 (E.D. Mich., 2000) (quoting *Cleburne*, 473 U.S. at 440). Whether the legislature was "unwise in not choosing a means more precisely related to its primary purposes is irrelevant." *Breck v. Michigan*, 203 F.3d 392, 396 (6th Cir. 2000), quoting *Vance v. Bradley*, 440 U.S. 93, 109 (1979). This is true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. at 632. If there is a rational basis for the legislation, some imperfections and inequalities will be tolerated. *Olympic Arms*, 91 F. Supp. 2d at 1075 (quoting *Dillinger v. Schweiker*, 762 F.2d 506, 508 (6th Cir. Ohio 1985)).

A classification does not fail rational-basis analysis because it, in practice, results in some inequality. Under the rational-basis test, the question is simply whether the challenged legislation is rationally related to a legitimate government interest. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

In *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir, 2000), the Sixth Circuit reiterated the concept that a statute will be afforded a strong presumption of validity and must be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate government purpose. The government has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data. *Hadix*, 230 F.3d at 843.

1. Plaintiffs fail to allege facts showing that Michigan's rational basis for defining marriage as the union of one man and one woman is not related to legitimate state interests.

Plaintiffs' Amended Complaint fails to allege facts demonstrating that the Marriage Amendment's recognition of opposite-sex marriage is not rationally related to any conceivable legitimate state interest. Michigan law does not, nor has it ever, recognized same-sex relationships as valid marriages. Plaintiffs have not alleged that the history surrounding the passage of the 2004 constitutional amendment reflects any animus against same-sex couples. Therefore, this Court has no reason to conclude that the State's continued limitation of marriage licenses to opposite-sex couples is irrational.

Again, rational-basis review is highly deferential to the legislature, or, in this case, to the electorate that adopted § 25 of article I of Michigan's Constitution by the initiative process. Thus, the classification created by the Michigan Marriage Amendment and other state laws defining marriage as the union between one man and one woman is afforded a "strong presumption of validity." *Heller v. Doe*, 509 U.S. at 319. The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices." *Beach Communications*, 508 U.S. at 313.

At the very least, it is for the citizens of Michigan to determine whether there is a social benefit to be gained from the promotion of same-sex partnerships. Plaintiffs seek to avoid the legislative process and ignore Michigan's voters, who have already voiced their support for continued historical recognition of opposite sex marriage through the passage of the Marriage Amendment. An expression of the popular will expressed by majority plebiscite must not be cavalierly disregarded. *City of Eastlake v. Forest City Enters, Inc.*, 426 U.S. 668, 679 (1976).

In fact, Michigan's limitation of marriage to opposite-sex couples is rationally related to legitimate state interests—the preservation of the historic institution of marriage as a union of one man and one woman, which in turn, uniquely fosters responsible natural procreation, which in turn, promotes raising children in a home environment with both a mother and a father. Opposite-sex marriages have been recognized as promoting these "long-standing societal benefits" because they are the only sexual relationship capable of producing children. *See Standhardt v. Superior*

Court, 77 P.3d 451 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Jackson*, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012). "[T]he limitation of marriage to one man and one woman preserves both its structure and its historic purposes." *Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 992 n.13 (Mass. 2003) (Cordy, J., dissenting).

While Plaintiffs may argue that same-sex couples can become parents through assisted reproduction or fostering children, they cannot establish that the legislature was irrational in recognizing a *unique* and *distinct* social benefit derived from heterosexual marriage: responsible natural procreation and child-rearing by both a mother and a father. In the traditional family, there is a role model of both sexes for the children, demonstrating how to relate to persons of the same sex and opposite sex, which is beneficial in the optimal raising of children. *In re Marriage of J.B. and H.B.,* 326 S.W.3d 654, 678 (Tx. Ct. App. 2010) ("The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship"); *Hernandez,* 855 N.E.2d at 7 ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like"). As such, a state may rationally encourage the notion that, all things being equal, it is ideal for a child to have both biological parents as legal parents. *See Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (en banc).

Plaintiffs may argue that Michigan's decision to allow single people to adopt undermines the State's rational basis for limiting its recognition of marriage to opposite-sex couples. But while many states, including Michigan, recognize adoptions by single persons, these adoptions are still consistent with the States' aim of attempting to imitate the natural family for adopted children. *See* Mich. Comp. Laws § 710.24. The adoptive parents serve as "replacements for the child's own biological parents. The approval of an unmarried individual [is] considered part of the conjugal family norm, simply with one of the parents not yet 'replaced.'" Camille S. Williams, *Family Norms in Adoption Law: Safeguarding the Bests Interest of the Adopted Child,* 18 St. Thomas L. Rev. 681, 682 (2005). A single person "remains eligible to marry," and, thus, there always remains the possibility that the natural family will be completed, such that the child will have both a mother and a father. Lynn D Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions,* 3 Ave Maria L. Rev. 561, 614. (2005).

Legal recognition of adoptions by same-sex couples, however, flatly contradicts the purpose for which the states passed adoption laws in the first place—replicating the natural family. *Id.* The nature of joint adoption by same-sex couples "differs so radically from traditional imitative adoption" that mandatory recognition of such adoptions would require Michigan to jettison its effort to imitate the natural family, which is one of the historic purposes of its adoption laws. *Id.* at 615.

If this court were to overturn Michigan's historical definition of marriage that is embedded in its constitution and statutes, such action would create potential legal chaos. As stated in State Defendants' previous brief, Michigan's current system guards against custody battles among those with varied and uncertain levels of commitment to each other and supports the State's overall policy of supporting the traditional family. Michigan's marriage framework, just like its adoption framework, creates stability in the law and legal predictability, which are all in the best interest of the child. And defining marriage as between one man and one woman furthers Michigan's legitimate interests in attempting to provide the ideal family setting for its children. Plaintiffs' Equal Protection claim in Count II fails and should be dismissed.

B. Plaintiffs fail to state a viable due-process claim.

The substantive component of the Due Process Clause prohibits states from infringing on fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Plaintiffs here allege – generally – in their Amended Complaint that marriage is a fundamental right entitled to due-process protection. State Defendants' agree. The right to marry is a fundamental right. However, the alleged right to same-sex marriage is not. Accurately identifying and analyzing Plaintiffs' claimed right—the right to marry a person of the same sex – exposes the serious consequences such a position portends: the redefinition of the time-honored institution of marriage.

A state law that does not implicate a fundamental right or suspect classification is subject to rational-basis review. *Glucksberg*, 521 U.S. at 722. In describing fundamental rights, the Supreme Court "has eschewed breadth and generality in favor of narrowness, delicacy, and precision." *Log Cabin Republicans v. United States of America*, 658 F.3d 1162, 1169 (O'Scannlain, J., concurring).

1. Fundamental right to marry

In order to be deemed a fundamental right protected by due process, the right must be "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." *Glucksberg*, 521 U.S. at 720-21. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making that direct and restrain [judicial] exposition of the Due Process Clause." *Id.* at 721 (citations and internal quotation marks omitted).

Relatively few "fundamental" rights have been recognized:

> Those [fundamental] rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted live saving medical treatment. [*United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012).]

The Court has "'always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.'" *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72 (2009) (citation omitted). In addition, the Supreme Court cautions that "extending constitutional protection to an asserted right or liberty interest . . . to a great extent, place[s] the matter outside the arena of public

debate and legislative action." *Glucksberg*, 521 U.S. at 720. For these reasons, even the Supreme Court "exercise[s] the utmost care whenever . . . asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of judges. *Id*. (citations and internal quotation omitted).

a. Same-sex marriage is not a recognized fundamental right

The right of same-sex couples to marry is not "deeply rooted in this Nation's history and tradition" and is therefore not a fundamental right. *See In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004). In fact, "[same-sex marriage] has not even been asserted until relatively recent times." *Hernandez*, 855 N.E.2d at 10. Until 2003, no state recognized same-sex marriages. *Smelt*, 374 F. Supp. 2d at 878.

Additionally, Congress and the majority of states have adopted legislation or constitutional amendments explicitly limiting the institution of marriage to opposite-sex unions. *Conaway*, 932 A.2d at 627. Numerous courts held that the right to legal recognition of a same-sex marriage is not a fundamental right. *See Jackson*, 2012 U.S. Dist. LEXIS 111376 at *86; *Smelt*, 374 F. Supp. 2d at 879; *Wilson v. Ake*, 354 F. Supp. 2d 1298 at 1307 (M.D. Fla. 2005); *Andersen v. King Cnty*., 158 Wn.2d 1(Wash. 2006) and *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d at 987 (Cordy, J., dissenting). ("While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not.").

The Supreme Court, in discussing the fundamental right to marry, has had no reason to consider anything other than the traditional and ordinary understanding of marriage as a union between a man and a woman. In discussing the importance of marriage, the Supreme Court has often linked marriage to procreation. *See Zablocki v. Redhail*, 434 U.S. at 383; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Maynard v. Hill*, 125 U.S. 190, 211 (1888); and *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Consequently, "in recognizing a fundamental right to marry, the [Supreme] Court has *only* contemplated marriages between persons of opposite sexes – persons who had the possibility of having children with each other." *Jackson*, 2012 U.S. Dist. LEXIS 111376 at 76-78, quoting *Dean v. Dist. of Columbia*, 653 A.2d 307, 333 (D.C. 1995).

The traditional understanding of marriage as the union of one man and one woman is deeply rooted in Western civilization and in this Nation's history. The majority of states continue to adhere to the traditional definition of marriage as a union between a man and a woman. This fact has considerable constitutional significance.

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [*Schall v. Martin*, 467 U.S. 253, 268 (1984) (citations and quote marks omitted).]

Absent any history of tradition of same-sex marriage, there is no basis for finding that arrangement to be a fundamental constitutional right.

2. Michigan's Marriage Amendment does not infringe on a fundamental right.

It is clear that Plaintiffs have a fundamental right to enter into opposite-sex marriages. They, however, do not have an equivalent right to enter into same-sex marriages. Civil marriage of same-sex couples is not a fundamental right under either the Michigan Constitution or the U.S. Constitution. Since Michigan's Marriage Amendment does not burden a fundamental right, nor target a suspect class, it must be deemed constitutional if it bears a rational relationship to a legitimate governmental interest. As outlined above, the Marriage Amendment bears a relational relationship to Michigan's legitimate interest in promoting responsible natural procreation and raising children in a home environment with both a mother and a father. Accordingly, Michigan's Marriage Amendment does not violate the Due Process Clause of the Fourteenth Amendment.

III. Plaintiffs request improper declaratory and injunctive relief.

As to Plaintiffs' requested declaratory relief, the Sixth Circuit considers, among other factors, whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction. *See Grand Trunk Western RR Co v. Consol. Rail Corp*, 746 F.2d 323, 326 (6th Cir. 1984).

Here, as argued previously, Plaintiffs' initial challenge to the State adoption statute improperly encroaches upon State jurisdiction. So too does Count II of the Amended Complaint. Plaintiffs attempt to have this Court declare that same-sex couples cannot be denied a marriage license or cannot otherwise be prevented from

marrying is beyond the traditional role of federal courts. The declaratory relief Plaintiffs seek in their proposed Amended Complaint would obviously and needlessly increase friction between our federal and state courts.

Regarding Plaintiffs' requested injunctive relief, in Count I, Plaintiffs want this Court to enjoin "all state judges and other officials" from refusing to process any of the Plaintiffs parent's adoption request based on their unmarried status. They also want this Court to require Defendant Schuette to advise state court judges that they must process Plaintiffs' request for adoption. (AC, Relief Sought, p 10). In their requested relief for Count II, Plaintiffs request an order that would prohibit Defendants from defending the action of "any and all" state officials who may attempt "to bar Plaintiff-parents from obtaining a marriage license." (AC, Relief Sought, p 11).

Generally, a court cannot enjoin non-parties not controlled by or in privity with a named defendant. *Tesmer v. Granholm,* 333 F.3d 683, 703 (6th Cir. 2003); *Sutton v. United States SBA*, 92 F. App'x 112, 124-25; 2003 U.S. App. LEXIS 25694 (2003). Plaintiffs, however, request this Court to invade state court judge's exercise of authority and prohibit the actions of other state and county officials. Basically, Plaintiffs want this Court to enjoin the conduct of individuals who are not part of this lawsuit. Moreover, Plaintiffs are prohibited from seeking injunctive relief against judicial officers under 42 USC § 1983 "unless a declaratory decree was violated or declaratory relief was unavailable." They have not alleged any such facts in their Amended Complaint.

Furthermore, much of Plaintiffs requested relief is based entirely on speculation and conjecture, and they do not present any facts supporting the conclusion that the identified Defendants acted in any way to harm them. The Complaint presents only a conjectural or hypothetical threat of injury from Michigan's Constitutional Amendment and fails to establish any past illegal conduct by the named Defendants directed toward them.

Finally, it appears that much of Plaintiffs requested injunctive relief requests this Court to command action by ordering Defendants to take certain actions. There are two forms of equitable relief which are available to command action — mandatory injunctions and writs of mandamus. *Johnson v. Interstate Power Compan*y, 187 F. Supp. 36, 41-42 (S.D. Dist. Ct. 1960). Although Plaintiffs state that they are requesting an injunction, it appears the true nature of the relief sought is that of mandamus. A mandatory injunction is similar to mandamus in that each compels performance of a positive act. *Johnson*, 187 F. Supp. at 39. This Court, however, does not have jurisdiction to issue a writ of mandamus against a state official. An action for mandamus against a state officer must be commenced in the Michigan Court of Appeals or in the State Circuit Court. Mich. Comp. Laws Ann. § 600.4401.

The Sixth Circuit has recognized that "[t]here is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing [of] an injunction." *Detroit Newspaper Publishers Ass'n. v. Detroit Typographical Union*

No. 18, 471 F.2d 872, 876 (6th Cir. 1972) (internal citation omitted). A party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. *Id.* at 876.

Since Plaintiffs fail to set forth sufficient facts warranting the declaratory and injunctive relief sought in their proposed Amended Complaint and this Court lacks jurisdiction to grant the requested relief, their Amended Complaint should be dismissed for this reason as well.

CONCLUSION AND RELIEF REQUESTED

State Defendants respectfully request this Court to grant its Motion to Dismiss Plaintiffs' Amended Complaint, award State Defendants their attorneys' fees and costs and grant such further relief this Court deems just and equitable.

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Dated: November 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2012, I electronically filed the foregoing document(s) with the Clerk of the Court using the ECF System, which will provide electronic notice and copies of such filing of the following to the parties: State Defendants' Motion to Dismiss Amended Complaint and State Defendants' Brief in Support of Motion to Dismiss

I also certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

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A courtesy copy of the aforementioned document was placed in the mail directed to:

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