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60CV-13-2662

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
THIRD DIVISION

M. KENDALL WRIGHT, et al **PLAINTIFFS**

VS. **Case No. 60CV-13-2662**

THE STATE OF ARKANSAS, et al **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS

COME NOW the State of Arkansas, the Governor of Arkansas in his official capacity, the Attorney General of Arkansas in his official capacity, and the Director of the Arkansas Department of Health in his official capacity (collectively, the "State Defendants" or the "State"), by and through undersigned counsel, and offer the following Brief in support of their Motion to Dismiss the Second Amended Complaint filed by the Plaintiffs on August 5, 2013 (the "Complaint"). The State Defendants are represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as counsel for state agencies and entities when requested. *See id.* ("The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.").

I. ARKANSAS LAW ON MARRIAGE

A. Amendment 83.

At the general election held on November 2, 2004, Arkansas voters approved a constitutional amendment by a vote of 753,770 (74.95%) for, to 251,914 (25.05%) against, *see* www.sos.arkansas.gov/electionresults/index.php?elecid=66,[1] which became Amendment 83 to the Arkansas Constitution. Amendment 83 provides in full:

> § 1. Marriage
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> Marriage consists only of the union of one man and one woman.
>
> § 2. Marital Status
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> Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.
>
> § 3. Capacity, rights, obligations, privileges and immunities
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> The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

Id.

B. Act 144 of 1997.

The Arkansas General Assembly had previously adopted Act 144 of 1997, codified at Ark. Code Ann. § 9-11-109, which declared that "[m]arriage shall only be between a man and a

[1] A Human Rights Campaign survey of 600 Arkansas adults taken between June 26 and June 30, 2013 (following the *Windsor* and *Perry* decisions, *infra*), determined that when posed the question "Please tell me if you favor or oppose the following . . . Allowing gay and lesbian couples to marry legally[,]" 55% of Arkansas adults opposed (47% strongly opposed), and 38% of Arkansas adults favored (26% strongly favored) allowing gays and lesbians to marry legally. *See* http://www.hrc.org/files/assets/resources/AR_PollingMemo_PDF.pdf.

woman. A marriage between persons of the same sex is void." *See also* Ark. Code Ann. § 9-11-107(b) (Arkansas recognition of certain foreign marriages "shall not apply to a marriage between persons of the same sex"). Finally, Act 144, codified at Ark. Code Ann. § 9-11-208, provides:

> (a)(1)(A) It is the public policy of the State of Arkansas to recognize the marital union only of man and woman.
>
> (B) A license shall not be issued to a person to marry another person of the same sex, and no same-sex marriage shall be recognized as entitled to the benefits of marriage.
>
> (2) Marriages between persons of the same sex are prohibited in this state. Any marriage entered into by a person of the same sex, when a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas, and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.
>
> (3) However, nothing in this section shall prevent an employer from extending benefits to a person who is a domestic partner of an employee.

Id.[2]

These Arkansas statutes mirror the laws of a majority of other states that likewise limit marriage to opposite-sex couples and frequently provide that state law does not recognize marriage between persons of the same sex, even if obtained in another jurisdiction that allows same-sex marriage.[3] Though a few state supreme courts have struck down laws prohibiting

[2] Arkansas law also expressly prohibits incestuous marriages, declaring them to be "incestuous and absolutely void." Ark. Code Ann. § 9-11-106(a). A violation of the prohibition of incestuous marriages is a misdemeanor criminal offense. Ark. Code Ann. § 9-11-106(b). Arkansas law also prohibits marriages of any male under the age of 17, and any female under the age of 16. Ark. Code Ann. § 9-11-105.

[3] *See* Ala. Code § 30-1-19; Ala. Const. Art. I, § 36.03; Alaska Const. Art. I, § 25; Alaska Stat. §§ 25.05.011, 25.05.013; Ariz. Rev. Stat. Ann. §§ 25-101, 25-112, 25-125; Colo. Const. Art. II, § 31; Colo. Rev. Stat. Ann. § 14-2-104; Fla. Const. Art. I, § 27; Fla. Stat. Ann. § 741.212; Ga. Const. Art. I, § 4; Ga. Code Ann. § 19-3-3.1; Haw. Const. Art. I, § 23; Haw. Rev. Stat. §§ 572-1, 572-3; Idaho Const. Art. III, § 28; Idaho Code §§ 32-201, 32-209; 750 Ill. Comp. Stat. Ann. 5/201, 5/212 to 5/213.1, 5/216; Ind. Code Ann. § 31-11-1-1; Kan. Const. Art XV, § 16;

same-sex marriage under provisions of state constitutions[4], the vast majority of these laws have stood unchallenged or have been upheld against challenges under state and federal law, by state and federal courts, and remain in effect today.

C. Plaintiffs' claims regarding Amendment 83 and Act 144 of 1997.

Plaintiffs, twenty gay and lesbian couples living in Arkansas and three children ("Plaintiffs"), challenge the constitutionality of Amendment 83 to the Constitution of Arkansas, and Arkansas Act 144 of 1997.[5] Plaintiffs allege that they are in long-term, committed relationships, and they have attempted to marry but have been denied because same-sex marriage is prohibited in Arkansas under Amendment 83.

Kan. Stat. Ann. §§ 23-2501, 23-2508; Ky. Const. § 233A; Ky. Rev. Stat. Ann. §§ 402.005, 402.020, 402.040, 402.045; La. Const. Art. 12, § 15; La. Civ. Code Ann. Art. 86, 3520; La. Civ. Code art. 89; La. Rev. Stat. Ann. §§ 9:272, 9:273; Mich. Const. 1963, Art. I, § 25; Mich. Comp. Laws Ann. §§ 551.1 to 551.4, 551.271 to 551.272; Miss. Const., Art. 14 § 263A; Miss. Code Ann. §§ 93-1-1, 93-1-3; Mo. Const. Art I, § 33; Mo. Rev. Stat. § 451.022; Mont. Const. Art. XIII, § 7; Mont. Code Ann. §§ 40-1-103, 40-1-401; Neb. Const. Art. I, § 29; Neb. Stat. § 42-117; N.C. Const. Art. XIV, § 6; N.C. Gen. Stat. §§ 51-1, 51-1.2; N.D. Const. Art. XI, § 28; N.D. Cent. Code §§ 14-03-01, 14-03-08; Nev. Const. Art. I § 21; Nev. Rev. Stat. § 122.020; Ohio Const. Art. XV, § 11; Ohio Rev. Code Ann. § 3101; Okla. Const. Art. II, § 35; Okla. Stat. Ann. tit. 43, §§ 3, 3.1; Or. Const. Art. 15, § 5a; 23 Pa. Cons. Stat. Ann. §§ 1102, 1704; S.C. Const. Art XVII, § 15; S.C. Code Ann. §§ 20-1-10, 20-1-15; S.D. Const. Art XXI, § 9; S.D. Codified Laws §§ 25-1-1, 25-1-38; Tenn. Const. Art. XI, § 18; Tenn. Code Ann. § 36-3-113; Tex. Const. Art. I, § 32; Tex. Fam. Code Ann. §§ 1.103, 2.001, 6.204; Utah Const. Art. I, § 29; Utah Code Ann. § 30-1-2, 30-1-4, 30-1-4.1; Va. Const. Art. I, § 15-A; Va. Code Ann. §§ 20-45.2 to 20-45.3; W. Va. Code Ann. §§ 48-2-104, 48-2-401, 48-2-603; Wis. Const. Art. XIII, § 13; Wis. Stat. §§ 765.01, 765.04, 765.001, 765.30(a); Wyo. Stat. Ann. §§ 20-1-101, 20-1-111.

[4] *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407 (Conn. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), opinion extended after remand, 2008 WL 3999843 (2008); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[5] As explained below, because Amendment 83 is a part of the State Constitution and sets forth the same policy as Act 144 of 1997, and because Amendment 83 explicitly authorizes Act 144 of 1997, Act 144 of 1997 stands or falls with Amendment 83.

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

The United States Supreme Court has cautioned restraint in the recognition of new substantive constitutional rights not anchored in the text of the federal Constitution, s*ee Washington v. Glucksberg*, 521 U.S. 702 (1997), urging lower courts to exercise the utmost care "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of a shifting court majority. *Id*. at 720. The Due Process Clause protects only those fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id*. at 720-21. As discussed in detail below, Plaintiffs' challenges to Amendment 83 and Act 144 of 1997 fail under binding precedent of the United States Supreme Court and the Arkansas Supreme Court. Accordingly, the Complaint should be dismissed with prejudice for failure to state a claim upon which any relief can be granted.

II. DISMISSAL STANDARD

On a motion to dismiss pursuant to Ark. R. Civ. P. 12(b)(6), the courts treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiffs. *Dockery v. Morgan*, 2011 Ark. 94, *6-7, 380 S.W.3d 377, 382 (citing *McNeil v. Weiss*, 2011

Ark. 46, 378 S.W.3d 133). "However, our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Id*. (Citing Ark. R. Civ. P. 8(a)(1); *Born v. Hosto & Buchan, PLLC*, 2010 Ark 292, 372 S.W.3d 324). The Court should "treat only the facts alleged in the complaint as true but not the plaintiff's theories, speculation, or statutory interpretation." *Id*. (Citing *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999)). On appeal, the appellate court asks "whether the circuit judge abused his or her discretion" in ruling on the motion to dismiss. *Id*. (Citing *Doe v. Weiss*, 2010 Ark. 150, 2010 WL 1253216).

III. THE STATE OF ARKANSAS, THE GOVERNOR, AND THE ATTORNEY GENERAL ARE NOT PROPER DEFENDANTS.

A. The State of Arkansas is not a proper defendant.

The State of Arkansas may not be sued in Arkansas's courts on any claim that could operate to control the action of the State or subject it to liability. *See* Constitution of the State of Arkansas, 1874, Article V, § 20 ("The State of Arkansas shall never be made defendant in any of her courts."). The sovereign immunity of the State protects it from suit for declaratory and injunctive relief as well as money damages, costs, and attorney's fees. *Ark. Tech Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000). Plaintiffs seek an order permanently enjoining enforcement of Act 146 of 1997 and Amendment 83, and they seek costs and fees from the State under 42 U.S.C. § 1983 "and otherwise[.]" Complaint, Wherefore Clause. Such claims fall within the core protection of sovereign immunity. The State is immune from Plaintiffs' state-law claims, and this Court therefore lacks subject matter jurisdiction over the State of Arkansas.

Plaintiffs' federal claims under 42 U.S.C. § 1983 are also barred by law. The State of Arkansas is never subject to suit in Arkansas's courts under Section 1983 for alleged violations of the United States Constitution. Section 1983 provides for suits against "persons" alleged to

have violated constitutional rights. The United States Supreme Court ruled in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), that states are not "persons" subject to suit under Section 1983, whether the suit is brought in state court or federal court. Thus, Plaintiffs cannot assert their federal claims against the State of Arkansas. The State of Arkansas should be promptly dismissed as a party defendant.

B. The Governor and the Attorney General are not proper defendants.

The Governor of Arkansas, Mike Beebe, and the Attorney General, Dustin McDaniel, are not proper defendants and all claims against them should be promptly dismissed. Plaintiffs' state-law claims against Governor Beebe and General McDaniel are barred by sovereign immunity. The Arkansas Supreme Court has long held that when a suit is filed against the State or a state official in his or her official capacity, Arkansas courts are wholly without jurisdiction to proceed. *Pitcock v. State*, 91 Ark. 527, 535 (1909). "If the State is the real party in interest, though only its officers and agents are parties, then it is in effect a suit against the State, and falls within the rule of prohibition." *Id.*, 91 Ark. at 535. "[W]here the pleadings show that the action is, in effect, one against the state, the trial court acquires no jurisdiction." *Fireman's Ins. Co. v. Ark. State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771 (1990).

In this case, neither the Governor nor the Attorney General has any enforcement authority under Amendment 83 or Act 144.[6] Accordingly, they have been sued solely as nominal representatives of the State. Where a state official is named merely as a device to bring suit against

[6] The only allegation about Governor Beebe is paragraph 204 of the Complaint: "Defendant, Michael D. Beebe, is the Governor of the State of Arkansas. In this official capacity, the Governor is the chief executive officer of the State of Arkansas. He is responsible to ensure that the laws of this state and the Arkansas Constitution are properly enforced." *Id.* The only allegation about General McDaniel is paragraph 205 of the Complaint: "Defendant, Dustin McDaniel, is the Attorney General of the State of Arkansas. In this official capacity, the Attorney General is the chief legal officer of the State of Arkansas. It is his duty to uniformly and adequately enforce the laws of the State of Arkansas and the Arkansas Constitution." *Id.*

the State itself, the suit is barred by sovereign immunity. Accordingly, this Court lacks jurisdiction over the claims against Governor Beebe and General McDaniel, and all claims against them should be promptly dismissed.

The Governor and the Attorney General are also not proper defendants, because they have no responsibility or authority to enforce Amendment 83 or Act 144 of 1997. In *Ex parte Young*, 209 U.S. 123, 157 (1908), the Supreme Court held that, although it might be convenient to name a governor, attorney general, or similar official in a lawsuit challenging the constitutionality of a state statute, absent enforcement authority over that law, such officials may not be sued to test its constitutionality. The Court explained:

> In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. **If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes.** That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.

Ex parte Young, supra, 209 U.S. at 157 (emphasis added) (quoting *Fitts v. McGhee*, 172 U.S. 516 (1899)). The Court then summarized the rationale for this rule as follows:

> **In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party**

> **as a representative of the state, and thereby attempting to make the state a party.**

Id. (Emphasis added).

Thus, no state official may be sued under *Ex parte Young* when he or she lacks authority to enforce a challenged statute. "A nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual." *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1342-43 (Fed. Cir. 2006) (holding that patentees could not maintain suit against individual officials of the University of Arkansas for patent infringement based upon allegation that officials supervised intellectual property activity at the University due to their positions at the University) (citing cases). Claims based solely upon an official's high-ranking position, where the official does not enforce the statute in question, fail as a matter of law. *See L. A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) ("This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.") (citing cases); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (holding the governor and attorney general of a state are not the proper defendants in every action attacking the constitutionality of a state statute merely because they have a general obligation to enforce state laws); *Young v. State of Hawaii*, Civ. No. 12-336-HG-BMK (D. Hawaii Nov. 29, 2012) (granting motion to dismiss state, governor, and attorney general where plaintiffs challenged state gun licensing laws; "Plaintiffs' claims against Governor Abercrombie and Attorney General Louie are based on their general oversight of Hawaii laws. These allegations are insufficient to establish a nexus between the named State officials and the alleged violation of Plaintiff's constitutional rights.") (citing *Pennington Seed, Inc., supra*; *L. A. County Bar Ass'n v. Eu, supra*).

Similarly, the fact that a state attorney general might be charged with representing the State or its agencies or officials in court does not authorize suit against the attorney general himself. *See Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (attorney general's general supervisory powers are not sufficient "connection" to enforcement of statute); *Rode v. Dellarciprete*, 845 F.2d 1195, 1208-09 (3rd Cir. 1988) (attorney general's power to review and approve regulation for form and legality does not charge him with duty to enforce regulation and constitutes an insufficient connection with enforcement of regulations to permit him to be sued under Section 1983); *McCrimmon v. Daley*, 418 F.2d 366, 368 (7th Cir. 1969) (attorney general not properly a defendant because he was not charged with enforcement of the enabling legislation or the local ordinance); *Gras v. Stevens*, 415 F.Supp. 1148, 1151 (S.D.N.Y. 1976) (attorney general not properly a defendant even though he had duty to support the constitutionality of challenged state laws and defend actions in which the state was "interested."); *Blackwell v. Harrison*, 221 F.Supp. 651, 651-52 (E.D.Va. 1963) (challenge to statute requiring segregated accommodations in theaters; attorney general had no "special relationship" to the controversy between plaintiffs and theater owner so as to make attorney general a proper party).

This rule has been followed by Arkansas courts. For example, in the lawsuit challenging the constitutionality of the Arkansas sodomy statute, the Arkansas Attorney General was originally named as one of the defendants. The claims against the Attorney General were dismissed by the circuit court, because the Attorney General had no authority to enforce the sodomy statute; only the State's prosecuting attorneys had legal authority to enforce that law. *See Jegley v. Picado*, 349 Ark. 600, 609, 80 S.W.3d 332, 335 (2002) ("The original defendants were prosecutor Larry Jegley and then-Attorney General Winston Bryant . . . The circuit court

later granted [the Attorney General's] motion to dismiss, finding that [the Attorney General] did not have a nexus with enforcement of the sodomy statute.").

In sum, Plaintiffs' state-law claims in the present case against Governor Beebe and General McDaniel are barred by sovereign immunity. Plaintiffs' state-law claims against the Governor and the Attorney General are also barred because neither the Governor nor the Attorney General has any enforcement authority under Amendment 83 or Act 144 of 1997. The claims against the Governor and the Attorney General should be dismissed accordingly.

Plaintiffs' federal claims against Governor Beebe and General McDaniel are likewise barred because the Governor and the Attorney General may not be sued under 42 U.S.C. § 1983. By its terms, Section 1983 applies only to "persons." In *Will v. Michigan Dept. of State Police*, *supra*, a Section 1983 suit brought in state court, the United States Supreme Court held that neither a state nor a state official in his official capacity can be sued, because neither is a "person" for purposes of Section 1983:

> [S]tate officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different than a suit against the State itself. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. . . . We hold that neither a State nor its officials acting in their official capacities are 'persons' under §1983.

Id., 491 U.S. at 71. Because Governor Beebe and General McDaniel are not "persons" amenable to suit under Section 1983, Plaintiffs' federal claims against the Governor and the Attorney General should be dismissed.

For all these reasons, the claims against Governor Beebe and General McDaniel should be promptly dismissed.

IV. PLAINTIFFS' CLAIMS BROUGHT PURSUANT TO THE ARKANSAS CONSTITUTION ARE BARRED AS A MATTER OF LAW.

Plaintiffs' Arkansas constitutional claims are barred as a matter of law. Amendment 83 is part of the Arkansas Constitution. As a matter of well-established Arkansas law, a constitutional provision cannot violate the Constitution. Arkansas law has been clear for more than 80 years that where there is an inconsistency between an earlier provision of the Arkansas Constitution and a later amendment, the amendment, being the sovereign expression of the will of the people, prevails. *Chesshir v. Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930). *See also, Lybrand v. Waffard*, 174 Ark. 298, 296 S.W. 729 (1927) (the last amendment to a constitution adopted by the people must control over earlier provisions or amendments to that constitution where there is irreconcilable conflict). An amendment becomes part of the constitution upon its adoption and "fits into that organic body." *Priest v. Mack*, 194 Ark. 788, 790, 109 S.W.2d 665 (1937). As the Arkansas Supreme Court explained in *Chesshir, supra*:

> It is a rule of universal application that the Constitution must be considered as a whole, and that, to get at the meaning of any part of it, we must read it in the light of other provisions relating to the same subject. The general rule is that constitutional provisions and amendments thereto must be harmonized where practical. **If there is to some extent an inconsistency or repugnancy between a provision of the Constitution and an amendment thereto so that one or the other must yield, the amendment, being the last expression of the sovereign will of the people, will prevail as an implied repeal to the extent of the conflict**. The same rule of construction would apply in the construction of amendments. The later amendment would govern to the extent that it was repugnant to, or in conflict with, the provisions of the former one. *Little Rock v. North Little Rock*, 72 Ark. 195, 79 S. W. 785; *Ferrell v. Keel*, 105 Ark. 380, 151 S. W. 269; *State ex rel. v. Donaghey*, 106 Ark. 56, 152 S. W. 746; *Grant v. Hardage*, 106 Ark. 506, 153 S. W. 826; *Babb v. El Dorado*, 170 Ark. 10, 278 S. W. 649; *Lybrand v. Wafford*, 174 Ark. 298, 296 S. W. 729; *Polk County v. Mena Star Co.*, 175 Ark. 76, 298 S. W. 1002; and *Lake v. Tatum*, 175 Ark. 90, 1 S.W.(2d) 554. **The principle of constitutional construction**

above laid down has been uniformly adhered to and applied according to the varying facts of the different cases.

Id., 32 S.W.2d at 302 (emphasis added). *See also Ward v. Priest*, 350 Ark. 345, 382, 86 S.W.3d 884, 898 (2002); *Wright v. Story*, 298 Ark. 508, 769 S.W.2d 16 (1989).

The citizens of Arkansas have the authority to amend the State constitution. *See* Arkansas Constitution, Amendment 7 ("the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls."). The people's exercise of that amendment power is not limited by anything existing in the Constitution at the time of such an amendment. *Brickhouse v. Hill*, 167 Ark. 513, 542, 268 S.W. 865 (1925) ("The amendment being the last expression of the popular will in shaping the organic law of the State, all provisions of the Constitution which are necessarily repugnant thereto must, of course, yield."). *See also, Forum for Equality PAC v. McKeithen*, 893 So.2d 738, 741 (La. 2005) ("Nearly one hundred years ago, this court explained that the power of the people to amend or revise their Constitution is limited only by the prohibitions set forth in the Constitution of the United States . . . Accordingly, the [state] constitution does not and cannot limit the plenary power of the people of this state to exercise their right to adopt amendments to their constitution not inconsistent with the Constitution of the United States.") (internal citations omitted); *Duggan v. Beerman*, 515 N.W.2d 788, 792 & 793 (Neb. 1994) (Noting that "a constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument[,]" but "[a] clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment" if they relate to the same subject and cannot both be enforced without conflict; "when constitutional provisions are in conflict, the later amendment controls"); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d

139, 144 (W. Va. 1988) ("A constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as 'the latest expression of the will of the people.'") (citing *State ex rel. Kanawha County Building Comm'n v. Peterno*, 233 S.E.2d 332, 337 (W. Va. 1977)); *Plymouth Township v. Wayne County Bd. of Comm'rs*, 359 N.W.2d 547, 552 (Mich. App. 1984) ("The drafters of a constitutional amendment are presumed to know about existing laws and constitutional provisions and thus to have drafted their provision accordingly.") (citing *Council of the City of Saginaw v. Saginaw Policemen & Firemen Retirement System Trustees*, 32 N.W.2d 899 (Mich. 1948)).

Under this long-established Arkansas law, Amendment 83 cannot violate the Arkansas Constitution. Plaintiffs' claims to the contrary should be dismissed, including Plaintiffs' claims that: Amendment 83 violates due process protected by the Arkansas Constitution (Complaint, ¶ 219); Amendment 83 denies equal protection protected by the Arkansas Constitution (*id*., ¶ 224); Amendment 83 impairs obligation of contracts in violation of the Arkansas Constitution (*id*., ¶¶ 232 – 241); and any other state-law claims raised by Plaintiffs.

Plaintiffs' state-law challenges to Arkansas Act 146 of 1997, Ark. Code Ann. § 9-11-208, and Ark. Code Ann. § 9-11-107(b), likewise fail on the merits, because these laws are entirely consistent with, and explicitly authorized by, Amendment 83, which is a valid part of the Arkansas Constitution. *See* Amendment 83, § 3 ("The Legislature has the power to determine the capacity of persons to marry, subject to this amendment"). Plaintiffs' claims under the Arkansas Constitution are entirely barred, *because of* Amendment 83 to the Arkansas Constitution. All of Plaintiffs' state-law claims should be dismissed accordingly.

V. PLAINTIFFS' FEDERAL CLAIMS FAIL ON THE MERITS.

A. Recent federal jurisprudence: *Windsor* and *Perry*.

"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*, No. 12-1307, Slip Op., at 14 (U.S. June 26, 2013). The United States Supreme Court has long maintained that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1878). The Supreme Court recently affirmed this deeply rooted deference to state regulation of marriage:

> State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); but, subject to those guarantees, "**regulation of domestic relations is 'an area that has been regarded as a virtually exclusive province of the States**.' " *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).
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> **The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens**. *See Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). **The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations** with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid*. "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce." *Haddoch v. Haddoch*, 201 U.S. 562, 575 (1906); see also *In re Burrus*, 136 U.S. 586, 593-594 (1890) ("The whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").
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> **The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common**

> **understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States."** *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930)). **Marriage laws vary in some respects from State to State . . . [b]ut these rules are in every event consistent within each State.**

Windsor, *supra*, at 16-17 & 18 (*italics*, citations and quotations in original; **bold** emphasis added). "The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people." *Id*. at 20.

Thus, in *Windsor*, the Supreme Court struck down the federal Defense of Marriage Act, not because the recognition of same-sex marriages is required by the federal Constitution, but rather because the federal government may not discriminate among opposite-sex and same-sex marriages where both are recognized under a state's law. The Court specifically declined to recognize same-sex marriage as a fundamental right under the federal Constitution, and declined to recognize homosexuality as a suspect classification for purposes of equal protection analysis. Rather, the Court concluded that federalism concerns undermined the rationality of a federal law that imposed a definition of marriage contrary to the definition in state law, and which did not treat all marriages authorized under state law as equal. *Id*. The *Windsor* majority did *not* hold that *states* are constitutionally required to recognize same-sex marriage. Thus, the *Windsor* majority affirmed the traditional view that it is the province of individual states to choose which marriages will be recognized under state law. Indeed, *none* of the Supreme Court Justices in *Windsor* – whether in the majority or in dissent – opined that states are constitutionally required to recognize same-sex marriage.[7]

[7] The four dissenting Justices filed three dissents. Chief Justice Roberts, Justice Alito, and Justice Scalia joined by Justice Thomas would have upheld the federal Defense of Marriage

Similarly, in *Hollingsworth v. Perry*, No. 12-144, Slip Op. (U.S. June 26, 2012), a 5-4 majority opinion delivered by Chief Justice Roberts and joined by Justices Scalia, Ginsburg, Breyer and Kagan, declined to hold that states are constitutionally compelled to recognize same-sex marriage. The plaintiffs in *Perry* challenged California's Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). Following a 12-day bench trial, the district court declared Proposition 8 unconstitutional. *Id*. The Ninth Circuit Court of Appeals affirmed the district court on the merits. *Hollingsworth v. Perry*, *supra*, at 3-5.

On certiorari to the United States Supreme Court, the Court majority declined to address the question "whether the Equal Protection Clause 'prohibits the State of California from defining marriage as the union of a man and woman[,]'" *id*. at 1, finding that because the petitioners lacked standing, the Court had no authority to decide the case on the merits. *Id*. at 2. Though the Supreme Court was presented with a constitutional challenge to a state constitutional amendment restricting marriage to opposite-sex couples, the Court declined to address the constitutionality of California's Proposition 8. *Id*. As in *Windsor*, *supra*, none of the Supreme Court Justices in *Perry* opined that states are constitutionally required to recognize same-sex marriage, despite the fact that the Court was presented with an appeal of that very issue.

B. Plaintiffs' federal due process and equal protection claims fail as a matter of well-established law.

Plaintiffs' federal due process and equal protection claims fail on the merits under established federal law. In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), the Minnesota Supreme Court held that a state statute that defined marriage

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Act. Presumably, by the same rationale, the four dissenters in *Windsor* would likewise uphold Arkansas Amendment 83 and similar state laws in the majority of states.

as a union between persons of the opposite sex did not violate the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution. The Minnesota Supreme Court rejected the plaintiffs' claims, determining that a right to marry without regard to the sex of the parties is not a fundamental right. 191 N.W.2d at 186-187. The court further determined that the Equal Protection Clause was "not offended by the state's classification of persons authorized to marry" and that there was "no irrational or invidious discrimination." *Id*. at 187.

The United States Supreme Court summarily dismissed the plaintiffs' appeal in *Baker* "for want of a substantial federal question," *Baker*, 409 U.S. 810, where the Court was presented with the following three questions:

> (1) Whether [Minnesota's] refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
>
> (2) Whether [Minnesota's] refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
>
> (3) Whether [Minnesota's] refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Jackson v. Abercrombie, 884 F.Supp.2d 1065, 1085 (Haw. 2012). "The Supreme Court has not explicitly or implicitly overturned its holding in *Baker* or provided the lower courts with any reason to believe that the holding is invalid." *Id.* (Citing *Perry v. Schwarzenegger*, 628 F.3d 1191, 1099 n.1 (9th Cir. 2011) (N. R. Smith, J., concurring in part and dissenting in part) (vacated by the Supreme Court in *Perry, supra*) (concluding that the Supreme Court cases following *Baker* do not suggest any doctrinal developments indicating *Baker* is no longer good law); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1305-06 (M.D. Fla. 2005) (same)). *See also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary dismissals by the Court "prevent lower courts from

coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."); *Hicks v. Miranda*, 422 U.S. 332, 344 & 345 n. 14 (1975) (summary dismissals by the Court constitute a ruling on the merits by the Court; "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise[.]").

Numerous courts have concluded that *Baker* is binding precedent that requires dismissal of due process, equal protection, and privacy claims brought against any state law codifying the traditional definition of marriage. *See, e.g.*, *Anderson v. King*, 138 P.3d 963, 969 (Wash. 2006) (citing to *Baker* and holding "the same-sex union as a constitutional right argument was so frivolous as to merit dismissal without further argument by the Supreme Court. A similar result is required today."); *Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind. App. 2005) (citing to *Baker* and stating: "There is binding United States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution."); *Wilson v. Ake*, *supra*, 354 F.Supp.2d at 1305 ("*Baker v. Nelson* is binding precedent upon this Court"); *but see In re Kandu*, 315 B.R. 123, 138 (W.D. Wash. 2004); *In re J.B.*, 326 S.W.3d 654, 672 (Tex. App. Dallas 2010). As other courts have done, *supra*, this Court should dismiss Plaintiffs' federal due process and equal protection claims under *Baker* alone.

In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), in which the Supreme Court invalidated a state law criminalizing sodomy, the majority was careful to note that the Texas statute at issue "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id*. In the recent decisions of *Windsor* and *Perry*, the Court again declined to address whether a state law limiting marriage to opposite-sex couples violates

the federal due process, equal protection, or privacy rights of same-sex couples who cannot marry under such a state law. In sum, the Supreme Court has consistently and repeatedly declined to recognize a fundamental constitutional due process, equal protection, or privacy right of the type advocated by Plaintiffs in this case.

The Eighth Circuit Court of Appeals has specifically held that Plaintiffs' equal protection claim fails on the merits. *See Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding a state constitutional amendment providing that "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."). In *Bruning*, the Eighth Circuit squarely addressed the constitutionality of a substantively identical state constitutional amendment, and specifically held that the "[plaintiffs'] equal protection argument fails on the merits." 455 F.3d at 864-69.[8] The Eighth Circuit noted that sexual orientation is not a suspect classification for purposes of equal protection analysis, and rational basis review applies to a state law defining marriage. *Id*. (Citing *Romer v. Evans*, 517 U.S. 620 (1996)). The Eighth Circuit emphasized that "[w]hatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.' " *Id*. at 868 (citing *Romer v. Evans*, *supra*, 517 U.S. at 632). In conclusion, the Eighth Circuit noted: "In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other

[8] The *Bruning* court also determined that the state marriage amendment did not violate the federal Bill of Attainder Clause (*id*. at 869), and did not violate the plaintiffs' right to associational freedom protected by the federal First Amendment (*id*. at 870).

provision of the United States Constitution." *Id*. at 870. The Eighth Circuit's holding in *Bruning* requires dismissal of Plaintiffs' federal claims for failure to state a claim upon which relief can be granted.

Like the Eighth Circuit in *Bruning*, other federal courts of appeals and district courts have concluded that state laws codifying the traditional definition of marriage are constitutional. *See, e.g., Irizarry v. Bd. of Education of Chicago*, 251 F.3d 604, 607 (7th Cir. 2001); *Jackson v. Abercrombie*, *supra*, 884 F.Supp.2d at 1071 ("The United States Supreme Court has never held that heightened scrutiny applies to classifications based upon sexual orientation and every circuit that has addressed the issue, *i.e.*, all circuits but the Second and Third Circuits, have unanimously declined to treat sexual orientation classifications as suspect") (citing *Romer v. Evans*, *supra*, 517 U.S. 620 at n. 25 (applying rational basis review to a classification based upon sexual orientation and collecting cases)).

Plaintiffs' federal constitutional claims are barred in the Eighth Circuit by *Bruning*, *supra*, and barred nationwide by *Baker*, *supra*, and the Supreme Court's refusal to overturn its holding in *Baker* despite ample opportunity in *Lawrence*, *Perry*, *Windsor*, and other cases, *supra*. Plaintiffs' federal constitutional claims should be dismissed.

C. Plaintiffs' claim under the Full Faith and Credit Clause of the United States Constitution fails to state a claim as a matter of law.

Amendment 83 does not expressly provide that same-sex marriages entered into in other states are void in Arkansas, but Amendment 83 provides that "[m]arriage consists only of the union of one man and one woman." *Id*. Ark. Code Ann. § 9-11-208(a)(2) specifically states, however, that "[a]ny marriage entered into by a person of the same sex, when a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas, and any contractual or other rights granted by virtue of that license, including its termination, shall be

unenforceable in the Arkansas courts." *Id*. In any event, Plaintiffs' claim under the Full Faith and Credit Clause of the United States Constitution (Complaint, ¶¶ 228 – 231) fails as a matter of law.

The federal Constitution's Article IV, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id*. Early on, the Supreme Court held that the sole focus of the Full Faith and Credit Clause is on the recognition of state court judgments; the Clause obligates the courts of State A to afford a judgment entered in the courts of State B the same res judicata effect which the issuing court would give the judgment. *Mills v. Duryee*, 11 U.S. 481, 485 (1813) (Story, J.); *Hampton v. McConnel*, 16 U.S. 234, 235 (1818) (Marshall, C.J.). Without the Clause, finality of judgments would be compromised as unsuccessful litigants proceeded from state to state retrying their claims in hope of a favorable outcome somewhere. As the Court put it, the Full Faith and Credit Clause brought to the Union a useful means of ending litigation by making "the local doctrines of res judicata . . . a part of national jurisprudence." *Durfee v. Duke*, 375 U.S. 106, 109 (1963) (quoting *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349 (1942)). Today, the effect of the Full Faith and Credit Clause remains limited to enforcement of the judgments of sister-state courts. *See Thompson v. Thompson*, 484 U.S. 174, 180 (1980) ("[T]he Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered.").

The Full Faith and Credit Clause, thus, prescribes the effect a state court must give a judgment entered in another state. It is equally well-established that the Clause creates no cause of action against a state or a state official:

> **[T]he Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action. Rather, the Clause only prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.**

Thompson v. Thompson, *supra*, 484 U.S. at 182-183 (internal citations omitted) (emphasis added). Because the Clause pertains only to judicial enforcement of judgments, a trial court simply lacks subject matter jurisdiction over any claim asserting that a State or executive branch officials have violated the Full Faith and Credit Clause. This rule, announced by the Supreme Court in *Thompson*, *supra*, has been consistently and repeatedly applied by trial courts and appellate courts. *See, e.g.*, *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904) ("We do not think that the [Full Faith and Credit Clause] has any bearing whatever upon the question under consideration . . . to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States"); *Adar v. Smith*, 639 F.3d 146, 154 (5th Cir. 2011) ("[S]ince the duty of affording full faith and credit *to a judgment* falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors.") (emphasis in original); *Rosin v. Monken*, 599 F.3d 574, 576 (7th Cir. 2010) (denying relief under 42 U.S.C. § 1983 where a plaintiff sued state police for failing to give full faith and credit to a foreign state judgment); *Stewart v. Lastaiti*, 409 Fed.Appx. 235, 2010 WL 4244064 (11th Cir. Oct. 29, 2010) (affirming district court's dismissal of a 42 U.S.C. § 1983 action alleging a violation of the Full Faith and Credit Clause for lack of subject matter jurisdiction); *Wigington v. McCarthy*, 124 F.3d 219 (10th Cir. 1997) (affirming district court's dismissal of claim brought pursuant to the Full Faith and Credit Clause for lack of jurisdiction); *Canipe v. Canipe*, 918 F.2d 955, *2 (4th Cir.

1990) ("[T]he Full Faith and Credit Clause of the United States Constitution and its statutory counterparts do not give rise to implied federal causes of action").

In *Adar v. Smith*, *supra*, for example, an unmarried couple legally adopted in New York an infant born in Louisiana. The couple asked the Louisiana Registrar of Vital Records to issue a new birth certificate for the child, listing the names of the adoptive parents rather than the biological parents. 639 F.3d at 149. The Registrar offered to place one of the adoptive parents' names on the birth certificate, but refused to place the names of both adoptive parents on the new birth certificate. The Registrar noted that under Louisiana law, only married couples could jointly adopt a child. The couple sued the Registrar under 42 U.S.C. § 1983 for declaratory and injunctive relief, asserting that the Registrar's action denied full faith and credit to the New York adoption and denied them and the infant equal protection. The district court ruled for the adoptive couple, but on appeal the Fifth Circuit, en banc, reversed.

The Fifth Circuit stated that two issues were raised on appeal: "the scope of the full faith and credit clause and whether its violation is redressable in federal court in a § 1983 action." *Adar*, 639 F.3d at 151. The Court noted that the adoptive couple contended that the Full Faith and Credit Clause obliged the Louisiana Registrar to "recognize" their adoption of the infant by issuing a revised birth certificate. The couple argued that the Registrar's refusal to issue an amended birth certificate effectively denied them and their child recognition of the New York adoption and, therefore, the Registrar, acting under color of law, had abridged rights created by the Constitution and laws of the United States. *Id.* The Court concluded that the adoptive parents' argument under the Full Faith and Credit Clause did not present a cognizable federal constitutional claim:

> This train of reasoning is superficially appealing, but it cannot be squared with the Supreme Court's consistent jurisprudential

> treatment of the full faith and credit clause or with the lower federal courts' equally consistent approach. **Simply put, the clause and its enabling statute created a rule of decision to govern the preclusive effect of final, binding adjudications from one state court or tribunal when litigation is pursued in another state or federal court. No more, no less. Because the clause guides rulings in courts, the "right" it confers on a litigant is to have a sister state judgment recognized in courts of the subsequent forum state. The forum's failure properly to accord full faith and credit is subject to ultimate review by the Supreme Court of the United States. Section 1983 has no place in the clause's orchestration of inter-court comity—state courts may err, but their rulings are not subject to declaratory or injunctive relief in federal courts.**

Id. at 151-152 (emphasis added). The Fifth Circuit held that on the question "whether this [Full Faith and Credit] obligation gives rise to a right vindicable in a § 1983 action. . . [w]e hold that it does not." *Id*. at 153. The proper "posture of full faith and credit cases" is "not as a claim brought against a party failing to afford full faith and credit to a state judgment, but as a basis to challenge the forum court's decision." *Id*. at 154. "Consequently, since the duty of affording full faith and credit *to a judgment* falls on courts, it is incoherent to speak of vindicating full faith and credit rights against non-judicial state actors." *Id*. (Emphasis in original). "State executive officials are unsuited and lack a structured process for conducting the legal inquiry necessary to discern whether a judgment is entitled to full faith and credit. Thus, it makes little sense to impose full faith and credit obligations on non-judicial officers who are not equipped for such a task." *Id*. at 156.

Numerous other cases likewise hold that a litigant may not bring a claim for violation of the Full Faith and Credit Clause against individual state actors, under § 1983 or otherwise. The Full Faith and Credit Clause is applicable only to actions by courts, under the circumstances described in *Thompson* and *Adar, supra*. Plaintiffs' claim under the Full Faith and Credit Clause fails as a matter of law. The claim should be dismissed accordingly.

D. Plaintiffs' claim under Article I, Section 10 of the United States Constitution fails as a matter of law.

Plaintiffs also allege that Amendment 83 imposes an unconstitutional impairment of contract under Article I, Section 10 of the United States Constitution ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"), because it denies same-sex couples the right to enter into, or to enforce, a marriage contract, even if the contract is valid in another state. Complaint, ¶ 241. Plaintiffs' Contract Clause claim is misconceived, because courts have consistently held that the Contract Clause has no application to marriage contracts.

A violation of the federal Contract Clause requires a plaintiff to show that the State impaired her contract, and that the impairment was substantial. But, not every state legislative action affecting a contract is barred. The Clause does not prevent a state in the exercise of its police powers from passing laws to promote the general welfare, including laws regulating marriage. Such a law is constitutional even if it impacts a private contract so long as there is a legitimate public purpose for the law. In analyzing impairment claims, the courts properly defer to legislative judgments as to the necessity and reasonableness of particular enactments. *See* C.J.S. Constitutional Law § 511 (collecting cases).

In short, states are free to enact legislation regulating marriage without running afoul of the Contract Clause.

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. The body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Maynard v. Hill, 125 U.S. 190, 205 (1888). "**The contract of marriage is not a contract within the meaning of the provision in the Constitution prohibiting States from impairing the obligations of contracts**." *Hunt v. Hunt*, 1879 WL 16398, 24 L.Ed. 1109 (U.S. 1879) (not reported in S.Ct.) (emphasis added). *See also Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 4 L.Ed. 629 (1819); *Tipping v. Tipping*, 82 F.2d 828 (App.D.C. 1936); *Ryan v. Ryan*, 277 So.2d 266 (Fla. 1973); *Gleason v. Gleason*, 256 N.E.2d 513 (N.Y.Ct.App. 1970); *Fearon v. Treanor*, 5 N.E.2d 815 (N.Y. 1936).

Even accepting Plaintiffs' allegations as true, they have not, and cannot, state a valid impairment of contract claim. Thus, Plaintiffs' claim under Article I, § 10 of the United States Constitution should be dismissed.

E. 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.

The Complaint mentions in its factual allegations certain children of the Plaintiffs and it is possible that the Complaint intended to assert a substantive due process or other claim on behalf of those children. There is, however, no mention of the children in the portions of the Complaint addressing the Plaintiffs' claims for relief.[9] *See* Complaint, ¶¶ 218-245. The Complaint does not allege sufficient facts, nor articulate any legal theory, to state a claim upon which any relief can be granted with respect to any child. As the Supreme Court has held, if a plaintiff intends to bring a substantive due process claim, he must carefully and fully articulate the facts and law that the plaintiff relies upon: "substantive due process analysis must begin with

[9] Plaintiffs generally allege that child Plaintiffs G.D.W. and P.L.W. are the children of Plaintiffs M. Kendall Wright and Julia Wright and "are deprived legitimacy and benefits afforded all other children of known parents who are married." Complaint, ¶ 35. Plaintiffs generally allege that child Plaintiff T.B.W. is the child of Plaintiffs Natalie Wartick and Tommie Jean Wartick and "is deprived legitimacy and benefits afforded all other children of known parents who are married." Complaint, ¶ 59.

a careful description of the asserted right, for the doctrine of judicial restraint requires [the courts] to give the utmost care whenever [they] are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993). *See also, Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 532, 247 S.W.3d 851, 861 (2007) (same).

In their recently filed Motion for Temporary Restraining Order, Plaintiffs have set forth additional factual allegations regarding the children.[10] For example, Plaintiffs state that Plaintiff T.B.W. was "born with only one legal parent on his birth certificate . . . a stigma that will affect and damage him his entire life." *Id.*, ¶ 8. Plaintiffs also allege that T.B.W.'s "other parent" lacks legal rights with respect to the child in the event of the death or incapacity of T.B.W.'s "birth mother." *id.*, ¶ 9. Plaintiffs set forth the same factual allegations regarding child Plaintiffs G.D.W. and P.L.W. *Id.*, ¶¶ 19 – 21.[11] Although Plaintiffs include new factual allegations in their TRO Motion, they do not purport to set forth any new legal claims and there is no mention of the child Plaintiffs in the Argument section of Plaintiffs' TRO Motion. *Id.*, ¶¶ 61-85.

As a threshold matter, Plaintiffs' allegations about "one parent" appearing on a birth certificate and the "other parent" being excluded from a birth certificate misconstrue applicable Arkansas law. For all children, Arkansas law permits only names of the biological parents to be

[10] These additional factual allegations appearing outside the Complaint do not cure the fatally defective Complaint. *See McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 368, 201 S.W.3d 375 (2002) ("In deciding whether a motion to dismiss a complaint was properly granted . . . we look only to the allegations in the complaint and not to matters outside the complaint.") (citing *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999)). The additional factual allegations appearing in Plaintiffs' TRO Motion should not be considered when the Court tests the sufficiency of the Complaint.

[11] Plaintiffs also allege that Plaintiffs Natalie Wartick and Tommie J. Wartick are expecting a second child, and request an order that both of their names be included on the unborn child's birth certificate. Plaintiffs' TRO Motion, ¶¶ 11-12. This unborn child does not have standing of course, and is not a named plaintiff in any event, so it is unclear why Plaintiffs have included these factual allegations in their TRO Motion.

listed on the birth certificate. This is true whether the parents are in a same-sex relationship, an opposite-sex relationship, whether they are married or unmarried, whether the child is a biological child of one parent or is an adoptive child. Amendment 83 and the Arkansas marriage laws challenged in this lawsuit have no bearing at all on which persons' names may or may not appear on a birth certificate. *See, e.g.*, Ark. Code Ann. §§ 20-18-401(e) ("For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child . . ."); (20-18-401(f)(2) ("If the mother was not married . . . the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father."). Indeed, even where a child is born to a married woman, the husband of the marriage will not be entered on the birth certificate as the father of the child if biological paternity is otherwise established in another man. *See* Ark. Code Ann. §§ 20-18-401(f)(1). Thus, marriage laws simply do not determine who appears as the parent of a child on an Arkansas birth certificate.

To the extent that Plaintiffs intend to assert a constitutional claim on behalf of any child, that claim fails because Amendment 83 does not burden any constitutionally protected liberty interest of any child. Under established law, a child has no liberty interest in being adopted, or otherwise cared for, by someone who is not the child's biological parent. *See, e.g., Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d 804, 811 (11th Cir. 2004) ("there is no fundamental right to adopt or to be adopted"); *In re Adoption of T.K.J.*, 931 P.2d 488, 494-95 (Co. Ct. App. 1996) (holding children have no liberty interest in care from potential adoptive parent, therefore the lack of a hearing on cohabitating partners' petitions to adopt each other's children did not violate children's right to due process); *Georgina G. v. Terry M.*, 516 N.W.2d 678, 685 (Wis. 1994) (holding that minor's right to due process was not violated by statute

prohibiting woman who cohabitated with minor's mother from adopting the minor, even though trial court found that such adoption would have been in the minor's best interest). Likewise, a child does not have a constitutionally protected right to have any person who is not the child's biological parent listed as a parent on the child's birth certificate.

To the extent that Plaintiffs seek to assert a claim on behalf of adults not listed on a child's birth certificate, that claim also fails as a matter of law. A biological parent has a well-recognized liberty interest in a child's care and custody. *See, e.g., Troxel v. Granville,* 530 U.S. 57, 65 (2000); *Lofton v. Sec'y of Dep't of Children & Family Services, supra,* 358 F.3d at 809. But, the case law has held that an adult who is not a biological parent has no such protected liberty interest, and this is true whether that person has a same-sex relationship with the biological parent, an opposite-sex relationship with the biological parent, or otherwise. *See, e.g., Cox v. Stayton,* 273 Ark. 298, 304-305, 619 S.W.2d 617 (1981) (only a biological parent has protected rights to care and custody, even a biological grandparent does not); *Mullins v. State of Or.*, 57 F.3d 789, 794 (9th Cir. 1995) (same). *See also In re Thompson,* 11 S.W.3d 913 (Tenn.Ct.App. 1999) (declining to find either statutory or common law *de facto* parentage claim for same-sex partner of biological mother who had been involved in child's conception and upbringing).

Because all persons who are not biological parents are treated exactly the same by Arkansas law, Plaintiffs' allegations regarding children fail to state any claim for relief. As a matter of law neither Amendment 83 nor the Arkansas marriage statutes burdens any constitutionally protected right of any child or any partner of a biological parent of any child. And, altering names on birth certificates would provide no relief to Plaintiffs. *See, e.g., Remkiewicz v. Remkiewicz,* 180 Conn. 114, 120, 429 A.2d 833 (1980) ("If a stepfather could

acquire parental rights through the simple expedient of changing his stepchild's birth certificate, all sorts of mischief could result."). Because Plaintiffs have not set forth any cognizable claim related to the child Plaintiffs and the partners of the biological parents of the child Plaintiffs, any such claims should be promptly dismissed.

VI. AMENDMENT 83 MEETS THE RATIONAL-BASIS TEST.

For the reasons explained above, Plaintiffs' claims, both state and federal, fail to state any claim upon which relief can be granted as a matter of law. Plaintiffs' state-law claims are barred because Amendment 83 is part of the Arkansas Constitution, *supra*. Plaintiffs' federal-law claims (aside from Plaintiffs' Full Faith and Credit Clause and Contract Clause claims, for which there is no cognizable cause of action, *supra*) are subject to rational-basis review, *supra*, and Amendment 83 easily meets the rational-basis test.

The right to marry someone of the same sex is not "objectively, deeply rooted in this Nation's history and tradition" and thus is not a fundamental right. *Washington v. Glucksberg*, *supra*, 521 U.S. at 720-21. The Supreme Court has cautioned that "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.*, 521 U.S. at 720. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citing *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985)). Thus, "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Id*. As explained above, the United States Supreme Court has not broken new ground or declared a

fundamental right applicable to the claims levied by Plaintiffs in this case. Amendment 83 is therefore subject to rational-basis review under the United States Constitution.

Under rational-basis review, a law is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotations omitted). *See also Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 533, 247 S.W.3d 851 (2007) ("Under the rational-basis test, the party challenging the constitutionality of the statute must prove that the statute is not rationally related to achieving any legitimate governmental objective under any reasonably conceivable fact situation."). A court conducting a rational-basis review does not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations," but only asks whether there is some conceivable rational basis for the challenged statute. *Heller v. Doe, supra*, 509 U.S. at 319. S*ee also Citifinancial Retail Services Div. of Citicorp Trust Bank, FSB v. Weiss*, 372 Ark. 128, 136, 271 S.W.3d 494 (2008) ("This court has repeatedly held that the determination of public policy lies almost exclusively with the legislature, and the courts will not interfere with that determination in the absence of palpable errors."); *Southwestern Bell Tel. Co. v. Roberts*, 246 Ark. 864, 868, 440 S.W.2d 208 (1969) ("[T]he question of the wisdom or expediency of a statute is for the Legislature alone. The mere fact that a statute may seem unreasonable or unwise does not justify a court in annulling it, as courts do not sit to supervise legislation. Courts do not make the law; they merely construe, apply, and interpret it.").[12]

[12] The Arkansas Supreme Court analyzes the state constitution consistently with the federal constitution, so the applicable standards are the same regardless of which constitution is at issue in a particular case or claim. *See McDonald v. State*, 354 Ark. 216, 221 n. 2, 119 S.W.3d 41, 44 n.2 (2003) ("We note that this court typically interprets Article 2, section 15, of the Arkansas Constitution in the same manner that the United States Supreme Court interprets the Fourth Amendment."); *see also* Ark. Code Ann. § 16-123-105(c) (when construing the Arkansas Civil Rights Act, the courts may look for guidance in state and federal decisions interpreting 42

In enacting Amendment 83, the citizens of Arkansas had "absolutely no obligation to select the scheme" that a court might later conclude was best. *Nat'l R.R. Passenger Corp. v. A.T.& S.F.R. Co.*, 470 U.S. 451, 477 (1985). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955). Amendment 83 does not have to be perfect in order to be constitutional. *See McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality."). The presumption that a law is constitutional even though it may be imperfect is even stronger with regard to laws passed by the citizens themselves at the ballot box. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (upholding an initiated act approved by California voters).

Montana, like Arkansas, has both a constitutional amendment, and several statutes, restricting marriage to opposite-sex couples. In *Donaldson v. State*, 292 P.3d 364 (Mont. 2012), plaintiffs challenged Montana's restrictions on same-sex marriage alleging they violated their rights to "equal protection, due process, and the rights of privacy, dignity and the pursuit of life's necessities." The Montana trial court granted the State's motion to dismiss the suit, and, on appeal, the Montana Supreme Court affirmed the dismissal. *Id*. at 366-367. In a concurring opinion, Justice Rice noted several conceivable grounds for Montana's laws, which were sufficient to satisfy the rational-basis test. Marriage might have been limited to opposite-sex

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U.S.C. § 1983). As explained in § IV above, however, analysis of the merits of the state-law claims in this case is inappropriate and unnecessary because Amendment 83 is part of the Arkansas Constitution and therefore Amendment 83 withstands scrutiny under the Arkansas Constitution as a matter of logic and settled law.

couples for "reasons of family, societal stability" and procreation, for example. One might agree or disagree with those reasons, but they were not irrational. *Id*. at 368-369.

The citizens of Arkansas, like those of Montana, amended the State Constitution to include a particular definition of marriage. As the Montana Supreme Court, the Eighth Circuit, and numerous other courts have held, "there is no fundamental right to be free of the political barrier a validly enacted constitutional amendment erects." *Citizens for Equal Protection v. Bruning*, *supra*, 455 F.3d at 868. "The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature – or the people through the initiative process – may rationally choose not to expand in wholesale fashion the groups entitled to those benefits." *Id*.

> Nationwide, citizens are engaged in a robust debate over this divisive social issue. If the traditional institution of marriage is to be restructured, as sought by Plaintiffs, it should be done by a democratically-elected legislature or the people through a constitutional amendment, not through judicial legislation that would inappropriately preempt democratic deliberation regarding whether or not to authorize same-sex marriage.

Jackson v. Abercrombie, supra, 884 F.Supp.2d at 1072. As these other courts have noted, the relief requested in this case does not lie with the judicial branch, but in the democratic process. [13]

Because Amendment 83 and the related marriage statutes easily satisfy the rational-basis test, Plaintiffs' Complaint should be dismissed for failure to state a claim upon which any relief can be granted.

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[13] To this end, there are two petition drives underway in Arkansas aimed at repealing Amendment 83. *See* www.arequality.org/ballot-initiative/ ("The Arkansas Initiative for Marriage Equality is a citizen-led effort to bring marriage equality to the Natural State in 2016 through a proposed initiated amendment to the Arkansas State Constitution."); www.arkansansforequality.org/about/index.html ("We are a non-profit organization supporting equality for all Arkansans. We are currently focused on repealing Amendment 83 of the Arkansas Constitution which defines marriage as only being between one man and one woman.").

VII. CONCLUSION

The State of Arkansas, the Governor, and the Attorney General are not proper defendants and should be promptly dismissed as party defendants. Plaintiffs' Arkansas constitutional claims are barred as a matter of law because Amendment 83 is part of the Arkansas Constitution. Plaintiffs' federal constitutional claims are barred in the Eighth Circuit by *Bruning*, *supra*, and barred nationwide by *Baker*, *supra*, and the Supreme Court's refusal to overturn its holding in *Baker* despite ample opportunity in *Lawrence*, *Perry*, *Windsor*, and other cases, *supra*. The federal Full Faith and Credit Clause does not give rise to a cognizable cause of action, and the federal Contract Clause does not prevent states from regulating marriage between private individuals. Amendment 83 meets the rational-basis test as a matter of law. For all these reasons, Plaintiffs' Complaint fails to state a claim for which any relief can be granted. The Complaint should be promptly dismissed in its entirety.

WHEREFORE, the State prays that the Complaint be dismissed, and for all other just and appropriate relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, certify that on this 23rd day of August, 2013, I electronically filed the foregoing with the Circuit Court Clerk using the Arkansas Judiciary's eFlex electronic filing system, which shall provide electronic notification to the following:

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