

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MARCIE FISHER BORNE, for herself)
And as guardian *ad litem* for M.F.-B.,)
a minor; et al.;)

Plaintiffs,)

vs.)

Case No. 1:12-cv-00589

JOHN W. SMITH, in his official)
capacity as the Director of North)
Carolina Administrative Office)
of the Courts; et al.;)

Defendants.)

**DEFENDANTS’ REPLY TO PLAINTIFFS’ RESPONSE IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

Defendants moved to dismiss the complaint filed in this matter pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Pursuant to Rule 7.3 of the Local Rules of Civil Practice for the Middle District of North Carolina, the Defendants submit this reply brief to Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss. In support of this Reply, Defendants show the Court the following:

ARGUMENT

In Plaintiffs’ Response to Defendants’ Motion to Dismiss, Plaintiffs make the following statement: “Although North Carolina trial courts previously had construed the state’s adoption laws to allow same-sex couples to petition for second parent adoption, the North Carolina Supreme Court’s ruling in *Boseman v. Jarrell* barred the clerks of the

court from accepting and considering such petitions as a matter of state adoption law.” Boseman v. Jarrell, 364 N.C. 537, 704 S.E.2d 494 (N.C. 2010). Actually, the North Carolina adoption law applicable to the case now before this Court, has been basically the same in pertinent part since at least 1995. (The 1995 rewrite of Chapter 48 contained this provision: *(c) If the individual who files the petition is unmarried, no other individual may join in the petition.*) Currently, NCGS 48-2-301, reads in part as follows: (c) If the individual who files the petition is unmarried, no other individual may join in the petition, except that a man and a woman who jointly adopted a minor child in a foreign country while married to one another must readopt jointly as provided in G.S. 48-2-205.” Legal Parent Plaintiffs and Second Parent Plaintiffs are not married, and therefore they cannot adopt as a couple in North Carolina. Boseman did not change this law. The Supreme Court in Boseman did state that “this new form of judicially created adoption” may have been available only in Durham County and not available in the other counties of North Carolina. Because North Carolina has a uniform court system, the law must be applied uniformly in all North Carolina counties. Therefore a new form of adoption cannot be made available in some counties but not all. The Supreme Court went on to state that adoption is a statutory creation. Policy arguments are appropriately addressed to the General Assembly. Boseman, at pp. 548-49. The law governing adoptions in North Carolina is wholly statutory. Wilson v. Anderson, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950). States have a legitimate interest in regulating adoption. North Carolina has articulated what is certainly a legitimate state interest served by its adoption law: promoting the best interest of children, family stability and avoiding untenable multiple

party adoptions. States are not required to convince the courts of the correctness of their legislative judgments. Rather, “those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.” Vance v. Bradley, 440 U.S. 93, 111 (1979). This burden has clearly not been met.

The alleged financial deprivation harms listed by Plaintiffs could be handled by other legal actions, such as by trust, a power of attorney and by will. Defendants did not argue that Plaintiffs’ alleged psychological harms were “imaginary,” but that such alleged harms are conjectural and hypothetical. Defendants do not claim that psychological harms can never be considered a legally recognized injury as is necessary to invoke constitutional standing. What Defendants do argue is that in this case, the conclusory allegations of harms listed by Plaintiffs are not concrete nor are they specific to the plaintiffs. Burke v. City of Charleston, 139 F.3d 401, 406 (4th Cir. 1998).

Plaintiffs also continue to assert that they are similarly situated to individuals pursuing step-parent adoptions without noting that these individuals are married. Plaintiffs concede that the state of North Carolina allows the adoption of a child by a single person without regard to sexual orientation. North Carolina does not allow adoption by any unmarried couples – heterosexual or homosexual. Therefore, Plaintiffs cannot claim to be similarly situated; they are not married. In Footnote 10, pages 11 and 12 of Plaintiffs’ Response Brief, Plaintiffs state that “While Plaintiffs seek equal treatment to families who can secure step-parent adoptions, that relief does not involve this court considering the constitutionality of North Carolina’s marriage amendment.”

Again, Plaintiffs are not similarly situated to step-parent adoptions – the step-parents are married.

Plaintiffs argue the inconsistency of North Carolina allowing custody and guardianship to same sex couples and not allowing second parent adoptions. “[L]egal custody is not parenthood or adoption.” Petersen v. Rogers, 337 N.C. 397, 401, 445 S.E.2d 901, ____ (1994). A parent appointed guardian in an action for custody and control is subject to removal at any time without such cause as must be shown in a neglect proceeding against a parent. Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994). Defendants do not deny that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment. Griswold v. Connecticut, 381 U.S. 479, 496, 14 L.Ed.2d 510, 85 S.Ct. 1687 (1965) – but Plaintiffs do not comprise such a family unit. It is well-established that family and probate law are areas of traditional state regulation. In re Burrus, 136 U.S. 586, 594, 10 S.Ct. 850, 34 L.Ed. 500 (1890). For the reasons more fully set out in Defendants’ initial brief, this Court should abstain from addressing such questions of state law.

In short, the classifications established under the North Carolina Adoption Code are a rational means of protecting family stability. An examination of the relevant law and legislative history leads to one conclusion: that there is no equal protection violation with the statutes in questions. Plaintiffs are not part of a suspect classification, no fundamental right is implicated. With respect to Plaintiffs’ remaining arguments,

Defendants rely on Defendants' Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Defendants respectfully move the Court to grant its Motion to Dismiss Plaintiffs' Complaint, award Defendants attorneys' fees and costs and grant such further relief this Court deems just and equitable.

Respectfully submitted, this the 4th day of October, 2012.

ROY COOPER
Attorney General

/s/ Mabel Y. Bullock
Special Deputy Attorney General
North Carolina State Bar No. 10592
mbullock@ncdoj.gov

/s/ Grady L. Balentine, Jr.
Special Deputy Attorney General
North Carolina State Bar No. 19541
gbalentine@ncdoj.gov

North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6864
Facsimile: (919) 716-6758
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on 4th of October, 2012, I electronically filed the foregoing DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jonathan Drew Sasser
Ellis & Winters, LLP
jon.sasser@elliswinters.com
Attorney for Plaintiffs

Catherine M. Bradley
Sullivan & Cromwell LLP
BradleyC@sullcrom.com
Attorney for Plaintiffs

Christopher A. Brook
American Civil Liberties Union of NC
cbrook@acluofnc.org
Attorney for Plaintiffs

Daniel W. Meyer
Sullivan & Cromwell LLP
Meylerd@sullcrom.com
Attorney for Plaintiffs

David A. Castleman
Sullivan & Cromwell LLP
CastlemanD@sullcrom.com
Attorney for Plaintiffs

Elizabeth O. Gill
American Civil Liberties Union Foundation
egill@aclunc.org
Attorney for Plaintiffs

Garrard R. Beeney
Sullivan & Cromwell LLP
beeneyg@sullcrom.com
Attorney for Plaintiffs

James D. Esseks
American Civil Liberties Union Foundation
jesseks@aclu.org
Attorney for Plaintiffs

Jeremy M. Falcone
Ellis & Winters, LLP
jfalcone@elliswinters.com
Attorney for Plaintiffs

Rose A. Saxe
American Civil Liberties Union Foundation
rsaxe@aclu.org
Attorney for Plaintiffs

William R. Kleysteuber
Sullivan & Cromwell LLP
KleysteuberR@sullcrom.com
Attorney for Plaintiffs

This the 4th day of October 2012.

/s/ Mabel Y. Bullock
Special Deputy Attorney General