UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

MARCIE FISHER-BORNE, for herself and as guardian *ad litem* for M.F.-B., a minor; *et al.*; Plaintiffs, v. JOHN W. SMITH, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; *et al.*; Defendants.	CIVIL ACTION NO. 12-cv-00589

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

STATUTES

OTHER AUTHORITIES

Defendants move to dismiss a complaint largely of their own invention. Plaintiffs do not seek a "constitutional right to adoption." Rather, they seek to vindicate well-accepted federal constitutional rights that are impaired by unambiguous state law that categorically prohibits the non-legal parent Plaintiffs from adopting the children they are raising jointly with the children's legal parents.[1]

The Complaint alleges four counts of unconstitutional discrimination: North Carolina's ban on second parent adoptions violates (i) the equal protection rights of the Child Plaintiffs because it discriminates against them on the basis of their parents' sexual orientation and/or marital status (Compl. ¶¶ 284–95); (ii) the equal protection rights of the Parent Plaintiffs because it discriminates against them on the basis of their sexual orientation (Compl. ¶¶ 296–305); (iii) the due process rights of the Legal Parent Plaintiffs because it infringes their fundamental right to make decisions concerning the care, custody, and control of their children (Compl. ¶¶ 306–12); and (iv) the due process rights of all Plaintiffs because it infringes their fundamental right to family integrity (Compl. ¶¶ 313–19). Plaintiffs also have described the concrete and ongoing harms that they have suffered as a result of the discrimination undeniably caused by the state law at issue.

[1] On September 17, 2012, Plaintiffs filed a motion on consent for leave to file excess pages, which is still under consideration by the Court [Dkt. 31]. If that motion is not granted, Plaintiffs hereby seek permission to re-file an Opposition as quickly as possible, consistent with the Court's order.

If Plaintiffs can prove the allegations set forth in the Complaint — as this Court must assume on a motion to dismiss — they will prevail on their claims. Accordingly, Plaintiffs respectfully request that Defendants' motion be denied.

STATEMENT OF FACTS

Plaintiffs are six North Carolina families, each headed by a gay or lesbian couple in a committed, long-term relationship raising one or more children ("Plaintiff Families"). (Compl. ¶ 1.) Although each child ("Child Plaintiff") is being raised by the child's two parents, as a result of state law each Child Plaintiff has a legally recognized parent-child relationship with only one parent ("Legal Parent Plaintiff"), either through birth or adoption. (Compl. ¶ 1.) The non-legal parents ("Second Parent Plaintiff") wish to petition to adopt the Child Plaintiffs in a court of this State, a process commonly known as "second parent adoption." (Compl. ¶ 1.) If granted — which the Complaint avers would occur if the petitions were judged on the merits (Compl. ¶¶ 80, 120, 147, 164, 185, 215) — these second parent adoption petitions would allow Plaintiff Families to enjoy all the benefits and protections of a family where both adults are legally recognized as parents. (Compl. ¶ 2.)

North Carolina allows heterosexual married couples to apply for step-parent adoptions with no effect "on the relationship between the child and the . . . stepparent's spouse" (Br. at 4),[2] but marriages of same-sex couples are not recognized

[2] Citations to the Brief (Br.) are citations to the Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint [Dkt. 28].

in North Carolina.[3] As a result, second parent adoptions are the only way these families can ensure that both parents have a legal relationship with their child or children. (Compl. ¶ 2.) 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. 704 S.E.2d 494 (N.C. 2010). Thus, as a result of North Carolina's statutory adoption scheme, as definitively interpreted by the State Supreme Court, it is now impossible for both the Legal and Second Parent Plaintiffs to simultaneously have legal parent-child relationships with the children they are raising. (Compl. ¶¶ 11–22.)

As alleged in the Complaint, North Carolina's categorical refusal to permit applications for second parent adoptions causes Plaintiffs to suffer numerous harms. (Compl. ¶¶ 231–66.) The harms range from the day-to-day — having one parent and caretaker unable to consent to school activities — to the life threatening — having one parent and caretaker unable to consent to medical treatment. (Compl. ¶ 260.)[4] The harms include both financial deprivations and psychological injury. (Compl. ¶¶ 241–50, 255–66.) For example, the Child Plaintiffs are categorically barred from receiving

[3] *See* N.C. Gen. Stat. § 48-1-101(18); N.C. Gen. Stat. § 51-1.2; N.C. const. art. XIV, § 6 ("Amendment 1").

[4] The latter harm has been and continues to be especially acute for one Plaintiff family whose child suffers from a severe, chronic medical condition. (Compl. ¶ 137.) Shana Carignan, the Second Parent of Child Plaintiff J.C., has been barred from staying with her young son in the hospital past visiting hours because of her lack of legal status. (Compl. ¶ 151.)

numerous benefits from the Second Parent Plaintiffs to which they would be entitled if they were the Second Parent Plaintiffs' legal children, such as Social Security and other federal benefits, insurance benefits, entitlement to child support (in the unlikely event of a separation), standing to sue for a wrongful death action and the benefits of North Carolina estate and succession laws. (*See, e.g.*, Compl. ¶¶ 241–43, 244–45, 246–49, 250, 251–52.) Likewise, the Second Parent Plaintiffs and their children are all categorically denied the comfort and security of knowing that their relationship is legally recognized. (Compl. ¶ 260.) And the Legal Parent Plaintiffs are deprived of sharing the benefits and burdens of full parenthood with their partners as co-parents. (Compl. ¶¶ 261–62.)

The Parent Plaintiffs suffer ongoing anxiety and fear about the real consequences of the Second Parents' lack of a legal relationship with their children (Compl. ¶¶ 255–64), and concerns about their families' legitimacy (Compl. ¶ 259). They currently forego opportunities and experiences that their families would otherwise consider, including limiting travel, limiting school options, and limiting choice of medical care providers. (Compl. ¶¶ 258, 260–65.) The Complaint also alleges, upon information and belief, that Child Plaintiffs are likely to experience similar anxieties and fears when they become aware that they do not have and cannot have a legal relationship with their Second Parents. (Compl. ¶¶ 256–57.) All Plaintiffs, therefore, have suffered and continue to suffer emotional harm and anxiety as a result of North Carolina's ban on second parent adoption. (Compl. ¶ 255.)

ARGUMENT

I. LEGAL STANDARD

To survive a motion to dismiss, Plaintiffs must establish only that they have stated a claim to relief that is "plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007); *see also E.I. du Pont de Nemours & Co.* v. *Kolon Indus.*, 637 F.3d 435, 440 (4th Cir. 2011). When ruling on a motion to dismiss, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007). The plaintiff's complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Coleman* v. *Md. Ct. of Apps.*, 626 F.3d 187, 190 (4th Cir. 2010) (internal quotation marks omitted).

II. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION AND THIS COURT HAS SUBJECT MATTER JURISDICTION.

To establish standing to maintain an action in federal court, a plaintiff must allege: (1) injury in fact, (2) causation — "a fairly traceable connection between the plaintiff's harm and the complained-of conduct of the defendant," and (3) 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, 103 (1998); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Defendants argue that Plaintiffs have not satisfied the first two requirements, injury in fact and causation.[5] This argument ignores

[5] Defendants do not dispute that Plaintiffs have shown redressability. If this action is resolved in Plaintiffs' favor, the Second Parents will be allowed to petition for second parent adoptions, which is the relief all Plaintiffs seek. "This court assumes the merits of a dispute will be resolved in favor of the party invoking our jurisdiction in assessing standing." *Equity In Athletics, Inc.* v. *Dep't of Educ.*, 639 F.3d 91, 99 (4th Cir. 2011).

the allegations of the Complaint, which amply demonstrate Plaintiffs' Article III standing.

A. Plaintiffs Have Suffered, and Will Continue to Suffer, Injuries in Fact.

To establish injury in fact, a plaintiff must allege a harm "that is concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical." *Long Term Care Partners, LLC* v. *United States*, 516 F.3d 225, 231 (4th Cir. 2008). In equal protection cases, the injury in fact "is the denial of equal treatment resulting from the imposition of the barrier" by the government, and the injury in fact requirement is satisfied "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Price* v. *City of Charlotte*, 93 F.3d 1241, 1247 (4th Cir. 1996); *Martinez* v. *Clark Cnty., Nev.*, No. 11-CV-457, 2012 WL 135990, at *6 (D. Nev. Jan. 18, 2012) (quoting *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am.* v. *City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993)).

Defendants concede that they deny the Second Parent Plaintiffs the ability to apply for second parent adoptions, and that legal recognition of the parent-child relationship between each Second Parent and the Child Plaintiffs is, therefore, unavailable under North Carolina law. (Br. at 2–4.) And Plaintiffs have alleged that such recognition is available to similarly situated families with two married heterosexual parents, who can petition as stepparents. (Compl. ¶¶ 15–18, 286, 298.) On this basis alone, Plaintiffs have satisfied the injury requirement for an equal protection claim. *Planned Parenthood of S.C., Inc.* v. *Rose*, 361 F.3d 786, 790 (4th Cir. 2004)

("Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes.").

The Complaint also alleges multiple, concrete injuries from the deprivations occasioned by state law. (*See supra*, pp. 3–4.) The harms alleged as a result of the denial of second parent adoptions include the ongoing denial of benefits and the deprivation of rights (such as the right to consent to medical treatment). (*See*, *e.g.*, Compl. ¶¶ 231–66.) Each of these harms, taken separately, would independently be sufficient to confer standing on Plaintiffs. *See*, *e.g.*, *Finstuen* v. *Crutcher*, 496 F.3d 1139, 1145 (10th Cir. 2007) (medical crew's refusal to allow both parents to accompany child constituted a "concrete, particularized injury" for standing purposes).[6]

Wholly apart from these concrete harms, Plaintiffs have also alleged psychological harms, which Defendants seek to dismiss as "imaginary" and "hypothetical." (Br. at 6.) But psychological harm has long been recognized as an injury in fact for Article III standing purposes. *See*, *e.g.*, *Hudson* v. *McMillian*, 503 U.S. 1, 16 (1992) (recognizing that "psychological pain" is "cognizable injury" for constitutional claims); *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 (1954) (identifying schoolchildren's feelings of psychological inferiority from segregation in the public school). Moreover,

[6] Defendants do not, and could not, argue that these alleged harms are insufficiently imminent to confer standing. For standing purposes, "actual injury need not be shown; the mere risk of future injury is a sufficient 'injury in fact' to support standing; thus, it is enough for standing purposes to show only a 'threatened' injury." *Chambers Med. Tech.* v. *Jarrett*, 841 F. Supp. 1402, 1407 (D.S.C. 1994) (the mere possibility of a $10,000 fine for future violations of a proposed regulation was sufficient injury in fact to confer standing on plaintiff seeking to challenge it).

on a motion to dismiss, pleaded injuries are assumed to be true and subject to further proof through discovery.[7]

In essence, Defendants argue that Plaintiffs' relationships with their families is "proof enough" that they have suffered no injury because they have been able to maintain "stable, nurturing, and loving environments for the children in their homes," and therefore have not been harmed by the denial of their rights. (Br. at 5.) While accurately describing the nature of the families' relationships, this argument ignores the fact that Plaintiffs' primary injury is the denial of the ability to petition for second parent adoptions to establish the full rights afforded to families headed by heterosexual parents. Such an injury cannot be "cured" absent the relief sought in this action. Defendants also confuse resilience for lack of injury, and the ability to overcome difficult circumstances with the ability to overcome laws. Plaintiffs have created stable, loving families *despite* the unconstitutional injury and discrimination that they have suffered. Their successful efforts to partially mitigate the effects of their injuries cannot and should not bar them from standing to sue for the concrete injuries that remain as a result of state law. (Compl. ¶¶ 263-64.)

[7] While the Complaint does allege that most Child Plaintiffs are too young to understand the discrimination and deprivation they face as a result of state law, it also alleges that psychological harm is inevitable once the children grow old enough to gain such an understanding. (Compl. ¶¶ 256–57.) A plaintiff "does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Retail Indus. Leaders Ass'n* v. *Fielder*, 475 F.3d 180, 186 (4th Cir. 2007) (internal quotations omitted).

B. The Named Defendants are the Cause of Plaintiffs' Injuries.

Defendants David L. Churchill and Archie L. Smith III are charged with enforcing the laws of North Carolina. (Compl. ¶¶ 270, 273.) Defendant John W. Smith is charged with instructing the Clerks of Court of North Carolina on the proper and lawful application of state law. (Compl. ¶ 267.) Those Defendants would facilitate granting the requested relief should the Plaintiffs prevail. Defendants concede that, at this time, Defendants Churchill and Archie L. Smith III could not accept petitions for second parent adoptions from Plaintiffs, nor could Defendant John W. Smith instruct the Clerks of the Court to accept them. (*See* Br. at 2, 7.) Thus, the named Defendants are proper defendants — if Plaintiffs prevail, these Defendants would process Plaintiffs' petitions and direct other clerks to do so.

Moreover, the Complaint should not be dismissed just because Plaintiffs have not undertaken the futile act of asking these Defendants to grant second parent adoption petitions. As Defendants admit, *Boseman* mandates that each Second Parent Plaintiff's petition for a second parent adoption would be rejected out of hand (Br. at 2), and Defendants do not contend that they would ignore the mandate of the North Carolina Supreme Court. For purposes of standing, a party need not apply to the state and be rejected when it is uncontested that the relief sought would be denied. *Turner* v. *Fouche*, 396 U.S. 346, 361 n.23 (1970); *Finlator* v. *Powers*, 902 F.2d 1158, 1162 (4th Cir. 1990)

(it would be an "untenable waste of judicial resources" to force plaintiffs to undertake a futile action in order to establish standing).[8]

III. PLAINTIFFS HAVE PLED VIOLATIONS OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES.

A. The Complaint Adequately Pleads That North Carolina Adoption Law Violates the Equal Protection Clause.

Defendants move to dismiss Plaintiffs' equal protection claims (Counts I and II) for failure to state a claim, on the grounds that they are premised on an unrecognized "fundamental right to adopt." (Br. at 10.) But Plaintiffs do not allege such a right. Rather, Plaintiffs allege that they are deprived of equal protection because same-sex couples raising children together, unlike heterosexual parents, are deprived of the ability to petition to adopt based solely on their sexual orientation and marital status.[9] (Compl. ¶¶ 288–90, 298.) Because Defendants ignore the actual claims pleaded by Plaintiffs — the denial of legal protections otherwise available to heterosexual parents and their families — and because the Complaint alleges facts sufficient to show the lack

[8] Defendants also argue that Plaintiffs should be required to raise their constitutional claims in "North Carolina's courts" because North Carolina courts "provide an adequate forum for the plaintiffs' constitutional claims." (Br. at 8.) There is no merit to this argument. Defendants cite no law for the principle that Plaintiffs' federal constitutional claims *must* be brought in state court, and the application of the United States Constitution to settled state law is unquestionably a proper question for this Court.

[9] The right to apply for a benefit or protection on equal terms as others is a proper basis for an equal protection claim. *See Morrison* v. *Garraghty*, 239 F.3d 648, 656 (4th Cir. 2001) (upholding equal protection claim brought by an inmate seeking access to religious items because "*Morrison* pursues not a constitutional right to obtain the religious items, but a constitutional right to be treated the same as Native American inmates requesting the same religious articles.").

of any legitimate justification for denying Plaintiffs the protections of legally recognized child-parent relationships, Defendants' motion should be denied.

1. Plaintiffs Have Alleged That They are Similarly Situated to Families Who are Able to Secure Step-Parent Adoptions.

"To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison*, 239 F.3d at 264. Plaintiffs' allegations satisfy this standard. In Count I, the Child Plaintiffs allege that "North Carolina law . . . ***allows similarly situated children of heterosexual couples*** to be adopted by their second parent, provided that their second parent becomes their step-parent through marriage, and lives with them for six months." (Compl. ¶ 288 (emphasis added).) In Count II, the Second Parent Plaintiffs allege:

> North Carolina's categorical refusal to permit applications for second parent adoption by same-sex couples discriminates against those parents on the basis of their sexual orientation . . . [and] deprives the Second Parent Plaintiffs of an opportunity to secure the benefits of a legal parent-child relationship, while those benefits would inure ***to similarly situated parents who are heterosexual***.

(Compl. ¶ 297 (emphasis added).) Thus, Defendants' contention that Plaintiffs "have not and cannot" show "differential treatment from similarly situated people or groups" (Br. at 13), is simply incorrect. Whatever arguments may be made at the close of discovery, the Complaint meets the pleading standard at this stage.[10]

[10] Defendants also argue that "the adoption laws of North Carolina do not prohibit the adoption of children based on the sexual orientation of the party wishing to adopt." (Br. at 12.) That is untrue, as applied to these Plaintiffs, as the Complaint plainly alleges.

(*footnote continued*)

2. Plaintiffs Adequately Plead That North Carolina's Adoption Laws are Not Rationally Related to Any Legitimate State Interest.

While Plaintiffs disagree with Defendants' contention that their claims must be evaluated under the rational basis standard (*see* pp. 18–24, *infra*), Plaintiffs respectfully suggest that the Court need not reach that issue, because Plaintiffs' allegations state a claim that categorically denying second parent adoptions advances no legitimate state interests under any standard of review. (Compl. ¶¶ 44–51.)

Under the rational basis standard, classifications drawn by statutes must bear a rational relationship to a legitimate government objective. *Heller* v. *Doe*, 509 U.S. 312, 320 (1993). While it is true that courts tolerate legislative generalizations "even

(*footnote continued*)
(Compl. ¶¶ 15–18, 288, 298.) The adoption statute limits adoption to single individuals or married couples, or the married spouse of a legal parent. Gay and lesbian couples like the Parent Plaintiffs cannot marry or have their legal marriages recognized under North Carolina law, and, therefore, the statute discriminates based on sexual orientation. Because the Parent Plaintiffs are barred from marriage due to their sexual orientations, the denial of full legal recognition of their families because of their inability to marry amounts to discrimination based on their sexual orientation. *See, e.g.*, *Collins* v. *Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (restricting benefits to married people is sexual orientation discrimination where state law prevents same-sex couples from marrying), *aff'd sub nom. Diaz* v. *Brewer*, 656 F.3d 1008 (9th Cir. 2011); *Dragovich* v. *U.S. Dep't of the Treasury*, No. C 10-01564 CW, 2012 WL 253325, at *7 (N.D. Cal. Jan. 26, 2012) (same); *Alaska Civil Liberties Union* v. *Alaska*, 122 P.3d 781, 788–89 (Alaska 2005) (same). Of course, by their Complaint, Plaintiffs do not seek a right to marry under North Carolina law, or challenge North Carolina's prohibition on legal recognition of marriage for same-sex couples. 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. (Compl. ¶¶ 320–22.) Rather, Plaintiffs allege that categorically denying any mechanism for same-sex couples raising children to secure a legal parent-child relationship with both parents denies those families equal protection of the laws. (Compl. ¶¶ 284–305.) Second parent adoptions are granted in numerous states that do not allow same-sex couples to marry. (Compl. ¶¶ 23–28.)

when there is an imperfect fit between means and ends," *Heller*, 509 U.S. at 321, that generalization must be "at least debatable" to survive, *id.* at 326 (internal quotation marks omitted). When applying the rational basis standard courts also "insist on knowing the relation between the classification adopted and the objective to be attained"; this is what "gives substance to the Equal Protection Clause." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). As the Supreme Court has cautioned, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321. Plaintiffs have squarely pleaded that the denial of second parent adoptions cannot meet this test.

Defendants urge otherwise by mischaracterizing Plaintiffs' burden in opposing a motion to dismiss, arguing that the Complaint has not "negat[ed] every conceivable rational basis supportive of North Carolina's adoption statute." (Br. at 11.) While the Fourth Circuit has held that "conclusory assertion[s]" are "insufficient to overcome the presumption of rationality" afforded to legislation, it has also found that "[t]he rational basis standard . . . cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard." *Giarratano* v. *Johnson*, 521 F.3d 298, 303–04 (4th Cir. 2008) (quoting *Wroblewski* v. *City of Washburn*, 965 F.2d 452, 459–60 (7th Cir. 1992)) (prisoner's equal protection claim failed because he did not allege any set of facts that would indicate the classification at issue violated any fundamental rights, was irrational, or otherwise failed to serve a legitimate state interest). Courts must "take as true all of the complaint's allegations and reasonable inferences that follow, [and] apply the resulting 'facts' in the light of the deferential rational basis standard." *Id.* (quoting

Wroblewski, 965 F.2d at 460); *see also Minn.* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (under rational basis review, "parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational"). Here, Plaintiffs' detailed allegations satisfy any such burden. (*See* Compl. ¶¶ 44–51.)

Defendants argue that it could be rational to "favor parenthood by a married couple or a single individual" because "adoption by unmarried partners, in a relationship that is freely severable, is not a sufficiently stable and nurturing basis for an adoption."[11] (Br. at 11.) This suggestion provides no basis to dismiss the Complaint.

First, there is simply no relationship — rational or otherwise — between any interest in parenthood by married couples or single individuals, and the relief sought here. As the Complaint alleges, denying second parent adoptions does not prevent or even deter children from being adopted into families with two parents who are unable to

[11] Although Defendants do not cite it, this argument alludes to the Fifth Circuit's decision in *Adar* v. *Smith*, 639 F.3d 146 (5th Cir. 2011) (*en banc*). *Adar* primarily focused on whether the plaintiffs could bring a Section 1983 action under the Full Faith and Credit Clause for a Louisiana registrar's refusal to print the names of a gay couple on their child's birth certificate. *Id.* at 149–61. After upholding Louisiana's arguments on Full Faith and Credit grounds, the Fifth Circuit also reached an additional, "alternative" holding that rejected an equal protection challenge under rational basis. *Id.* at 151, 161–62. This "alternative holding" is not persuasive precedent for this Court to follow. In any event, the facts of *Adar* are distinguishable from those here; most notably, the child plaintiff in *Adar* was already adopted by both parents, so the question of whether a state can *completely bar* a group of children from having a legal relationship with both parents was not before the Fifth Circuit. Here, Plaintiffs have alleged facts more than sufficient to show that this State's statutory adoption scheme has no relationship to any legitimate government purpose.

marry, or prevent children being born to a biological parent who is unable to marry the child's second parent. (Compl. ¶¶ 49, 50.) Indeed, Plaintiffs have alleged, and will prove, that North Carolina not only does not discourage foster or adoptive placements in homes with same-sex couples, but in fact encourages adoption by same-sex, unmarried couples, like Plaintiffs. (Compl. ¶¶ 29–36.) In short, the Child Plaintiffs will be raised by their two parents regardless of whether second parent adoptions are granted — albeit without a formal legal parent-child relationship with one of their parents, or the protections and benefits that attach to that legal relationship. (Compl. ¶ 49.) Plaintiffs thus have alleged not "merely a matter of poor fit of remedy to perceived problem, but a lack of *any* demonstrated connection." *Mass.* v. *Dep't of Health and Human Servs.*, 682 F.3d 1, 13–14 (1st Cir. 2012) (emphasis added).

Second, Defendants contend that a committed, same-sex relationship is an "[in]sufficiently stable and nurturing basis for an adoption." (Br. at 11.) Assuming that this contention is based on the risk that same-sex parents might be more likely than married heterosexual couples to separate, and thus subject the children to custody disputes, Plaintiffs have alleged facts showing that this justification, too, is "impossible to credit." *Romer*, 517 U.S. at 635. North Carolina law currently grants *de facto* parents (including same-sex co-parents who lack a legal relationship with the child) standing to sue for custody or visitation, in the event the parents separate. (Compl. ¶¶ 37–41.) While the *de facto* parent doctrine serves important interests in protecting a child's ongoing relationship with both his or her parents, it also shows that denying second parent adoptions to Plaintiffs and others like them bears no rational relationship to any asserted

interest in preventing children from being exposed to "unstable" families.[12] In fact, North Carolina's law provides that the Child Plaintiffs are denied protections while their families are intact, but may face the same potential for custody disputes if their parents separate as a result of the *de facto* parent doctrine. (Compl. ¶¶ 42–43.)

Third, while Defendants imply that unmarried couples are insufficiently "nurturing" (Br. at 11.), they do not and could not contend (particularly at this pleading stage) that denying second parent adoptions is justified because same-sex couples are inferior parents. North Carolina law allows gay and lesbian individuals — including individuals living with committed partners — to adopt; the legislature could not therefore maintain that the adoption law is rationally based on the theory that gay individuals or couples are worse parents than their heterosexual counterparts. Even if Defendants made such an allegation, Plaintiffs also have alleged facts sufficient to overcome any presumption of rationality based on any alleged inferiority of same-sex couples as parents (*see* Compl. ¶ 48), and are prepared to present expert testimony and evidence to show that any preference for married heterosexual parents as superior parents finds no footing in factual reality, *see, e.g.*, *Gill* v. *Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) ("[C]hildren raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents."), *aff'd on other grounds*, 682 F.3d 1 (1st Cir. 2012); *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010)

[12] The *de facto* parent doctrine does not, however, provide children or their families with equal or even similar protections as those that result from the legally-recognized parent-child relationship formed by an adoption. (Compl. ¶¶ 37–43.)

(same), *aff'd on other grounds sub nom. Perry* v. *Brown*, 671 F.3d 1052 (9th Cir. 2012); *In re Adoption of John Doe & James Doe*, 2008 WL 5006172, at *28 (Fla. Cir. Ct., Miami-Dade Cnty., Nov. 25, 2008) (same), *aff'd sub nom*. *In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. App. 2010).

Finally, Defendants' motion should be denied because accepting Plaintiff's allegations as true, it is simply "impossible to credit" the denial of second parent adoption as serving *any* interest in children's welfare. *See, e.g.*, *Pedersen* v. *O.P.M.*, __ F. Supp. 2d __, No. 3:10-cv-1750 (VLB), 2012 WL 3113883, at *40 (D. Conn. 2012) (holding that where a law has "no impact on the rights afforded to same-sex couples by a variety of states to adopt and rear children," but "inflicts significant and undeniable harm upon such couples and their children by depriving them of a host of federal marital benefits and protections," the law "is inimical to its stated purpose of protecting children"). Any adoption petition — including step-parent adoptions or the second parent adoptions sought here — can only be granted following safeguards that ensure that any particular adoption is in the child's best interests. (Compl. ¶¶ 4, 45, 46.) Plaintiffs' allegations, if proven, support the conclusion that a categorical ban on state courts even being *permitted to consider* whether children who are already being raised by their second parents should be allowed a legal relationship with both their parents simply does not advance the well-being of children. (Compl. ¶¶ 44–51.)[13]

[13] At the motion to dismiss stage, Plaintiffs respectfully urge that the Court does not have to decide whether the State could conceivably have a sufficient justification for treating children of unmarried couples differently than children of married parents in other

(*footnote continued*)

In short, taking Plaintiffs' allegations as true, the Complaint has "'allege[d] facts sufficient to overcome the presumption of rationality that applies to government classifications.'" *Giarratano*, 521 F.3d at 304 (quoting *Wroblewski*, 965 F.2d at 460).

3. Plaintiffs Have Alleged Facts Sufficient to Support Application of Heightened Scrutiny to Their Equal Protection Claims.

To the extent that the issue is reached at the pleading stage, Plaintiffs also have adequately pleaded that the application of a standard of higher scrutiny to their Equal Protection claims is appropriate. (Compl. ¶¶ 52–67, 285, 289.) Defendants improperly assume at this stage that rational basis review applies. Because application of heightened scrutiny would require Defendants to justify their discrimination against Plaintiffs, which they have not even attempted to do, and which could not be decided on a motion to dismiss, this provides an alternative basis to deny Defendants' motion.

Count I alleges that the denial of second parent adoptions "discriminates against the Child Plaintiffs on the basis of their parents' sexual orientation and/or sexual orientation and marital status." (Compl. ¶ 285.) The Supreme Court has long recognized that laws that treat children differently based on whether their parents are married — *i.e.*, on the basis of illegitimacy — are subject to a form of heightened scrutiny. *See, e.g.*, *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (Louisiana's workers

(*footnote continued*)
circumstances. Plaintiffs have alleged that there is no meaningful difference between the Child Plaintiffs and similarly situated children of heterosexual parents for purposes of considering applications for adoption, which is sufficient at this stage of the proceedings for the case to proceed. *See Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) ("[I]n defining a class subject to legislation, the distinctions that are drawn [must] have some relevance to the purpose for which the classification is made") (internal quotation marks omitted).

compensation law relegating "unacknowledged illegitimate children" to a lower priority status in the distribution of benefits than "legitimate children" violated the equal protection rights of children born to unmarried parents). The Court has explained the basis for this heightened scrutiny as follows:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.

Id. In the wake of *Weber*, the Supreme Court has repeatedly held that laws — like the laws here — that disadvantage children born to unmarried parents are subject to heightened scrutiny. *See, e.g.*, *Mills* v. *Habluetzel*, 456 U.S. 91, 99–102 (1982) (applying heightened scrutiny and striking down one year statute of limitations for illegitimate child to bring action to prove paternity); *United States* v. *Clark*, 445 U.S. 23, 26 (1980). Other courts have followed: the United States District Court for the Southern District of Florida recently held that state regulations that denied in-state tuition benefits to children of undocumented residents are subject to heightened scrutiny under the Equal Protection Clause. *Ruiz* v. *Robinson*, No. 11-cv-23775-KMM, 2012 WL 3779058, at *6–9 (S.D. Fla. Aug. 31, 2012). The court applied heightened scrutiny because "in a very real way the regulations punish the citizen children for the acts of their parents." *Id.* at *7.

Here, Plaintiffs have alleged that North Carolina's adoption laws treat children differently based on the marital status created by the sexual orientation of their parents — both factors beyond the control of the children — and deprive the Child

Plaintiffs of adoptions that would otherwise be in their best interest solely on this basis. (Compl. ¶¶ 231–66, 285–88.) Like the regulations in *Ruiz*, North Carolina's adoption law "punish[es]" the Child Plaintiffs "for the acts of their parents" and must therefore be subjected to heightened scrutiny. *Ruiz*, 2012 WL 3779058, at *7; s*ee also Gomez* v. *Perez*, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.").

Count II, in turn, asserts that Defendants deny equal protection to the Legal and Second Parent Plaintiffs by depriving them of the security of a legal parent-child relationship without sufficient justification. As Plaintiffs have alleged, heightened scrutiny is appropriate because the adoption laws discriminate based on the parents' sexual orientation, a suspect classification. (Compl. ¶¶ 52–67.) Defendants respond to Plaintiffs' allegations that gay men and lesbians represent a suspect class with nothing more than a bald denial. (*See* Br. at 12 ("This is not so.").) But, as alleged in the Complaint, a straightforward application of the traditional factors by which heightened scrutiny is determined compels the conclusion that sexual orientation classifications should be treated as suspect or, at a minimum, quasi suspect. *See, e.g.*, *Perry*, 704 F. Supp. at 997; *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 426–62 (Conn. 2008) (analyzing federal precedent as persuasive authority when interpreting state constitution). This Court should not reject these allegations without evidence to consider them.

B. Plaintiffs Have Pled a Violation of Their Substantive Due Process Rights.

Defendants also urge this Court to dismiss Plaintiffs' due process claims (Counts

III and IV) on the grounds that "Plaintiffs' allegations do not sufficiently allege a deprivation of a protectable liberty interest." (Br. at 15.) Once more, however, Defendants dispute a claim of their own making. Plaintiffs' due process claims are not premised on a fundamental right to adopt, nor are their claims founded in procedural due process. (Br. at 14, 15.) Plaintiffs allege a denial of substantive due process because of Defendants' interference with fundamental liberty rights. (Compl. ¶¶ 307, 314.)

The Due Process Clause "forbids the government to infringe . . . fundamental liberty interests at all, *no matter what process is provided*, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (omission in original) (emphasis added) (internal quotation marks omitted). It is well-established that the substantive liberties protected by the Due Process Clause include the right to family integrity and parental decision-making. *See, e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Moore* v. *City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (recognizing fundamental right to family integrity); *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–535 (1925) (holding that legislation that mandated that children attend public schools exclusively "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"). As the Fourth Circuit has recognized, the constitutional right to familial liberty can be implicated both by "governmental attempts to interfere with particularly intimate

family decisions," and "government actions that sever, alter, or otherwise affect the parent/child relationship." *Hodge* v. *Jones*, 31 F.3d 157, 163 (4th Cir. 1994). The laws at issue here do both. (*See* Compl. ¶¶ 231–66.)

Plaintiffs have alleged in Count IV that North Carolina's adoption laws categorically prohibit the Second Parent Plaintiffs from creating a legal parent-child relationship with the Child Plaintiffs. (*See* Compl. ¶¶ 314–16.) That lack of legal relationship results in a host of material and psychological deprivations that form the basis of Plaintiffs' injuries here. (*See supra* pp. 3–4.) Second Parent Plaintiffs have a constitutionally protected familial relationship with the respective Child Plaintiffs, *see Smith* v. *Org. of Foster Families*, 431 U.S. 816, 844 (1976) ("biological relationships are not exclusive determination of the existence of a family"), and the complete inability to obtain legal recognition of an existing parent-child relationship through adoption is an unlawful burden on the Plaintiffs' family integrity.

Similarly, Count III alleges that the adoption laws interfere with the ability of the Legal Parent Plaintiffs to make one of the most fundamental and intimate parental decisions — with whom to share the joys and obligations of parenting their child. (*See* Compl. ¶ 308.) As the Supreme Court recognized in *Troxel*, "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 66. North Carolina law impermissibly burdens Legal Parent Plaintiffs' right to parental autonomy.

Defendants argue that "[t]he adoption laws of North Carolina do not guarantee any particular outcome relative to a petition for adoption." (Br. at 14.) That is

not so — the adoption laws in fact guarantee that the second parent adoptions that Plaintiffs wish to secure will be rejected out of hand. (Compl. ¶¶ 11–18; *see also supra*, p. 9.) While Defendants are otherwise correct that a "state trial court has the authority to grant or deny an application for adoption as the best interests of the child dictate" (Br. at 14), Plaintiffs have alleged (and will prove) that the law challenged here categorically *prevents* the state trial courts from even *considering* the second parent adoptions, regardless of the fact that such adoptions are in the Child Plaintiffs' best interests, (Compl. ¶¶ 4, 23–28, 46, 49–51, 80, 98, 102, 112, 120, 133, 141 147, 164, 185, 202, 209, 215). Accordingly, Plaintiffs are entitled to put on evidence showing the impermissible burden on their fundamental rights to parental autonomy and family integrity.

IV. *BURFORD* ABSTENTION DOES NOT APPLY HERE.

Finally, Defendants' contention that the Court should abstain from adjudicating this case under *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 329 (1943), is meritless. Abstention is invoked only in "extraordinary circumstances" when "federal adjudication would 'unduly intrude' upon 'complex state administrative processes' because either: (1) 'there are difficult questions of state law . . . whose importance transcends the result in the case then at bar'; or (2) federal review would disrupt 'state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Martin* v. *Stewart*, 499 F.3d 360, 364, 369 (4th Cir. 2007). Defendants have not, and cannot, demonstrate that either of those extraordinary circumstances are present here, or that the abstention doctrine should prevent Plaintiffs from vindicating their federal constitutional rights in federal court.

Plaintiffs' claims arise exclusively under federal constitutional law. No difficult question of state law is at issue — the North Carolina Supreme Court has already definitively construed the North Carolina adoption statutes. Where a state statute is "well defined" by the state's highest court and a plaintiff brings federal constitutional law challenges to the statute, "*Burford* abstention is inappropriate." *Martin*, 499 F.3d at 366. There is certainly "no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 367 (quoting *Zablocki* v. *Redhail*, 434 U.S. 374, 379–80 n.5 (1978)).

Similarly, federal adjudication of this case does not threaten uniform state regulation because Plaintiffs' federal constitutional claims do not require the Court to construe state law. Plaintiffs claim that state law must be applied consistently with the federal constitutional requirements, not "that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors." *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 362 (1989). Therefore "federal adjudication of [a claim that a state court has violated federal law] would not disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'" *Id.*; *see also Harper* v. *Public Serv. Comm'n of W. Va.*, 396 F.3d 348, 358 (4th Cir. 2005).

Because this case does not involve the rare and extraordinary circumstances in which *Burford* abstention may be permissible, the Court should not abstain from hearing Plaintiffs' federal claims regarding settled state law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

Dated: September 20, 2012
Raleigh, North Carolina

/s/ Jonathan D. Sasser
Jonathan D. Sasser
N.C. State Bar No. 10028
Jeremy M. Falcone
N.C. State Bar No. 36182
Ellis & Winters LLP
P.O. Box 33550
Raleigh, North Carolina 27636
Telephone Number: (919) 865-7000
Facsimile Number: (919) 865-7010
jon.sasser@elliswinters.com
jeremy.falcone@elliswinters.com

Garrard R. Beeney*
David A. Castleman*
C. Megan Bradley*
W. Rudolph A. Kleysteuber, IV*
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-9007
BeeneyG@sullcrom.com
CastlemanD@sullcrom.com
BradleyC@sullcrom.com
KleysteuberW@sullcrom.com

Rose A. Saxe*
James D. Esseks*
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004-2400
Telephone: (212) 549-2500
Facsimile: (212) 549-2646
rsaxe@aclu.org
jesseks@aclu.org

Elizabeth O. Gill*
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, California 94111-4805
Telephone: (415) 343-1237
Facsimile: (415) 255-1478
egill@aclunc.org

Christopher Brook
N.C. State Bar No. 33838
ACLU of North Carolina
P.O. Box 28004
Raleigh, North Carolina 27611-8004
Telephone: (919) 834-3466
Facsimile: (866) 511-1344
cbrook@acluofnc.org

(*Notice of special appearance filed)

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012, I electronically filed the foregoing **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Grady L. Balentine, Jr. and Mabel Y. Bullock, counsel of record for Defendants.

/s/ Jonathan D. Sasser
Jonathan D. Sasser
Ellis & Winters LLP
P.O. Box 33550
Raleigh, North Carolina 27636
Telephone Number: (919) 865-7000
Facsimile Number: (919) 865-7010
jon.sasser@elliswinters.com