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,

and

BILL SCHUETTE, in his official capacity as Michigan Attorney General,

Defendants.

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

HON. BERNARD A. FRIEDMAN

MAG. MICHAEL J. HLUCHANIUK

DEFENDANTS' RESPONSE AND BRIEF TO PLAINTIFFS' MOTION TO AMEND COMPLAINT

Dana M. Nessel (P51346)
Attorney for Plaintiffs
645 Griswold Street, Suite 3060
Detroit, MI 48226
(313) 556-2300
dananessel@hotmail.com

Carole M. Stanyar (P34830)
Attorney for Plaintiffs
682 Deer Street
Plymouth, MI 48170
(313) 963-7222
cstanyar@wowway.com

Joseph E. Potchen (49501)
Tonya C. Jeter (P55352)
Attorney for Defendants
Mich. Dep't of Attorney General
Health, Education & Family
Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700; Fax (517) 351-1152
potchenj@michigan.gov
jetert@michigan.gov

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INTRODUCTION

Plaintiffs' request to amend their Complaint to challenge Michigan's Constitutional Amendment regarding marriage under the Fourteenth Amendment must be denied as futile. Adding this second count does not cure the deficiencies noted in Defendants' pending motion to dismiss, namely, Defendants' arguments regarding standing, abstention or failure to state a claim.

Federal appellate courts have uniformly shielded state and local marriage laws from Fourteenth Amendment challenges for decades. Plaintiffs cannot state a viable claim upon which relief may be granted due to the strong historical precedent prohibiting such claims.

Finally, Plaintiffs seek improper declaratory and injunctive relief. The proposed Amended Complaint presents only a conjectural or hypothetical threat of injury from the state constitutional amendment and the named Defendants. It fails to establish any past illegal conduct by the Defendants directed toward any Plaintiff. Moreover, the proposed Amended Complaint improperly seeks to have this Court permanently enjoin state officers, and the Oakland County Clerk, from conducting state and county business. Such requested relief is outside this Court's jurisdiction.

For the reasons set forth in Defendants' pending motion to dismiss and those set forth in this response, Defendants request this Court to deny Plaintiffs' motion to file an amended complaint and dismiss this entire action, with prejudice.

STANDARD OF REVIEW

A motion to amend must be denied where it is brought in bad faith, is dilatory, prejudices the opposing party, results in undue delay or would be futile. *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995). In addition, there is no automatic right to amend a pleading. *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 551 (6th Cir. 2008). Accordingly, a court must carefully scrutinize a proposed amendment.

An amendment would be futile where the resulting pleading would not survive a motion to dismiss. *Willing v. Lake Orion Comm. Sch. Bd. of Trustees*, 924 F. Supp. 815, 818 (E.D. Mich. 1995). An amendment is also futile where there are no federal claims on which relief can be granted, leaving the court without jurisdiction over state law claims raised by a plaintiff. *Willing*, 924 F. Supp. at 821. Similarly, a motion to amend should be denied as futile where the movant fails to establish a plausible claim. *Shinew v. Wszola*, No. 08-14256, 2009 U.S. Dist. LEXIS 33226, at 6 (E.D. Mich. April 21, 2009), citing to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544; 127 S.Ct. 1955, 1964-1965 (2007).

ARGUMENT

Rather than fix the issues with their initial complaint, the Plaintiffs attempt to expand this case beyond their initial challenge to Michigan's adoption statute. They now seek to add a count challenging Michigan's Constitutional Amendment regarding marriage, Mich. Const. 1963, art 1, § 25, under the Equal Protection Clause of the Fourteen Amendment of the United States Constitution. Not only are

they seeking additional declaratory relief, but they also want this Court to order Defendants not to defend any state officials who may attempt to bar the adult Plaintiffs from obtaining a marriage license and order the Oakland county clerk to issue the adult Plaintiffs a marriage license. (Proposed Amended Complaint, Relief Sought, p 11). This new requested relief adds to the improper relief Plaintiffs sought in their initial complaint wherein they asked this Court to enter an order enjoining Defendants' from performing their constitutional and statutorily-required duties, and non-party state judges and other unspecified officials from refusing to process adoptions based upon the unmarried status of the Plaintiffs. Such requested relief is outside this Court's jurisdiction and is improper.

This court should deny Plaintiffs' request to amend and dismiss this case in its entirety.

1. Generally, state and local marriage laws are shielded from Fourteenth Amendment challenges.

For decades, with the exception of two recent ninth circuit cases,[1] federal appellate courts have uniformly shielded state and local marriage laws from Fourteenth Amendment challenges. See, e.g., *Jackson v. Abercrombie*, Civ. No. 11-00734, 2012 U.S. Dist. LEXIS 111376 (D.Haw. August 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.

[1] *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), filed Feb. 7, 2012, cert pending *sub nom Hollingsworth v. Perry,* Case No. 12-144, set for conference for September 24, 2012.

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—a decision on the merits that precludes courts from "coming to opposite conclusions on the precise issues presented and necessarily decided" by it. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). As the Eighth Circuit's decision in *Bruning*, explained, "laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States." *Bruning,* 455 F.3d at 871.

Likewise, every state appellate court to address a federal constitutional challenge to the traditional definition of marriage has upheld the state law at issue. See *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App. 2010); *Standhardt v. Superior Court of Arizona*, 77 P.3d 451 (Ariz. Ct. App. 2003), review denied, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. 2004); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), review denied, 84 Wash.2d 1008 (Wash. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

Indeed, when the First Circuit recently invalidated a federal statute, the Defense of Marriage Act, defining marriage as the union of a man and a woman for

purposes of federal law, it relied, in part, on considerations of federalism and States' traditional role in regulating marriage:

> [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

Massachusetts v. United States Dep't of HHS, 682 F.3d 1, 12 (1st Cir. 2012)[2], quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94, 10 S. Ct. 850, 34 L. Ed. 500 (1890)); see also *Loving v. Virginia*, 388 U.S. 1, 7, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (marriage).

The proposed Amended Complaint adding a constitutional challenge to Michigan's marriage amendment is futile. Accordingly, Plaintiffs' Motion to Amend should be denied.

2. Plaintiffs' request inappropriate 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) (citation omitted).

Here, as argued previously, Plaintiffs' initial challenge to the state adoption statute improperly encroaches upon state jurisdiction. So too does the proposed second count. See argument 1 above. Accordingly, Plaintiffs attempt to have this

[2] Defendants do not necessarily agree with all aspects of the Massachusetts decision, but that is not the subject of this response.

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, as to 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. (Proposed Amended Complaint, 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." (Proposed Amended Complaint, 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 Fed. Appx. 112, 124-125; 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 even part of this lawsuit.

Moreover, much of their requested relief is based entirely on speculation and conjecture and Plaintiffs 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 these 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 lack jurisdiction to grant the requested relief, their Motion to Amend should be denied for this reason as well.

WHEREFORE, Defendants respectfully request this honorable Court to deny Plaintiffs' Motion to Amend their Complaint, dismiss this case in its entirety, with prejudice and award such further relief this court deems just and reasonable, including costs and attorney fees.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Joseph E. Potchen
Joseph E. Potchen (P49501),
Assistant Attorney General
/s/ Tonya C. Jeter
Tonya C. Jeter (P55352),
Assistant Attorneys General
Attorneys for Defendants
Health, Education & Family
Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700
Potchenj@michigan.gov
Jetert@michigan.gov

Dated: September 21, 2012

PROOF OF SERVICE

I hereby certify that on September 21, 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: Defendants' Response and Brief to Plaintiffs' Motion to Amend Complaint.

A courtesy copy of the aforementioned document was placed in the mail directed to: Hon. Bernard A. Friedman

/s/ Joseph E. Potchen (P49501)
Assistant Attorney General
Attorneys for Defendants
Health, Education & Family
Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700
Potchenj@michigan.gov