

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
THIRD DIVISION**

M. Kendall Wright, et al.,
Plaintiffs,

vs.

Case No. 60CV-13-2662

The State of Arkansas, et al.,
Defendants.

**DEFENDANT REYNOLDS'S MOTION TO DISMISS AND OPPOSITION TO MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION¹**

Defendant Melinda Reynolds, through her attorney, hereby submits this Motion to Dismiss Plaintiffs' Second Amended Complaint and Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

1. At the general election held on November 2, 2004, 753,770 Arkansas voters approved amendment 83 to the Arkansas Constitution by a landslide 74.95% of the votes cast. *See* www.sos.arkansas.gov/electionresults/index.php?elecid=66. Amendment 83 affirmed already existing Arkansas law by stating in pertinent part that "[m]arriage consists only of the union of one man and one woman."

2. The Arkansas General Assembly had previously adopted Act 144 of 1997, codified at Ark. Code Ann. § 9-11-109, which declared that "[m]arriage shall only be between a man and a woman. A marriage between persons of the same sex is void." *See also* Ark. Code Ann. § 9-11-

¹ Although Ms. Reynolds has not been served with Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (filed with the Court on August 15, 2013), in the interests of judicial economy, Ms. Reynolds submits her objections to this motion in conjunction with her Motion to Dismiss. In any event, Ms. Reynolds does not waive service under the rules of civil procedure.

107(b) (Arkansas recognition of certain foreign marriages “shall not apply to a marriage between persons of the same sex”). Act 144 is also codified at Ark. Code Ann. § 9-11-208. Plaintiffs, twenty gay and lesbian couples living in Arkansas and three children (“Plaintiffs”), challenge the constitutionality of amendment 83 to the Constitution of Arkansas and Arkansas Act 144 of 1997.

3. Plaintiffs contend that amendment 83 violates their constitutionally protected rights to due process (Second Amended Complaint filed August 5, 2013 (“Complaint”), ¶¶ 218–222) and equal protection (*id.*, ¶¶ 223 – 227) under both the Arkansas and United States Constitutions; violates the Full Faith and Credit Clause of the United States Constitution (*id.*, ¶¶ 228–231); impairs the obligation of contracts in violation of the Arkansas Constitution and the United States Constitution (*id.*, ¶¶ 232 – 241); and causes irreparable injury to Plaintiffs (*id.*, ¶¶ 242–245). Plaintiffs request a declaration that amendment 83 is unconstitutional, and a permanent injunction barring enforcement of amendment 83. *Id.*

4. The United States Supreme Court has cautioned restraint in the recognition of new substantive constitutional rights not anchored in the text of the federal Constitution, *see Washington v. Glucksberg*, 521 U.S. 702 (1997), urging lower courts to exercise the utmost care “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences” of a shifting court majority. *Id.* at 720. The Due Process Clause protects only those fundamental rights and liberties that are “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. As discussed in detail in the Brief filed contemporaneously herewith, Plaintiffs’ challenges to Amendment 83 and Act 144 of 1997 fail under binding precedent of the United States Supreme Court and the Arkansas Supreme Court. Accordingly,

the Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

5. Plaintiffs' claims brought pursuant to the Arkansas Constitution are barred as a matter of law. As a matter of well-established Arkansas law, a constitutional provision cannot violate the Constitution. Where two Arkansas constitutional provisions are inconsistent, the later-adopted amendment prevails. Thus, Plaintiffs' state-law claims that amendment 83 violates due process (Complaint, ¶ 219), violates equal protection (*id.*, ¶ 224), and impermissibly impairs the obligation of contracts (*id.*, ¶¶ 232 – 241) must be dismissed. Plaintiffs' state-law challenges to Arkansas Act 146 of 1997, Ark. Code Ann. § 9-11-208, and Ark. Code Ann. § 9-11-107(b), likewise fail on the merits because these laws are entirely consistent with, and explicitly authorized by, amendment 83, which is a valid part of the Arkansas Constitution. In short, Plaintiffs' claims under Arkansas law are barred *because of* Amendment 83 to the Arkansas Constitution. All Plaintiffs' state-law claims should be dismissed accordingly.

6. Plaintiffs' federal due process and equal protection claims fail on the merits under established federal law because a state does not violate either clause when it reserves marriage to one man and one woman. *See, e.g., Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing appeal on the merits for want of a substantial federal question); *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Plaintiffs' federal due process and equal protection claims should thus be dismissed.

7. Plaintiffs' claims pursuant to the Full Faith and Credit Clause of the United States Constitution fail on the merits because that provision applies only to courts, not to individual state actors, and it does not operate to require a state to violate its established public policy.

Plaintiffs' claims under the Full Faith and Credit Clause should be dismissed because it is the public policy of Arkansas that marriage is between a man and a woman.

8. Plaintiffs' claims pursuant to the Contract Clause of the United States Constitution must be dismissed because the Contract Clause has no application to marriage contracts.

9. The Complaint mentions in its factual allegations certain children of the Plaintiffs, but does not mention children in the portions of the Complaint addressing the Plaintiffs' claims for relief. *See* Complaint, ¶¶ 218-245. The Complaint does not allege sufficient facts, nor articulate any legal theory, to state a claim upon which any relief could be granted with respect to any child. For this reason, among others, any potential claims by the child Plaintiffs should be dismissed.

10. Amendment 83 and Arkansas Act 144 of 1997 meet the rational-basis test. The Arkansas marriage laws therefore pass constitutional muster, and the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

11. Separate Plaintiffs (Julia E. Wright, and M. Kendall Wright, individually and on behalf of minors G.D.W. and P.L.W.; Natalie Wartick, and Tommie J. Wartick, individually and on behalf of minor T.B.W; Kimberly M. Robinson, Felicity L. Robinson, Jennifer D. Moore, Mandy A. Lyles, Andra Alsbury, Amber Gardner-Alsbury, John Schenck, Roberty Loyd, William A. King and John McClay Rankine) who have obtained out-of-state marriage licenses have also filed a separate motion (Plfs. Mot.) in which they request a temporary restraining order and preliminary injunction against enforcement of Act 146 of 1997, amendment 83, Ark. Code. § 9-11-208 and Ark. Code § 9-11-197(b), requesting that the court order defendants to recognize their out-of-state licenses and complete birth certificates (Plfs. Mot. at ¶ 91).

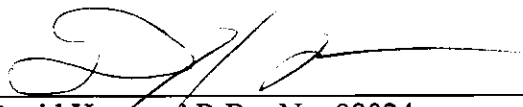
12. Separate Plaintiffs have no standing to sue Defendant Melinda Reynolds because Ms. Reynolds did not cause the injuries alleged, nor does she have authority to redress the purported injuries.

13. In support of this Motion to Dismiss, Ms. Reynolds relies upon the contemporaneously filed Brief.

14. In support of her Opposition to the Motion for Temporary Restraining Order and Preliminary Injunction, Defendant Melinda Reynolds relies upon the contemporaneously filed Brief, the Affidavit of Melinda Reynolds in Support of Her Opposition to the Motion for Temporary Restraining Order and Preliminary Injunction, and all other relevant facts on the record. The affidavit is filed contemporaneously herewith.

WHEREFORE, Defendant Melinda Reynolds prays that the Complaint be dismissed, that the Motion for Temporary Restraining Order and Preliminary Injunction be Denied, and for all other just and appropriate relief.

Respectfully submitted this the 30th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, I filed the foregoing Motion to Dismiss and Opposition to Motion for Temporary Restraining Order and Preliminary Injunction, the accompanying brief, and the accompanying affidavit with the Circuit Court Clerk and delivered a copy to the following:

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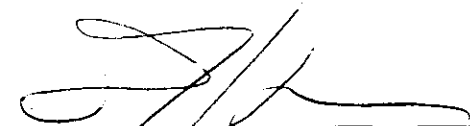
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