IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
THIRD DIVISION

M. Kendall Wright, et al., Plaintiffs, vs. The State of Arkansas, et al., Defendants.	Case No. 60CV-13-2662

BRIEF IN SUPPORT OF DEFENDANT REYNOLDS'S MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATEMENT OF FACTUAL AND LEGAL BASIS FOR MOTION[1]

Defendant Melinda Reynolds (Ms. Reynolds) hereby incorporates the statement of applicable law in Section (I) of State Defendants' Brief in Support of Motion to Dismiss (State Mot. to Dismiss). For Ms. Reynolds's Motion to Dismiss, the applicable law requires the Court to view Plaintiffs' factual allegations as true, but will not give deference to Plaintiffs' mere legal conclusions even if they purport to be factual assertions.

For Ms. Reynolds's Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Ms. Reynolds incorporates the statements of Defendant Melinda Reynolds's Affidavit in Support of Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Aff. of Melinda Reynolds).

INTRODUCTION

This case is about the sovereignty of the State of Arkansas to enact policies affirming the People's interests in the inherently unique relationship of a husband and wife. "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *United States v. Windsor*, 133 S. Ct. 2675, 2689–90 (2013). When the People of Arkansas passed amendment 83, they affirmed the state's existing policies regarding, and interest in, the biologically and socially unique relationship of marriage. Recognizing this uniqueness does not run afoul of the Arkansas or United States Constitutions.

Plaintiffs' allegations under the state constitution clearly fail to establish a claim under Arkansas law because amendment 83 cannot violate previously enacted provisions of the

[1] To the extent that Ms. Reynolds incorporates any factual statements from Plaintiffs' Second Amended Complaint, the facts are incorporated only for the purposes of the Motion to Dismiss and Response to Motion for Temporary Restraining Order and Preliminary Injunction and do not constitute an admission of facts.

Arkansas Constitution. Similarly, statutes that are consonant with amendment 83 cannot run afoul of the Constitution. Plaintiffs' state law claims should therefore be dismissed.

Plaintiffs also fail to state a claim under the federal Due Process and Equal Protection clauses because the United States Supreme Court has already ruled that a challenge under these clauses to states' affirming the uniqueness of marriage between a man and a woman must be dismissed for lack of a substantial federal question. Further, under clearly established law, there is no fundamental right to marry a person of the same sex; sexual orientation is not a protected classification; and the state has a rational basis for affirming the uniqueness of marriage between a man and a woman. Plaintiffs' factual allegations place their claims squarely within this established case law; thus, these claims should be dismissed.

Plaintiffs have also failed to plead cognizable full-faith-and-credit and right-of-contract claims. These claims are precluded by established law and should be dismissed.

As to Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, which seeks recognition of out-of-state marriages, that Motion should be denied for two reasons. First, Plaintiffs have no standing to sue Ms. Reynolds because she has not caused the alleged injuries, nor can she redress the alleged injuries in the event of a favorable judgment. Thus, Plaintiffs lack standing to sue Ms. Reynolds. Second, as demonstrated below, Plaintiffs have failed to demonstrate a likelihood of success on the merits. Thus, Separate Plaintiffs' Motion should be denied.

STANDARD OF REVIEW

Standard for Motion to Dismiss

"Where the complaint states only conclusions without facts," or where the facts pled do not give rise to a cause of action, dismissal is appropriate. *Brown v. Tucker*, 330 Ark. 435, 438, 954 S.W.2d 262, 264 (1997); Ark. R. Civ. P. 12(b)(6). In reviewing a motion to dismiss, this Court must treat the facts alleged in the complaint as true, but not a plaintiff's theories, speculation, or statutory interpretation. *Dockery v. Morgan*, 2011 Ark. 94, at 5–6, 380 S.W.3d 377, 382; *Sluder v. Steak & Ale of Little Rock, Inc.*, 361 Ark. 267, 272, 206 S.W.3d 213, 215 (2005). This Court must read Rule 12(b)(6) together with Rule 8(a), which requires fact pleading. *Brown*, 330 Ark. at 438, 954 S.W.2d at 264. The Arkansas Supreme Court has consistently held that "a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 212–13, 114 S.W.3d 189, 196 (2003) (quoting *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002)). A complaint may not merely rephrase the elements of a cause of action; rather, the complaint must set forth the underlying facts, not mere conclusions, that support each element. *See, e.g., Fleming v. Cox Law Firm*, 363 Ark. 17, 21, 210 S.W.3d 866, 868–69 (2005); *Perrodin v. Rooker*, 322 Ark. 117, 120, 908 S.W.2d 85, 87 (1995). Where the allegations in a complaint, if ultimately proven, do not entitle the pleader to relief, the Court must dismiss. *Id.* Arkansas Rules of Civil Procedure 8(a) and 12(b)(6) require Plaintiffs to assert specific facts in support of every element of a cause of action when they file suit. *Id.* Plaintiffs fail to meet this standard.

Standard for Temporary Restraining Order and Preliminary Injunction

"In determining whether to issue a preliminary injunction pursuant to Rule 65 of the Arkansas Rules of Civil Procedure, [the] court considers whether irreparable harm will result in the absence of a preliminary injunction and whether the moving party has demonstrated a likelihood of success on the merits." *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 541, 42 S.W.3d 453, 456-57 (2001). "Likelihood of success on the merits" means "a reasonable probability of success. *Id.* at 457–58. In other words, Plaintiffs must establish that is more likely than not that Plaintiffs will ultimately prevail on the merits. It is plain from the allegations that Plaintiffs fail to allege facts to support all elements of each claim. Thus, since Plaintiffs have not alleged facts sufficient to make it more likely than not that they would prevail on the merits, Plaintiffs' motion for temporary restraining order and preliminary injunction should be denied.

ARGUMENT

I. Plaintiffs' State Constitutional Claims Fail to Allege Facts upon which Relief May Be Granted and Thus Have No Likelihood of Success on the Merits Because, to the Extent that any Conflict Exists Between a Constitutional Amendment and an Earlier Enacted Constitutional Provision, the Amendment is Superior Law.

"Amendments to a constitution are not regarded as if they had been parts of the original instrument but are treated as having a force superior to the original to the extent to which they are in conflict." *Bryant v. English*, 311 Ark. 187, 193, 843 S.W.2d 308, 311 (1992); *Grant v. Hardage*, 106 Ark. 506, 153 S.W. 826, 827 (1913) (same); *see also Wright v. Story*, 298 Ark. 508, 509, 769 S.W.2d 16, 17 (1989) ("The later amendment prevails in the event of a conflict.").

Plaintiffs allege that 2004 Arkansas Constitutional Amendment 83 and similar statutes passed prior to the 2004 amendment conflict with other provisions of the Arkansas Constitution. (Second Am. Compl. at ¶ 12.) Plaintiffs further allege that amendment 83 was passed "in an apparent response to" the holding of the Arkansas Supreme Court in *Jegley v. Picado*, 349 Ark.

600, 80 S.W.3d 332 (2002). (Second Am. Compl. at ¶ 11.) Such allegations, even if taken as true, fail to state a claim upon which relief may be granted. As a matter of law, a duly enacted constitutional amendment cannot violate the original constitution because, to the extent any amendment may conflict with a previous provision of the constitution, the amendment takes precedence. *Bryant*, 311 Ark. at 193, 843 S.W.2d at 311; *Grant*, 106 Ark. 506, 153 S.W. at 827. "Further, a constitutional amendment is to be interpreted and understood in its most natural and obvious meaning," *Bryant*, 311 Ark. at 193, 843 S.W.2d at 311, and if that meaning conflicts with a previous provision of the constitution, the amendment "displac[es] whatever may be in conflict or repugnant to the provisions of the amendment." *Priest v. Mack*, 194 Ark. 788, 109 S.W.2d 665, 666 (1937).

Arkansas law affirming constitutional amendments' priority is not unique in this respect. In 2009, the California Supreme Court recognized that a California constitutional amendment defining marriage took precedence over any previous provisions of the constitution, including the rights of due process and equal protection. *See Strauss v. Horton*, 46 Cal. 4th 364, 388–89, 207 P.3d 48, 62 (2009) ("Neither the language of the relevant constitutional provisions, nor our past cases, support the proposition that any of these rights is totally exempt from modification by a constitutional amendment adopted by a majority of the voters through the initiative process.").

Thus, because a constitutional amendment takes precedence over prior constitutional provisions, Plaintiffs' factual allegations, taken as true and interpreted in a light most favorable to them, fail to state a claim upon which relief may be granted. As a matter of law, amendment 83 cannot violate a previous constitutional provision.

Because amendment 83 "displac[ed] whatever may be in conflict or repugnant to the provisions of the amendment," *Priest*, 194 Ark. at 788, 109 S.W.2d at 666, any statute that

substantively comports with the provisions of Amendment 83 cannot be constitutionally infirm. In this case, the challenged statutes (Act 144 of 1997 and Ark. Code Ann. § 9-11-208) substantively comport with amendment 83. Thus, Plaintiffs' allegations that Ark. Code Ann. §§ 9-11-107 and 9-11-208 violate the Arkansas Constitution must be dismissed for failing to state a claim upon which relief may be granted. Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction based on the Arkansas Constitution should be dismissed because Plaintiffs have failed to show likelihood of success on the merits.

II. Plaintiffs' Due Process Claims Fail to Allege Facts upon which Relief May Be Granted and Thus Have No Likelihood of Success on the Merits.

A. Plaintiffs Fail to Allege Facts Sufficient to Support a Federal Due Process Claim.

Plaintiffs' allegation that there is a fundamental due process right to marry a person of the same sex, and that Arkansas law burdens this alleged right, should be dismissed for failing to state a claim because: 1) it is precluded by binding Supreme Court precedent, see *Baker v. Nelson*, 409 U.S. 810 (1972), and 2) Plaintiffs have failed to allege, and indeed cannot allege, that a right to marry a person of the same sex is a fundamental right "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 it were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations and quotation marks omitted).

In *Baker v. Nelson*, the Supreme Court of the United States held that an appeal raising a federal due-process and equal-protection challenge to a Minnesota state law defining marriage as between a man and a woman must be "dismissed for want of a substantial federal question." 409 U.S. at 810. 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 "leave undisturbed the judgment appealed from. . . . [and] 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 Federal District Court for the District of Hawai'i recently recognized *Baker* as binding precedent on this question when it dismissed a Due Process and Equal Protection challenge to Hawai'i's marriage laws. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1086–88 (D. Haw. 2012) ("[T]he Court is bound by *Baker* and Plaintiffs' due process claim fails. . . . [T]he 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.").

Furthermore, even if Plaintiffs' due process claim is not precluded by *Baker*, Plaintiffs fail to allege, and indeed cannot allege, facts sufficient to establish a that claim. In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Supreme Court clarified and delimited the process for identifying and defining the fundamental rights protected by the Due Process Clause. The Court emphasized "two primary features" of this substantive-due-process analysis. *Id.* at 720. First, the Due Process Clause provides special protection only to "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (quotation marks and citations omitted). "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 (quotation marks and citations omitted). Second, identification of fundamental rights "require[s] a careful description of the asserted fundamental liberty interest." *Id.* (quotation marks omitted). These principles are intentionally strict, for "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." *Id.* at 720. Courts "must therefore exercise 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.* (quotation marks and citations omitted). The Supreme Court has repeatedly and forcefully reiterated these principles. *See e.g.*, *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72–73 (2009).

The purported right asserted by Plaintiffs to marry a person of the same sex plainly fails the test the Supreme Court has mandated for identifying fundamental rights. As the Supreme Court recognized this last term, far from being "deeply rooted in this Nation's history and tradition, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might [enter] . . . [a] lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Indeed, same-sex marriage was unknown in the laws of this Nation before 2004, and even today same-sex marriages are performed legally in only thirteen States and the District of Columbia. Thus, "[t]here is no long history of such a right, and [t]he mere novelty of such a claim is reason enough to doubt that substantive due process sustains it." *Osborne*, 557 U.S. at 72 (quotation marks omitted).

Further, here, much like in *Glucksberg*, *see* 521 U.S. at 717–18, innovations in a minority of jurisdictions that have chosen to redefine marriage to include same-sex unions have provoked a reaffirmation of the traditional understanding of marriage in a far greater number of other jurisdictions, and during the last two decades, 29 States (including Arkansas) have enshrined in their Constitutions the legal definition of marriage as the union of a man and a woman. And

many more States have likewise chosen to continue to adhere to that traditional definition of marriage.

Plaintiffs plead no facts, and indeed could not, alleging that deeply rooted in this Nation's history and tradition is a right to marry a person of the same sex. Such an allegation, as mentioned above, is precluded by the Supreme Court's decision in *Windsor*. *See* 133 S. Ct. at 2689 ("[M]arriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization"). Plaintiffs rely on *Loving v. Virginia* as their sole basis for alleging a fundamental right to marry a person of the same sex. (Second Am. Compl. at ¶ 220). *Loving* holds no such thing. In *Loving*, the Court held that marriage between a man and a woman (regardless of their race) was "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). This confirms that the right discussed in that case was the right to marry a person of the opposite sex, for only the procreative capacity of opposite-sex relationships can explain the Court's discussion of marriage's essential role "to our very existence and survival." *Loving* thus undermines, rather than bolsters, Plaintiffs' fundamental rights claim.

In short, here, just as in *Glucksberg*, "[t]he history of [the asserted right] in this country has been and continues to be one of the rejection of [most] efforts to permit it. That being the case, . . . the asserted 'right' . . . is not a fundamental liberty interest protected by the Due Process Clause." 521 U.S. at 728 (quotation marks omitted). Plaintiffs' due process claim should thus be dismissed for failing to state a viable claim.

B. Plaintiffs Fail to Allege Facts Sufficient to Support a State Due Process Claim.

Plaintiffs' state law due process claims, as explained above, are precluded by the Arkansas Constitution and should be dismissed for failing to state a claim. *See supra* section I.

Furthermore, Plaintiffs' reliance on *Jegley v. Picado* is misplaced. In Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Pls. Mot.), they rely on incorrect allegations of law when they allege that "[i]n *Jegley* . . . the Court found that . . . sexual orientation is a protected fundamental right to privacy under the due process clause" and that strict scrutiny must therefore apply. (Pls. Mot. at ¶ 73.) This is incorrect as a matter of law. *Jegley* held that "the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults." 349 Ark. at 632, 80 S.W.3d at 350. Recognizing that the right to privacy is "fundamental," the Court applied strict scrutiny to the privacy/due process claim. *Id.* The Court did not hold that sexual orientation was a protected class. *Jegley*, simply put, did no more than order the government out of the "bedrooms of [consenting adults'] homes." 349 Ark. at 638, 80 S.W.3d at 354; *accord Polston v. State*, 360 Ark. 317, 332, 201 S.W.3d 406, 414 (2005) (declining to extend *Jegley* beyond protecting adults' right to privacy in their own homes). Because Plaintiffs seek not to order the government from their personal, private lives, but request a judicial order forcing the government to publicly grant official state recognition to their relationships, this Court should conclude that *Jegley* does not support Plaintiffs' due process claim under the state constitution. Thus, in addition to the reasons previously stated, Count One should be dismissed, and the Motion for Temporary Restraining Order and Preliminary Injunction denied, because Plaintiffs cannot show a likelihood of success on the merits.

III. Plaintiffs' Equal Protection Claims Fail to Allege Facts upon which Relief May Be Granted and Thus Have No Likelihood of Success on the Merits.

Federal "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right[3] or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Ret. v. Murgia*,

427 U.S. 307, 312 (1976). "In cases where a classification burdens neither a suspect group nor a fundamental interest, 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'" *Gregory v. Ashcroft*, 501 U.S. 452, 470–71 (1991) (citation omitted). Where, like "[i]n this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of [Arkansas] as a whole" rational basis is the appropriate level of scrutiny. *Id.*

Plaintiffs fail to allege facts sufficient to obtain relief on their federal equal protection claims because 1) those claims are precluded by binding Supreme Court precedent, *Baker*, 409 U.S. at 810, 2) those claims do not implicate a fundamental right, *supra* section (II)(A), 3) Arkansas marriage laws do not subject men or women to disparate treatment based on their sex, 4) sexual orientation is not a suspect classification, and 5) Arkansas's marriage laws are rationally related to legitimate government interests.

Defendant already addressed these first two points under Section (II)(A) of this brief. Defendant addresses the other three points below.

A. Arkansas Marriage Laws Do Not Discriminate on the Basis of Sex Because the State's Laws Treat Men and Women Equally.

Plaintiffs' allegations regarding sex discrimination under the Equal Protection Clause fail to state a claim under established law. Plaintiffs allege that "[a] man who wishes to marry a man cannot do so – because he is a man. A woman who wishes to marry a woman cannot do so – because she is a woman." (Second Am. Compl. at ¶ 227). These allegations fail to state a claim because the United States Supreme Court's cases have never strayed from the baseline rule that to be sex-based discrimination, a law must treat men more favorably than women or women more favorably than men, and Arkansas's marriage laws do not meet that standard as a matter of law. "To date, the laws in which the Supreme Court has found sex-based classifications have all

treated men and women differently." *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 876 (C.D. Cal. 2005) (citing *United States v. Virginia*, 518 U.S. 515, 519–20 (1996) (law excluded women from attending military college)); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718–19 (1982) (law excluded men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191–92 (1976) (women allowed to buy beer at lower age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678–79 (1973) (law imposed higher burden on females than males to establish spousal dependency); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (law gave automatic preference of men over women to administer estates); *accord Baker v. Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999) ("All of the seminal sex-discrimination decisions . . . have invalidated statutes that single out men or women as a discrete class for unequal treatment"). Arkansas's marriage laws do not discriminate on the basis of sex because those laws treat men and women equally: each man or woman may marry one person of the opposite sex, and each man or woman is prohibited from any other marital relationship. Thus, even if taken as true, Plaintiffs' allegations fail to establish sex discrimination.[2]

The proper question for assessing a constitutional sex discrimination claim therefore is whether men and women are treated differently or subject to special denigration because of their sex. *See Virginia*, 518 U.S. at 532-34. If the rule were otherwise, the government would create a constitutional crisis each time it offered sex-specific restrooms, locker rooms, living facilities, schools, or sports teams. But acknowledging the biological distinction between men and women is not discrimination when both men and women have the same benefits and restrictions. *Id.*

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[2] Distinctions in race are different than distinctions in sex. As the Supreme Court has noted: "Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both." *Virginia*, 518 U.S. at 533 (citations and quotation marks omitted).

So it is no marvel that almost every court that has addressed whether the definition of marriage constitutes sex discrimination has flatly rejected the claim. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 598 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 988 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11(N.Y. 2006); *Smelt v. Cnty. Of Orange*, 374 F. Supp. 2d at 876–77; *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307–08 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004); *Baker v. Vermont*, 744 A.2d at 880 n.13; *Dean v. Dist. of Columbia*, 653 A.2d 307, 363 n.2 (D.C. 1995 (Steadman, J., concurring); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *but see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010). Thus, Plaintiffs' allegations fail as a matter of law to allege facts sufficient to establish sex discrimination under the Equal Protection Clause.

B. Plaintiffs Fail to Allege Facts upon which Relief may be Granted Because Sexual Orientation is not a Suspect Classification.

Plaintiffs' equal protection allegations fail to state a claim as a matter of law under Eighth Circuit precedent. In *Citizens for Equal Protection v. Bruning*, the Eighth Circuit considered and rejected a sexual-orientation-based challenge to Nebraska's marriage amendment defining marriage as between one man and one woman. 455 F.3d 859, 869 (8th Cir. 2006) (concluding that plaintiffs' "equal protection argument fails on the merits").

The Eighth Circuit and all other circuits except one have affirmed that sexual orientation is not a protected classification. *See, e.g., Citizens for Equal Prot.*, 455 F.3d at 866–67; *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.

2006); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see also Romer v. Evans*, 517 U.S. 620, 631–35 (1996) (not applying strict scrutiny to classification based on sexual orientation); *but see Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (concluding that sexual orientation constitutes a suspect classification for constitutional equal-protection analysis) *reviewed by United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (not creating a new suspect classification based on sexual orientation).

As the near unanimity of these decisions suggests, the question whether sexual orientation is a suspect classification is not a close one. To qualify for the "extraordinary protection from the majoritarian political process" accorded suspect or quasi-suspect classes, *see San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973, Plaintiffs must show, among other things, that homosexuals as a group are (a) "politically powerless," *e.g., City of Cleburne*, 473 U.S. at 445, and (b) defined by an "immutable" characteristic, *e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Plaintiffs have not alleged either, nor can they credibly do so. Thus, on the facts pled and under established and binding precedent, Plaintiffs' sexual-orientation-based equal protection claims fail.

C. Arkansas Marriage Laws are Rationally Related to Furthering Legitimate and Compelling Governmental Interests.

Plaintiffs fail to state a claim upon which relief may be granted because 1) the Eighth Circuit has already decided that state laws affirming marriage between a man and a woman are rationally related to important government interests; 2) Plaintiffs merely allege, without stating facts to support their allegations, that no rational basis could exist for defining marriage as between a man and a woman; and 3) affirming the inherent uniqueness of marriage between a man and a woman is unquestionably rationally related to important government interests.

The Eighth Circuit has already held that a state law defining marriage as the union of a man and a woman is rationally related to legitimate government purposes. *Citizens for Equal Prot.*, 455 F.3d at 867. Plaintiffs' conclusory assertion, unsupported by a single factual allegation, that Arkansas's laws "lack" "a rational basis" (Second Am. Compl. at ¶ 17), is insufficient to support an equal protection claim in the face of this established law. The Arkansas Supreme Court has consistently held that "a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 212–13, 114 S.W.3d 189, 196 (2003) (quoting *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002)). A complaint may not merely rephrase the elements of a cause of action; rather, the complaint must set forth the underlying facts, not mere conclusions, that support each element. *See Fleming v. Cox Law Firm*, 363 Ark. 17, 21, 210 S.W.3d 866, 868–69 (2005); *Perrodin v. Rooker*, 322 Ark. 117, 120, 908 S.W.2d 85, 87 (1995).

Rational-basis review constitutes a "paradigm of judicial restraint," under which courts have no "license ... to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's

objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (citation and quotations marks omitted). Thus, Arkansas marriage laws "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Id.* at 320. Furthermore, because "the institution of marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Citizens for Equal Prot.*, 455 F.3d at 867. As demonstrated below, Arkansas's marriage laws clearly satisfy this deferential standard.

1. Arkansas Marriage Laws Advance Society's Vital Interest in Responsible Procreation and Childrearing.

The definition of marriage as a union of one man and one woman has prevailed throughout this Nation since before its founding, including the period when the Fourteenth Amendment was framed and adopted. *See, e.g.*, Bishop, Commentaries on the Law of Marriage & Divorce §225 ("It has always . . . been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex"). Indeed, "marriage between a man and a woman no doubt [has] been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). And "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." Claude Levi-Strauss, The View From Afar 40-41 (1985); *see also, e.g.*, James Q. Wilson, The Marriage Problem 24 (2002) (noting that "a lasting, socially enforced obligation between man and woman that authorizes sexual congress and the supervision of children" exists and has existed "[i]n every community and for as far back in time as we can probe").

The record of human history leaves no doubt that the institution of marriage owes its existence to the undeniable biological reality that opposite-sex unions—and only such unions—can produce children. Marriage thus is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction, in* 1 A History of the Family: Distant Worlds, Ancient Worlds 5 (Andre Burguiere, et al. eds., 1996). And that biological foundation—the unique procreative potential of sexual relationships between men and women—implicates vital social interests. On the one hand, procreation is necessary to the survival and perpetuation of the human race; accordingly, the responsible creation, nurture, and socialization of the next generation is a vital—indeed existential—social good. On the other hand, irresponsible procreation and childrearing—the all-too-frequent result of casual or transient sexual relationships between men and women—commonly results in hardships, costs, and other ills for children, parents, and society as a whole. As eminent authorities from every discipline and every age have uniformly recognized, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits—rather than harms—society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both their mother and their father.

This animating purpose of marriage was well explained by Blackstone. Speaking of the "great relations in private life," he described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." William Blackstone, 1 Commentaries *410. Blackstone then immediately turned to the relationship of "parent and child," which he described as "consequential to that of marriage,

being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*; *see also id.* *435.[3]

Prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood and accepted, without a hint of controversy, that an overriding purpose of marriage is to further society's vital interest in responsible procreation and childrearing. That is why the United States Supreme Court has repeatedly recognized marriage between the two sexes as "fundamental to our very existence and survival." *See, e.g.*, *Loving*, 388 U.S. at 12. And certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. As renowned atheist philosopher Bertrand Russell put it, "[b]ut for children, there would be no need of any institution concerned with sex." Bertrand Russell, Marriage & Morals 77 (Liveright Paperbound Edition, 1970). Indeed, if "human beings reproduced asexually and ... human offspring were born self-sufficient[,] ... would any culture have developed an institution anything like what we know as marriage? It is clear that the

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[3] Throughout history, other leading thinkers have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, John Locke, Second Treatise of Civil Government §78 (1690); David Hume, An Enquiry Concerning the Principles of Morals 66 (1751); Montesquieu, 2 The Spirit of Laws 96 (1st American from the 5th London ed., 1802); Noah Webster, An American Dictionary of the English Language (1st ed. 1828); Bronislaw Malinowski, Sex, Culture, and Myth 11 (1962); G. Robina Quale, A History of Marriage Systems 2 (1988); Robert P. George, et al., What is Marriage? 38 (2012). In the words of the sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. . . . The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning and Significance of Marriage in Contemporary Society, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985); *see also, e.g.*, Wilson, The Marriage Problem 41 ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.").

answer is no." George, What is Marriage? 96.

By providing unique recognition, encouragement, and support to committed opposite-sex relationships, the traditional institution of marriage preserved by amendment 83 seeks to channel potentially procreative conduct into stable and enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests in responsible procreation and childrearing. By reaffirming the age-old definition of marriage, Arkansas law preserves the abiding link between that institution and this traditional purpose. Arkansas law thus plainly bears a close and direct relationship to society's interest in increasing the likelihood that children will be born to and raised by both their mother and their father in stable and enduring family units.

Because same-sex relationships cannot naturally produce offspring, they do not implicate the State's interest in responsible procreation and childrearing in the same way that opposite-sex relationships do. Same-sex relationships "are thus different, immutably so, in relevant respects" from opposite-sex relationships for purposes of marriage. *Cleburne*, 473 U.S. at 442. And given this biological reality, as well as marriage's central concern with responsible procreation and childrearing, the "commonsense distinction," *Heller*, 509 U.S. at 326, that the law has always drawn between same-sex couples and opposite-sex couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63. For as the United States Supreme Court has made clear, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366–67 (2001); *see also Johnson v. Robison*, 415 U.S. 361, 383 (1974) (stating that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other

groups would not"). Simply put, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

It is thus not surprising that there are "a host of judicial decisions" concluding that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867–68; *see also Dean*, 653 A.2d at 363; *Baker*, 191 N.W.2d at 186–87; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677–78 (Tex. App. 2010); *Standhardt v. Superior Ct. ex rel. Cnty. of Maricopa*, 77 P.3d 451, 461–64 (Ariz. Ct. App. 2003); *Singer*, 522 P.2d at 1195, 1197; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015–16 (D. Nev. 2012); *Jackson*, 884 F. Supp. 2d at 1112–13; *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308–09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. at 145–47; *Adams v. Howerton*, 486 F. Supp. 1118, 1124–25 (C.D. Cal. 1980); *Conaway*, 932 A.2d at 630-34; *Hernandez*, 855 N.E.2d at 7–8; *Andersen*, 138 P.3d at 982–85; *Morrison v. Sadler*, 821 N.E.2d 15, 23–31 (Ind. Ct. App. 2005). Plaintiffs' bare allegation that no rational basis exists for recognizing the undeniable biological distinction between opposite-sex couples and same-sex couples fails to state a claim under established law.

2. Arkansas Marriage Laws Serve the State's Interest in Proceeding with Caution before Fundamentally Redefining a Bedrock Social Institution.

Marriage has long been understood as the "human action[] . . . in which society is most interested." Montesquieu, 2 Spirit of Laws 173. As the United States Supreme Court has recognized, marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). It is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S.

287, 303 (1942), and "fundamental to the very existence and survival of the race," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Even if Plaintiffs are correct that amendment 83 was passed "in an apparent response" to *Jegley* (Second Am. Compl. at ¶ 11), it is not unreasonable (and is in fact eminently rational) that society would tread lightly before redefining such a fundamental institution.

Almost everyone, including prominent advocates of same-sex marriage, admits that redefining marriage would alter the institution. For example, Professor William Eskridge, a prominent advocate for redefining marriage, explains that much support for redefining marriage is *premised* on the understanding that "enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new." William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse? What We've Learned from the Evidence 19 (2006). Indeed, some advocates favor redefining marriage *because* of its likely adverse effects on the traditional understanding and purposes of marriage. They argue that redefining marriage "is a breathtakingly subversive idea," E. J. Graff, *Retying the Knot*, The Nation, June 24, 1996, at 12, that "will introduce an implicit revolt against the institution [of marriage] into its very heart," Ellen Willis, contribution to *Can Marriage be Saved? A Forum,* The Nation, July 5, 2004 at 16, such that "th[e] venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers," Graff, *Retying the Knot*, at 12; *see also, e.g.*, Michelangelo Signorile, *Bridal Wave*, Out Magazine 161 (Dec./Jan. 1994). It is thus plainly reasonable for the People of Arkansas to be concerned about the potential consequences of such a profound redefinition of a bedrock social institution.

D. Plaintiffs Fail to Allege Facts Sufficient to Support their State Equal Protection Claim.

Plaintiffs' state equal protection claims, as explained above, are precluded by the Arkansas Constitution and should be dismissed for failure to state a claim. *See supra* section I.

Furthermore, Plaintiffs' reliance on *Jegley* to support their state equal protection claims is misplaced. In Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Plaintiffs rely on incorrect allegations of law when they allege that "[i]n *Jegley* . . . the Court found that . . . a statute limiting the rights of homosexual individuals is based upon gender and involves a violation of equal protection requiring an intermediate level of scrutiny." (Pls. Mot. at ¶ 73.) This is incorrect as a matter of law. *Jegley* held that a statute criminalizing sodomy between persons of the same sex, but not sodomy between persons of the opposite sex, violated the State's Equal Protection Clause because the State did not offer a rational basis for criminalizing private conduct between persons of the same sex that it permitted between persons of the opposite sex. 349 Ark. at 638, 80 S.W.3d at 353–54. Notably, the Court explicitly held that sexual orientation does "not constitute a protected class" and applied rational basis analysis to the equal protection claim raised there. *Id.* at 634, 80 S.W.3d at 351. As demonstrated above, Plaintiffs have failed to allege facts that contradict the presumption of rationality that attached to the Arkansas marriage laws, and it is beyond dispute that those laws are rationally related to furthering important government interests.

In sum, it was entirely reasonable for the People of Arkansas to affirm marriage as the union of one man and one woman. Thus, Count Two should be dismissed, and the Motion for Temporary Restraining Order and Preliminary Injunction denied, because Plaintiffs cannot show a likelihood of success on the merits.

IV. Plaintiffs' Full-Faith-and-Credit Claims Fail to Allege Facts Upon which Relief May Be Granted and Thus Have No Likelihood of Success on the Merits.

In the interests of judicial economy, Defendant Reynolds hereby incorporates the argument in Section (V)(C) of State Defendants' Brief in Support of Motion to Dismiss. For the reasons explained therein, this Court should dismiss Plaintiffs' full-faith-and-credit claims.

Furthermore, in addition to the reasons explained by State Defendants, Plaintiffs' full-faith-and-credit claim fails to allege facts upon which relief may be granted because, as a matter of law, United States Supreme Court precedent "clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *see also Pacific Employers Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 501 (1939) ("[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."). It is the declared "public policy of the State of Arkansas to recognize the marital union only of man and woman." Ark. Code 9-11-208. Thus, as a matter of law, the Full Faith and Credit Clause of the United States Constitution does not coerce the State of Arkansas to recognize marriages that violate its own public policy.

For these reasons, Plaintiffs have not stated a valid claim under the Full Faith and Credit Clause. Count Three thus should be dismissed, and Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be denied, because Plaintiffs cannot show a likelihood of success on the merits.

V. Plaintiffs' Impairment-of-Contract Claims Fail to Allege Facts upon which Relief May Be Granted and Thus Have No Likelihood of Success on the Merits.

In the interests of judicial economy, Defendant Reynolds hereby incorporates the argument in Section (V)(D) of State Defendants' Brief in Support of Motion to Dismiss.

For those reasons, Plaintiffs have not stated a valid claim under the Contracts Clause of the Arkansas or United States Constitutions. Count Four thus should be dismissed, and Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be denied, because Plaintiffs cannot show a likelihood of success on the merits.

VI. The Child Plaintiffs and the Partners of the Biological Parents of the Child Plaintiffs Fail to State a Claim Upon Which Relief can be Granted.

In the interests of judicial economy, Defendant Reynolds hereby incorporates the argument in Section V(E) of State Defendants' Brief in Support of Motion to Dismiss.

VII. Plaintiffs Lack Standing to Seek the Requested Temporary Restraining Order or Preliminary Injunction against Defendant Melinda Reynolds Because None of Her Duties Involve Recognizing a Marriage License Issued by Another Jurisdiction.

Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction must fail as to Ms. Reynolds because none of her duties involve recognizing a marriage license issued by another jurisdiction. Plaintiffs seek a "preliminary injunction restraining the Defendants from enforcing [state marriage law] as applied to same-sex couples married in jurisdictions where same-sex marriage is legal and who seek to have their out-of-state marriage accepted as legal in Arkansas." (Pls. Mot. at ¶ 90.) Ms. Reynolds, as Clerk of Faulkner County, has no authority to recognize or record an out-of-state marriage license. (Aff. of Melinda Reynolds, ¶ 5). Her duties require her to issue marriage licenses; she does not recognize or record marriage licenses from other jurisdictions. Therefore, in executing her duties as clerk, Ms. Reynolds did not cause, and cannot redress, Plaintiffs' injuries, and thus Plaintiffs lack standing.

Standing requires "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant" and "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (citations omitted); *see Hames v. Cravens*, 332 Ark. 437, 440-43, 966 S.W.2d 244, 246-47 (1998) (discussing redressability as necessary for standing).

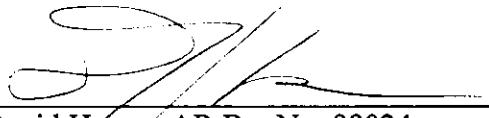
Here, Ms. Reynolds did nothing to cause Separate Plaintiffs' alleged injuries since there is no evidence that they asked her to recognize their out-of-state marriage licenses. But even if they had asked, she would have told them the same thing she would tell opposite-sex couples with the same request: she does not "recognize" or "record" out-of-state marriage licenses. Because Separate Plaintiffs cannot show that Ms. Reynolds has injured them or that she has power to redress their alleged injury, they lack standing to sue her.

Moreover, even if Separate Plaintiffs had standing to raise their claims against a county clerk, Ms. Reynolds has explained above that Plaintiffs have not demonstrated a likelihood of success on the merits of their claims, and thus the Court should deny Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

CONCLUSION

Because Plaintiffs have failed to state facts upon which relief may be granted, Ms. Reynolds respectfully requests that this Court dismiss Plaintiffs' Second Amended Complaint. In addition, because Separate Plaintiffs do not have standing to assert claims against her, and because Plaintiffs have not shown a likelihood of success on the merits of their claims, Ms. Reynolds respectfully requests that this Court deny Separate Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

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

By: 

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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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