IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTOPHER INNISS et al.,	*	
Plaintiffs,	*	
v.	*	**CIVIL ACTION NO. 1:14-CV-01180-WSD**
DEBORAH ADERHOLD, et al.,	*	
Defendants.	*	

DEFENDANT DEBORAH ADERHOLD'S BRIEF IN SUPPORT OF HER MOTION TO DISMISS THE COMPLAINT

Defendant Deborah Aderhold, State Registrar and Director of Vital Records for the Georgia Department of Public Health ("Defendant" or "the State"), moves to dismiss this case pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Seven individual Plaintiffs filed this putative class-action suit as a challenge to Georgia's constitutional and statutory provisions that define civil marriage as the union only of man and woman. This case must be dismissed in its entirety because (1) the Court lacks subject matter jurisdiction because Plaintiffs fail to raise a substantial federal question, and (2) Plaintiffs fail to state a plausible claim for

relief under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I. INTRODUCTION

Plaintiffs ask this Court to declare that the people of Georgia no longer have the right to decide for themselves whether to define marriage in the way every state in our union defined it as recently as 2003.

In arguing that this decision is now beyond the bounds of democratic process, Plaintiffs claim that sexual orientation is a suspect class – a claim that the Eleventh Circuit has squarely rejected – and ask this Court to recognize for the first time a new fundamental right to same-sex marriage. Both of these arguments fail under controlling Eleventh Circuit precedent. Accordingly, rational basis scrutiny applies, and the State easily clears that low hurdle. Plaintiffs also claim that the State's definition of marriage as between opposite-sex couples discriminates on the basis of sex, but even the vast majority of courts that have found a new right to same-sex marriage have rejected this argument because the law applies equally to men and women. Moreover, the U.S. Supreme Court has already rejected all of these claims in a decision that remains binding on this Court and the Eleventh Circuit unless and until the Supreme Court declares otherwise.

At their core, Plaintiffs' claims are about where the law is headed, not about where it is now. Plaintiffs may well be right that our nation is headed for a new

national equilibrium on same-sex marriage. Indeed, in the last several years, at least eleven states have decided to expand their definition of marriage to include same-sex couples through the democratic process.[1] And it seems as though each month new opinion polls are released showing increased public support for such changes in additional states. But judicially imposing such a result now would merely wrest a potentially unifying popular victory from the hands of supporters and replace it instead with the stale conformity of compulsion. This Court should reject Plaintiffs' invitation to disregard controlling precedent, decline to anticipate a future ruling by the U.S. Supreme Court, and dismiss Plaintiffs' claims in their entirety.

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[1] Eight states (Minnesota, Illinois, Hawaii, Delaware, New York, New Hampshire, Rhode Island, and Vermont) and the District of Columbia passed legislation that initiated recognition of same-sex marriages. See Del. Code Ann. tit. 13, § 129 (West 2014) (effective July 1, 2013); D.C. Code § 46-401 (2014) (effective Mar. 3, 2010); Haw. Rev. Stat. § 572-1 (West 2014) (effective Dec. 2, 2013); 750 Ill. Comp. Stat. Ann. 5/201 (West 2014) (effective June 1, 2014); Minn. Stat. Ann. § 517.01 (West 2014) (effective Aug. 1, 2013); N.H. Rev. Stat. Ann. § 457:1-a (2014) (effective Jan. 1, 2010); N.Y. Dom. Rel. Law § 10-a (McKinney 2014) (effective July 24, 2011); R.I. Gen. Laws Ann. § 15-1-1 (West 2013) (effective Aug. 1, 2013); Vt. Stat. Ann. tit. 15, § 8 (West 2014) (effective Sept. 1, 2009). The voters of Maryland, Washington, and Maine approved same-sex marriage electorally. Maine Dep't of the Secretary of State, November 6, 2012 Referendum Election Tabulations, www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html (last visited July 14, 2014); Washington Secretary of State, November 06, 2012 General Election Results: Referendum Measure No. 74 Concerns Marriage for Same-Sex Couples (Nov. 27, 2012 4:55 PM), vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples.html; Maryland State Board of Elections, Ballot Question Certifications (Nov. 30, 2012), www.elections.state.md.us/elections/2012/linda_balot_question_certifications.pdf.

II. BACKGROUND

A. The Challenged Laws.

In 1996, the Georgia legislature enacted O.C.G.A. §19-3-3.1, which prohibited marriages of persons of the same sex, and recognition of such marriages in Georgia. Specifically, O.C.G.A. §19-3-3.1 provides:

> (a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.
>
> (b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

In addition, O.C.G.A. §19-3-30(b)(1) was amended to provide that "No marriage license shall be issued to persons of the same sex." This legislation simply made explicit the rule that had always previously applied. Cf. Baldwin v. Smith, No. 14-5003, 2014 U.S. App. LEXIS 13733, at *120-21 (10th Cir. July 18, 2014) (Holmes, J., concurring) (enactments like this "only made explicit a tacit rule that until recently had been universal and unquestioned for the entirety of our legal

history as a country: that same-sex unions cannot be sanctioned as marriages by the State").

In 2004, the citizens of the State of Georgia voted to amend the Constitution of the State of Georgia to prohibit marriages of persons of the same sex and recognition of such marriages in Georgia:

> (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.
>
> (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties respective rights arising as a result of or in connection with such relationship.

Ga. Const. Art. I, Sec. IV, Para. I.

The challenged laws define marriage as the union of man and woman. This definition furthers the State of Georgia's legitimate interests in encouraging the raising of children in homes consisting of a married mother and father; ensuring legal frameworks for protection of children of relationships where unintentional reproduction is possible; ensuring adequate reproduction; fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the

needs of their children; and exercising prudence before departing from the heretofore universal definition of marriage.

B. Plaintiffs.

Plaintiffs Christopher Inniss and Shelton Stroman are a same-sex male couple residing in Snellville, Georgia. (Complaint ¶ 20). Inniss and Stroman adopted a boy named J.S.I. in 2004. (Complaint ¶ 22). Inniss and Stroman would like to enter into a same-sex marriage in order to affirm their relationship with each other and J.S.I. and to prevent societal disapproval that J.S.I. or they might face. (Complaint ¶¶ 23-25).

Plaintiffs RayShawn Chandler and Avery Chandler are a same-sex female couple residing in Jonesboro, Georgia. (Complaint ¶ 26). Plaintiff Avery Chandler is a U.S. Army reservist who deploys to Kuwait in July 2014. Id. Both RayShawn Chandler and Avery Chandler serve as police officers for the Atlanta Police Department. Id. The Chandlers married in West Hartford, Connecticut, on June 26, 2013, and later celebrated with a ceremony and reception in Atlanta. (Complaint ¶ 28). They are planning to have children through artificial insemination of RayShawn Chandler. (Complaint ¶ 29). RayShawn Chandler and Avery Chandler claim that Georgia's refusal to recognize their same-sex marriage burdens them and their potential children because Avery Chandler cannot be recognized as the other parent on any birth certificate. Id. RayShawn Chandler

and Avery Chandler also worry about any stigma their potential children might experience due to Georgia's refusal to recognize their same-sex marriage. Id. Due to the dangerousness of their jobs, they also worry that, in the event that one of them was killed in the line of duty, the surviving Plaintiff and any potential children would not qualify for survivor benefits. (Complaint ¶ 30).

Plaintiffs Michael Bishop and Johnny Shane Thomas are a same-sex male couple residing in Atlanta, Georgia. (Complaint ¶ 31). Bishop and Thomas adopted two children, a five-year-old boy named T.A.B. and a three-year-old girl named M.G.B. (Complaint ¶ 32). Bishop and Thomas want to marry to express their devotion to each other and to obtain the dignity and legitimacy of marriage for T.A.B. and M.G.B. (Complaint ¶ 33). Bishop and Thomas are concerned that T.A.B. and M.G.B. might carry a sense of uncertainty, inferiority, or shame because Georgia does not allow Bishop and Thomas to enter into a same-sex marriage. Id. Bishop and Thomas also worry that their relationship to T.A.B. and M.G.B. might be questioned in the event of a medical emergency and carry around the adoption papers and medical directives when they travel. Id.

Plaintiff Jennifer Sisson, age thirty-four, entered into a same-sex marriage with Pamela Drenner on February 14, 2013. (Complaint ¶ 34). Drenner was diagnosed with ovarian cancer in 2008 and passed away on March 1, 2014. (Complaint ¶¶ 35-38). Because Sisson and Drenner's home state of Georgia did

not recognize their same-sex marriage, the death certificate entered by Defendant listed Drenner as "never married." (Complaint ¶¶ 34, 40). Plaintiff Sisson wishes to have a death certificate that reflects her devotion and same-sex marriage to Pamela Drenner. (Complaint ¶ 41).

The love that Plaintiffs articulate for their partners and children is clear, as are their contributions to our society. The State values Plaintiffs as its citizens, and readily acknowledges its responsibility to ensure that they, too, enjoy due process and equal protection under law. The State also respects the important, intimate, and personal choices that Plaintiffs have freely made. But the U.S. Constitution does not convert every "important, intimate, and personal decision" into a fundamental right immune from the democratic process. Washington v. Glucksberg, 521 U.S. 702, 725 (1997).

III. ARGUMENT

Plaintiffs' claims are foreclosed by binding Supreme Court and Eleventh Circuit precedent. In Baker v. Nelson, the Supreme Court summarily dismissed claims indistinguishable from Plaintiffs' as failing to raise a substantial federal question. 409 U.S. 810 (1972). That decision remains binding on lower courts until the Supreme Court instructs otherwise, and subsequent decisions have not changed that fact.

Even if this Court could disregard Baker, however, Plaintiffs lose on the merits. Binding decisions of the Eleventh Circuit make clear that there is no fundamental right to marry someone of the same sex and that classifications based on sexual orientation are not subject to heightened scrutiny. Accordingly, rational basis review applies to both claims, and the challenged laws easily pass that review. In addition, Plaintiffs' claims that the laws impermissibly discriminate on the basis of sex fail because men and women are equally subject to the laws.

A. Standard Of Review.

When reviewing a motion to dismiss, the Court must take the allegations of the complaint as true, and must construe those allegations in the light most favorable to the plaintiff. Riven v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir. 2008). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see also Amer. Dental Assoc. v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010) (courts are to "eliminate any allegations in the complaint that are merely legal conclusions").

B. Binding Supreme Court Precedent Makes Clear That Federal Question Jurisdiction Is Lacking, And Thus This Court Lacks Subject Matter Jurisdiction.

"Absent diversity of citizenship, a plaintiff must present a 'substantial' federal question in order to invoke the district court's jurisdiction." Wyke v. Polk

Cnty. Sch. Bd., 129 F.3d 560, 566 (11th Cir. 1997) (citing Hagans v. Lavine, 415 U.S. 528, 537 (1974)). The Supreme Court in Baker v. Nelson unanimously dismissed claims indistinguishable from those raised here because they failed to present a substantial federal question. 409 U.S. 810. That case remains binding on this Court. Accordingly, this Court is without subject matter jurisdiction to hear this case, and it must be dismissed. See Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.")

In Baker, the U.S. Supreme Court considered the appeal from a ruling of the Minnesota Supreme Court that a state law ban on same-sex marriage did not violate the Due Process Clause or Equal Protection Clause of the United States Constitution. See Baker v. Nelson, 191 N.W. 2d 185, 187 (Minn. 1971) ("The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry."). On appeal to the U.S. Supreme Court, the plaintiffs argued that Minnesota's refusal to issue a marriage license to a same-sex couple violated their fundamental right to marry under the due process clause, Baker Jurisdictional Statement at 11-15 (attached as Exhibit A), and impermissibly discriminated against them in violation of the Equal Protection Clause. Id. at 15-18; accord Perry v. Brown, 671 F.3d 1052, 1098-99 (9th Cir. Cal. 2012) (Smith, J., concurring in part and dissenting in

part), vacated by Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (itemizing claims asserted in Baker jurisdictional statement). The Supreme Court dismissed the claims "for want of a substantial federal question." 409 U.S. 810.

A summary dismissal for lack of a substantial federal question is a decision on the merits, Hicks v. Miranda, 422 U.S. 332, 344 (1975), and "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented." Mandel v. Bradley, 432 U.S. 173, 176 (1977). The summary dismissal in Baker is precedential and binding. Although the Eleventh Circuit has not considered the holding in the context of a state's definition of marriage, other courts have recognized that it controls. See Mass. v. U.S. HHS, 682 F.3d 1, 8 (1st Cir. 2012) (Baker precludes lower courts from accepting arguments that "presume or rest on a constitutional right to same-sex marriage."); Wilson v. Ake, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) (Baker is binding precedent); Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012) (Baker precluded equal protection claim challenging same-sex marriage ban); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1086 (D. Haw. 2012) (Baker precluded due process and equal protection challenges to Hawaii's law defining marriage as between a man and woman); Donaldson v. State, 292 P.3d 364, 371 n.5 (Mont. 2012) (Baker is binding precedent); see also Kitchen v. Herbert, Case. No. 13-4178, 2014 U.S. App.

LEXIS 11935, at **123-28 (10th Cir. June 25, 2014) (Kelly, J., dissenting in part) (arguing that Baker controls).

Lower courts are bound by summary decisions like Baker "until such time as the Court informs them that they are not." Hicks, 422 U.S. at 344-45 (internal citations, quotations, and punctuation omitted). The Supreme Court explained that "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." Id. at 344 (internal citations and quotations omitted). If there is a Supreme Court case directly on point, a lower federal court should rely on the case which directly controls and allow the Supreme Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). The Supreme Court's holding in Baker is directly on point. The Supreme Court has not overruled it. Accordingly, it still binds this Court and requires dismissal of Plaintiffs' claims.

Plaintiffs will likely turn to the dicta in Hicks about "doctrinal developments" and try to explain why Windsor v. U.S., 570 U.S. __, 133 S. Ct. 2675 (2013), and its predecessors constitute sufficient development to disregard Baker's binding effect. The "doctrinal developments" language of Hicks has always only been dicta. Hicks was not a case about doctrinal developments. It

squarely held that the lower court "was in error in holding that it could disregard" the Supreme Court's earlier summary dismissal. 422 U.S. at 343. The "doctrinal developments" language is one small part of a longer quotation by the Hicks Court of language from a Second Circuit decision, and the Court did not consider whether doctrinal developments had occurred.[2] This language did not survive the Supreme Court's direction in Rodriguez that lower courts should leave to the Supreme Court "the prerogative of overruling its own decisions." 490 U.S. at 484.[3] And the Court reiterated this direction even more forcefully in Agostini v. Felton, where it prohibited lower courts from "conclud[ing that] more recent [Supreme Court] cases have, by implication, overruled an earlier precedent." 521 U.S. 203, 237 (1997). The Agostini Court went on to make clear that lower courts are required to follow binding precedent of the Supreme Court even when that precedent "cannot be squared with the Court's later jurisprudence in the area that has significantly changed the law." Id. at 237-38.

[2] And, indeed, it is also in Hicks that we find the Court's direction that "lower courts are bound by summary decisions by [the Supreme] Court 'until such time as the Court informs them that they are not.'" Hicks, 422 U.S. at 344-45. Whatever the "doctrinal differences" principle means, it cannot be read to allow lower courts to determine for themselves which directly on-point summary decisions of the Supreme Court they need follow.

[3] Lest the State be accused of encouraging this Court to do precisely what it argues this Court cannot do, it bears mention that disregarding later-superseded dicta – which is never more than persuasive in any event – is quite different from deciding that an on-point merits decision need no longer be followed.

But even assuming that the "doctrinal developments" dicta of Hicks applies, Windsor by its own terms does not constitute such a development, and the Eleventh Circuit's narrow reading of Romer v. Evans, 517 U.S. 620 (1996), and Lawrence v. Texas, 539 U.S. 558 (2003), preclude this Court from considering those cases sufficient "developments." The State readily acknowledges that most courts to consider the question since Windsor have concluded that Baker is not binding. See Kitchen v. Herbert, 2014 U.S. App. LEXIS 11935, at **21-32 (collecting cases). But none of those courts were bound by constraining Eleventh Circuit precedent that narrowly reads Romer and Lawrence. And, frankly, the courts that disregarded Baker were wrong. Many Court-watchers believe that the Court is likely to change course and hold, at some point in the relatively near future, that the U.S. Constitution affirmatively requires states to allow same-sex marriage. The Court may well do that. But it has not yet, and in Windsor – the closest it has come to such a ruling – the Court made very clear that it did not address the issue. "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. … ***This opinion and its holding are confined to those lawful marriages***." Windsor, 133 S. Ct. at 2696 (emphasis added).

Perhaps the best way to characterize Windsor is as the converse of Glucksberg. In Glucksberg, the key question is whether the asserted fundamental right is "objectively … deeply rooted in this Nation's history and tradition." Glucksberg, 521 U.S. at 721. In Windsor, the Court struck down a section of the Defense of Marriage Act ("DOMA") because "DOMA's ***unusual deviation from the usual tradition*** of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." 133 S. Ct. at 2693 (emphasis added). The Windsor Court went on to explain that this "unusual deviation" from tradition was critical in concluding DOMA violated the Constitution:

> This is strong evidence of a law having the purpose and effect of disapproval of [the class protected by the state]. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States. The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.

Id. "The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married." Id. "The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious

question under the Constitution's Fifth Amendment." Id. at 2693-94. "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal." Id. at 2694. Glucksberg teaches that the Due Process Clause prohibits the government from violating individual rights that are rooted in history and tradition. Windsor teaches that the Due Process Clause prohibits the government from acting out of animus to strip individuals of rights they already possess, and concluded that a government's unusual deviation from tradition in an attempt to revoke rights is strong evidence of impermissible motive. Cf. generally Baldwin v. Smith, No. 14-5003, 20140 U.S. App. LEXIS 13733, at *120-21 (10th Cir. July 18, 2014) (Holmes, J., concurring) In both instances, history and tradition wins.

Here, of course, "this Nation's history and tradition" cut the other way. Plaintiffs seek to invalidate the definition of marriage that, until 2003, was universal in this Nation. See Windsor, 133 S. Ct. at 2715 (Alito, J., dissenting) (citing sources and noting also that no country allowed same-sex marriage until 2000); Baldwin, 2014 U.S. App. LEXIS 13733, at *120-21 (Holmes, J., concurring) (the traditional definition of marriage, "until recently[,] had been universal and unquestioned for the entirety of our legal history as a country"). No holding in Windsor supports Plaintiffs' effort. Regardless of what Court-watchers may think the Supreme Court will do when next faced with the question, Baker requires this Court to wait until the Supreme Court actually does it.

Society's significant interest in marriage is manifested by a state's "rightful and legitimate concern" for the marital status of its citizens, Williams v. North Carolina, 317 U.S. 287, 298 (1942), and that concern includes the state's power to decide what marriage is, who may enter into it, and, consistent with federalism, an acceptance of the fact that marital policies will differ from state to state, Windsor, 133 S. Ct. at 2691. States have historically varied in who is granted access to civil marriage. For example, states vary in the legal minimum age of consent for marriage,[4] whether blood relatives can marry, whether a marriage can include more

[4] See Ala. Code § 30-1-4; § 30-1-5; Alaska Stat. Ann. § 25.05.171; Ariz. Rev. Stat. Ann. § 25-102; Ark. Code Ann. § 9-11-102 ; Cal. Fam. Code § 300 - § 303; Colo. Rev. Stat. § 14-2-106; § 14-2-108; Conn. Gen. Stat. Ann. § 46b-30; Del. Code Ann. tit. 13, § 123; Fla. Stat. Ann. § 794.05, 800.04; Ga. Code Ann. §§ 19-3-2; Haw. Rev. Stat. § 572-1, 572-2; Idaho Code Ann. § 32-202 ; 750 Ill. Comp. Stat. Ann. 5/203, 5/208; Ind. Code Ann. § 31-11-1-4 - § 31-11-1-6; Kan. Stat. Ann. § 23-106; Ky. Rev. Stat. Ann. § 402.020; La. Child. Code Ann. art. 1545; Me. Rev. Stat. Ann. tit. 19, § 652; Md. Code. Ann., Family Law § 2-301; Mass. Gen. Laws Ann. ch.. 207, § 7, 24, 25; Mich. Comp. Laws Ann. § 551.51; §551.103; Minn. Stat. Ann. § 517.02; Miss. Code Ann. § 93-1-5; Mo. Ann. Stat. § 451.090; Mont. Code. Ann. § 40-1-213;§ 40-1-202; Neb. Rev .St. § 42-102; 42-105; Nev. Rev. Stat. Ann. § 122.025; N.H. Rev. Stat. § 457:4, § 457:5; N.J. Stat. Ann. 37:1-6; N.M. Stat. Ann. § 40-1-5, § 40-1-6; N.Y. Dom. Rel. § 7, 15a; N.C. Gen. Stat. Ann. § 51-2, 51-2.1; N.D. Cent. Code Ann. § 14-03-02; Ohio Rev. Code Ann. § 3101.01, § 3101.05; Okla. Stat. tit. 43, § 3; Or. Rev. Stat. Ann. § 106.010 - § 106.060; 23 Pa. Cons. Stat. § 1304; R.I. Gen. Laws Ann. § 15-2-11; S.C. Code Ann. § 20-1-100, 20-1-250, 20-1-300; S.D. Codified Laws § 25-1-9; Tenn. Code Ann. § 36-3-104 - §36-3-107; Tex. Fam. Code Ann. § 2.101-2.103; Utah Code Ann. § 30-1-2, § 30-1-9; Vt. Stat. Ann. tit. 18, § 5142 ; Va. Code Ann. § 20-48, § 20-49; Wash. Rev. Code § 26.04.010; W. Va. Code § 48-2-301; Wis. Stat. Ann. § 765.02; Wyo. Stat. Ann. § 20-1-102; D.C. Code § 46-403, § 46-411.

than two partners,[5] and even differ regarding the circumstances in which a person can divorce or otherwise be legally released from marriage. States have varied with regard to whether a blood test is required prior to the issuance of a marriage license, or if a waiting period is imposed between the time the license is issued and the time the marriage may take place. See Windsor, 133 S. Ct. at 2691. The states are laboratories of democracy and can differ in their views without interference by the federal government. See id. ("[T]he Federal Government, throughout our history, has deferred to state-law policy decisions with respect to domestic relations. . . . In order to respect this principle, the federal courts, as a general rule,

[5] While all 50 states and the District of Columbia currently outlaw polygamy, they outlawed the practice at different times, and currently vary in the manner in which it is defined and penalized. See Ala. Code §13A-13-1; Alaska Stat. §11.51.140; Ariz. Rev. Stat. §13-3606; Ark. Code Ann. §5-26-201; Cal. Penal Code §281-§283; Colo. Rev. Stat. 18-6-201; Conn. Gen. Stat. §53a-190; Del. Code Ann. tit. 11 §1001; Fla. Stat. §826.01; Ga. Code Ann. §16-6-20; Haw. Rev. Stat. Ann. §709-900; Idaho Code Ann. §18-1101-1103; 720 Ill. Comp. Stat. Ann. 5/11-45 ; Ind. Code Ann. §35-46-1-2; Iowa Code §726.1; Kan. Stat. Ann. §21-5609; Ky. Rev. Stat. Ann. §530.010; La. Rev. Stat. Ann. §14:76; Me. Rev. Stat. Ann. tit. 17, §551; Md. Code Ann., Crim. Law §10-502; Mass. Gen. Laws Ann. ch. 272, §15; Mich. Comp. Laws Serv. §551.5; Minn. Stat. §609.355; Miss. Code Ann. §97-29-13; Mo. Rev. Stat. §568.010 ; Mont. Code Ann. §45-5-611; Neb. Rev. Stat. Ann. §28-701; Nev. Rev. Stat. Ann. §201.160; N.H. Rev. Stat. Ann. 639:1; N.J. Stat. Ann. §2C:24-1; N.M. Stat. Ann. §30-10-1; N.Y. Penal Law §255.15 (Consol.) ; N.C. Gen. Stat. §14-183; N.D. Cent. Code, §12.1-20-13; Ohio Rev. Code Ann. 2919.01; Okla. Stat. tit. 21, §881-883; Or. Rev. Stat. §163.515; 18 Pa. Cons. Stat. §4301; R.I. Gen. Laws §11-6-1; S.C. Code Ann. §16-15-10; S.D. Codified Laws §22-22A-1; Tenn. Code Ann. §39-15-301; Tex. Penal Code Ann. §25.01; Utah Code Ann. §76-7-101; Vt. Stat. Ann. tit. 13, §206; Va. Code Ann. §18.2-362; Wash. Rev. Code Ann. §9A.64.010; W. Va. Code Ann. §61-8-1; Wis. Stat. §944.05; Wyo. Stat. Ann. §6-4-401; D.C. Code §22-501.

do not adjudicate issues of marital status even where there might otherwise be a basis for federal jurisdiction.").

After Windsor, a state retains the right to regulate marriage. Nowhere in Windsor did the Supreme Court indicate that it interpreted the Fourteenth Amendment to compel every state to extend marriage to same-sex couples. In fact, it did not address the question at all. Decisions on issues peripheral (at most) to a question summarily dismissed by the Supreme Court do not constitute "doctrinal developments" sufficient to disregard that dismissal. See Bates v. Jones, 131 F.3d 843, 850 (9th Cir. 1997) (en banc) (O'Scannlain, J., concurring).

The Supreme Court's decision in Baker still controls. It is for the Supreme Court, and not this Court, to reverse its own precedent. And even if Hicks' dicta applies, there have been no doctrinal developments addressing whether a state's decision to define marriage in the traditional fashion as between opposite-sex couples violates the Fourteenth Amendment. Baker compels this Court to conclude that Plaintiffs raise no substantial federal question, and, thus, this Court lacks subject matter jurisdiction and must dismiss the case.

C. Plaintiffs Fail To State A Plausible Claim For Relief Under Either The Due Process Clause Or The Equal Protection Clause.

Even assuming that this Court did have jurisdiction to hear Plaintiffs' claims, those claims must still be dismissed because the challenged laws do not violate Plaintiffs' rights to due process or equal protection.

1. Plaintiffs Fail to State a Claim for Relief Under the Due Process Clause.

Plaintiffs claim that the Georgia laws barring same-sex marriage violate the due process guarantees of the Fourteenth Amendment of the United States Constitution. Plaintiffs' claim fails because it incorrectly assumes that the fundamental right to marriage includes the right to marry someone of the same sex. As there is no fundamental right implicated by Georgia's marriage laws, they are scrutinized under rational basis review, and easily pass.

a. Applicable Law.

The Due Process Clause of the Fourteenth Amendment guarantees that all citizens have certain "fundamental rights comprised within the term liberty [that] are protected by the Federal Constitution from invasion by the States." Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) (quoting Whitney v. California, 274 U.S. 357, 373 (1927)). The Due Process Clause contains a substantive component, which courts have recognized as providing "heightened protection against government interference with certain fundamental rights and liberty interests." Troxel v. Granville, 530 U.S. 57, 65 (2000) (citation omitted).

While the right to traditional marriage has been found to be of fundamental importance, this fundamental right does not encompass the right to marry a person

of the same sex.[6] An effort to frame the fundamental right to marry in that manner is an effort to redefine marriage as it has been known throughout history.

The Due Process Clause protects only a narrow class of what have been identified as fundamental rights and liberty interests. Indeed, fundamental rights are "not simply deduced from abstract concepts of personal autonomy[,]" Glucksberg, 521 U.S. at 725, and "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal

[6] While the right to marry is a fundamental liberty, every decision recognizing that right involved two persons of the opposite sex and contains no indication that "marriage" as used in these decisions meant anything other than what it has been traditionally understood to mean since the founding of our nation. Moreover, based on the specific facts of these cases, it does not appear that they support a universal individual right to marry anyone a person chooses. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (invalidating a law barring individuals from marrying if they were behind in court-ordered child support obligations or if the children to whom they were obligated were likely to become public charges, and noting that if there is a fundamental right to abortion and to bring an illegitimate child into life, "[s]urely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection and, if appellee's right to procreate means anything at all, it must imply some right to enter [civil marriage] the only relationship in which the State of Wisconsin allows sexual relations legally to take place."); Loving v. Virginia, 388 U.S.1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination."); Skinner v. Okla. ex. rel. Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental" to humanity's "very existence and survival"); Turner v. Safley, 482 U.S. 78, 95-96 (1987) (invalidating a prison rule barring inmates from marrying). Rather, as the Supreme Court noted in Windsor, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S. Ct. at 2689.

decisions are so protected." Id. at 727. Rights are designated as fundamental where the Supreme Court (1) provides a careful description of the asserted right, Glucksberg, 521 U.S. at 721; see also Reno v. Flores, 507 U.S. 292, 302 (1993); and (2) when the right has been identified as one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S. at 720-21.

The Supreme Court has been reluctant to expand the concept of substantive due process, as has the Eleventh Circuit. The Supreme Court has explained:

> [W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. By 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. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Glucksberg, 521 U.S. at 720 (internal citations and quotations omitted). Similarly, the Eleventh Circuit has emphasized the need to exercise restraint in identifying new fundamental rights. The Eleventh Circuit explained that once a right is elevated to a fundamental right, it is "effectively removed from the hands of the people and placed into the guardianship of unelected judges." Williams v. Att'y

Gen. of Alabama, 378 F.3d 1232, 1250 (11th Cir. 2004) (internal citations omitted).

In upholding Alabama's prohibition of the commercial distribution of sex toys and rejecting a challenge based on the fundamental right to sexual privacy under the due process clause, the Eleventh Circuit highlighted the importance of exercising restraint in identifying new fundamental rights and allowing the democratic process, instead of the judiciary, to regulate such issues:

> One of the virtues of the democratic process is that, unlike the judicial process, it need not take matters to their logical conclusion. If the people of Alabama in time decide that a prohibition on sex toys is misguided, or ineffective, or just plain silly, they can repeal the law and be finished with the matter. On the other hand, if we today craft a new fundamental right by which to invalidate the law, we would be bound to give that right full force and effect in all future cases….

Williams, 378 F.3d at 1250. The Eleventh Circuit went on to quote Justice Felix Frankfurter in his concurring opinion in Dennis v. United States, 341 U.S. 494, 525 (1951), where he observed that "[h]istory teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." Id. Surely these cautions are of particular salience here.

In addition, the Eleventh Circuit has held that it is "particularly hesitant to infer a new fundamental liberty interest from a [Supreme Court] opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis." Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004). In applying this principle, the Eleventh Circuit analyzed the Supreme Court's holding in Lawrence v. Texas, and concluded that Lawrence did not create a new fundamental right. In support of this conclusion, the Eleventh Circuit noted that the analysis in Lawrence did not include the "two primary features" of fundamental-rights analysis:

> First, the Lawrence opinion contains virtually no inquiry into the question of whether the petitioners' asserted right is one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, the opinion notably never provides the careful description of the asserted fundamental liberty interest that is to accompany fundamental-rights analysis. Rather, the constitutional liberty interests on which the Court relied were invoked, not with careful description, but with sweeping generality. Most significant, however, is the fact that the Lawrence Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds, holding that it furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lofton, 358 F.3d at 817 (internal citations and quotations omitted). Thus, the Eleventh Circuit concluded that, although Lawrence clearly established the unconstitutionality of a criminal prohibition on consensual adult "sodomy," "it is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right." Id. at 817; accord Williams, 378 F.3d at 1236 (discussing the Eleventh Circuit's analysis of Lawrence in Lofton).

As the Eleventh Circuit made clear in Lofton, and again in Williams, it will not infer a new fundamental right from an opinion that does not employ the Glucksberg analysis for identifying such rights. See Lofton, 358 F.3d at 816; Williams, 378 F.3d at 1237 ("[W]e are not prepared to infer a new fundamental right from an opinion that never employed the usual Glucksberg analysis for identifying such rights. Nor are we prepared to assume that Glucksberg – a precedent that Lawrence never once mentions – is overruled by implication."). This principle is binding on this Court and precludes the interpretation of Windsor as recognizing a fundamental right.

b. *Glucksberg* Analysis.

Applying the Supreme Court's two-step analytical framework for evaluating new fundamental-rights claims, it is clear that Windsor did not announce a new fundamental right. The language and reasoning of Windsor are inconsistent with the Glucksberg analysis for identifying a fundamental right.

First, as explained above, Windsor is best understood as the converse of Glucksberg. As in Romer, the Windsor Court invalidated an "unusual deviation" from tradition. Here, it is tradition itself that Plaintiffs seek to invalidate.

Second, Windsor contains no careful description of the asserted right to same-sex marriage. Windsor did not announce a fundamental right to marry a person of the same sex. Rather, the Court noted that the power to define marriage belonged primarily to the states – not Congress – and the Constitution prohibited Congress from treating as unmarried couples whom a state had declared married. In support of this conclusion, the Supreme Court specifically noted that its decision was limited to the lawful same-sex marriages that the State of New York had already recognized as a result of a local "community's considered perspective on the historical roots of the institution of marriage and its involved understanding of the meaning of equality." 133 S. Ct. at 2696; see also id. (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in their exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."). The Eleventh Circuit applied this same principle when it emphasized the possibility that the state could create a protectable interest but that absent such a creation by the state, no due process protection attached. See Lofton, 358 F.3d at 814-15.

Third, it is without question that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition, objectively or otherwise. In fact, Windsor observed that the right to same-sex marriage is not deeply rooted in this nation's history and tradition. See Windsor, 133 S. Ct. at 2689 ("It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."); accord id. at 2706-07, (Scalia, J., dissenting) (the majority opinion "does not argue that same-sex marriage is 'deeply rooted in this Nation's history and tradition'"); accord Baldwin, 2014 U.S. App. LEXIS 13733, at *122 (Holmes, J., concurring) ("Far from being unprecedented, then, same-sex marriage bans were literally the only precedent in all fifty states until little more than a decade ago.") (quotations and citation omitted).

Finally, although Windsor did not identify or articulate the applicable standard of review, it did not use heightened scrutiny, which would have been the proper standard if a fundamental right were implicated. Instead, the Supreme Court appeared to engage in rational basis review. Windsor used the language of rational basis review in declaring Section 3 of DOMA invalid as it was motivated by "no legitimate purpose," 133 S. Ct. at 2696, and relied on cases utilizing rational basis review to invalidate Section 3 of DOMA. 133 S. Ct. at 2693 (citing

Dept. of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973) (applying rational basis review to a challenge under the equal protection clause), and Romer, 517 U.S. at 633 (same); see also Windsor, 133 S. Ct. at 2706 (Scalia, J., dissenting) (the majority "opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases . . . the Court certainly does not ***apply*** anything that resembles that deferential framework") (emphasis in original).

Any attempt to extrapolate from Windsor a right to same-sex marriage would be a dramatic step that the Supreme Court has not indicated a willingness to take and would be contrary to Eleventh Circuit precedent regarding fundamental rights interpretation. Like the arguments rejected in Williams, to find a fundamental right based on Windsor would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in Glucksberg analysis, and that never invoked strict scrutiny. While the Supreme Court may expand its catalog of fundamental rights one day, for a lower court "preemptively to take that step would exceed [its] mandate as a lower court." Williams, 378 F.3d at 1238.

Windsor did not find a fundamental right to same-sex marriage, and neither should this Court. The first step in this analysis is to provide a careful and specific description of the asserted right. Glucksberg, 521 U.S. at 721. Plaintiffs rely heavily on the fundamental right to marry. And, of course, the right to marry is

fundamental. But Plaintiffs describe the right they seek at far too abstract a level. Supreme Court and Eleventh Circuit precedent requires a granular and particularized approach to determining whether an asserted individual right is, in fact, fundamental. For example, in Williams, the Eleventh Circuit, relying on the Supreme Court's formulation of the liberty interests at issue in Glucksberg and Flores, held that the liberty interest at stake had to be defined in reference to the scope of the challenged Alabama statute banning the commercial distribution of sexual devices. 378 F.3d. at 1241. The Eleventh Circuit rejected the district court's framing of the issue in terms of whether there was a more general fundamental right to sexual privacy and, instead, held that the correct framing was the much more specific question of whether the Constitution protects a right to use sexual devices. Id. at 1242. Similarly, in Doe v. Moore, the Eleventh Circuit rejected an attempt to frame broadly the asserted right at issue in a challenge to Florida's sex offender publication act. In Moore, the plaintiffs argued that the challenged act infringed on their liberty and privacy interests, particularly their "rights to family association, to be free of threats to their persons and members of their immediate families, to be free of interference with their religious practices, to find and/or keep any housing, and to a fundamental right to find and/or keep any employment." 410 F.3d 1337, 1343 (11th Cir. 2005). The Eleventh Circuit rejected this framing and held that the right at issue was properly framed much

more specifically in the context of the challenged statute as the right of a person, convicted of sexual offenses, to refuse subsequent registration of his or her personal information with Florida law enforcement and to prevent publication of this information on Florida's Sexual Offender/Predator website. Id. at 1344.

Based on the clear instructions of the Eleventh Circuit, the scope of the asserted liberty interest at stake must be defined in reference to the scope of Georgia's marriage laws. Thus, the broad right to marry, or fundamental right to marriage is not at issue. The interest at issue must be defined in reference to the scope of the challenged marriage laws and is, therefore, whether there is a right to same-sex marriage. As the Eleventh Circuit noted, "the requirement of a careful description is designed to prevent the reviewing court from venturing into vaster constitutional vistas than are called for by the facts of the case at hand." Williams, 378 F.3d at 1240 (internal quotations and citations omitted). The Eleventh Circuit went on to note that "[o]ne of the cardinal rules of constitutional jurisprudence is that the scope of the asserted right – and thus the parameters of the inquiry – must be dictated by the precise facts of the immediate case." Id. (quotations omitted). Accordingly, the analysis here must be framed in terms of whether the Constitution protects a right to same-sex marriage.

The second prong of the fundamental rights analysis requires an inquiry into whether the right to same sex marriage is "objectively, deeply rooted in this

Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." Glucksberg, 521 U.S. at 721. As discussed above, it is without question that the right to same sex marriage is not objectively, deeply rooted in this Nation's history and tradition. Accordingly, there is no fundamental right at issue in Plaintiffs' challenge to Georgia's marriage law that would trigger heightened scrutiny.

Thus, Georgia's marriage laws must be evaluated under the most deferential level of scrutiny, rational basis review. See Fresenius Med. Care Holdings, Inc. v. Tucker, 704 F.3d 935, 945 (11th Cir. 2013) ("When a challenged law does not infringe upon a fundamental right, we review substantive due process challenges under the rational basis standard.")

c. Rational Basis Review.

"[I]f a law neither burdens a fundamental right nor targets a suspect class, [the court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer, 517 U.S. at 631. Under rational basis scrutiny, governments "are not required to convince the courts of the correctness of their legislative judgments." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). "Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental

decisionmaker." Id. (internal quotations omitted). This standard is "highly deferential" and courts hold legislative acts unconstitutional under a rational basis standard in only the most exceptional of circumstances. Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001). "Courts proceeding pursuant to the rational basis standard 'must be a paradigm of judicial restraint.'" Huff v. DeKalb County, No. 1:05-cv-1721, 2007 WL 295536, at *8 (N.D. Ga. April 20, 2007) (Duffey, J.) (quoting Resindiz-Alcaraz v. U.S. Atty. Gen., 383 F.3d 1262, 1271-72 (11th Cir. 2004)).

Georgia's marriage laws are rationally related to numerous state interests. First, the law is rationally related to the State's interest in encouraging the raising of children in homes consisting of a married mother and father, an interest the Eleventh Circuit has found to be a legitimate state interest. See Lofton, 358 F.3d at 819-20. In support of this conclusion, the Eleventh Circuit observed that "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society…." Lofton, 358 F.3d at 819-20. The Tenth Circuit adopted this rationale in Kitchen v. Herbert by treating as compelling the state's interest in linking marriage to the ability to procreate. 2014 U.S. App. LEXIS 11935, at *68. While finding Utah's law insufficiently tailored to survive heightened scrutiny, the Tenth Circuit's reasoning

suggests Utah could have survived rational basis scrutiny. In the light of Lofton and other Eleventh Circuit precedent, the Court is bound to view Georgia's provisions through the rational basis lens.

The challenged laws also rationally further Georgia's legitimate interest in ensuring legal frameworks for protection of children of relationships where unintentional reproduction is possible; ensuring adequate reproduction; fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children; and exercising prudence before departing from a definition of marriage that, until quite recently, "was an accepted truth for almost everyone who ever lived, in any society in which marriage existed." Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006). None of these state interests are related to the "emotional and romantic reasons" Plaintiffs identify for seeking to be married. Compare Complaint ¶ 13. And these interests are clearly legitimate.

2. The Challenged Laws Do Not Violate Equal Protection.

Eleventh Circuit precedent compels this Court to conclude that the challenged laws do not violate the Equal Protection Clause. That binding precedent establishes that:

1) Sexual orientation is not a suspect classification;

2) The state has a legitimate interest in protecting the traditional definition of the nuclear family;

3) That the state can lawfully conclude that homosexuals and heterosexuals are not similarly situated for reasons related to procreation and children;[7]

4) That the rationale offered by the state need only be arguable to immunize the legislative choice from constitutional challenge.

Lofton, 358 F.3d at 821-23.

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike. Campbell v. Rainbow City, Ala., 434 F.3d 1306, 1313 (11th Cir. 2006). The Equal Protection Clause does not forbid classifications; it simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). As a general rule, "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). "Unless the challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest." Lofton, 377 F.3d at 1277; see also

[7] Plaintiffs' allegation that they are similarly situated to opposite-sex couples in all respects relevant to marriage, see Complaint ¶ 11, is a legal conclusion that this Court should disregard.

Lawrence, 539 U.S. at 585 (O'Connor, J., concurring) (indicating that "preserving the traditional institution of marriage" is a legitimate state interest far beyond mere moral disapproval).

Plaintiffs contend that because a man may not marry another man, and a woman may not marry another woman under Georgia's marriage laws, the classification is necessarily one based on sex. (Complaint ¶¶ 110-14.) In other words, if either person in a specific couple was of the other sex, the couple could marry. But the challenged laws do not impermissibly discriminate on the basis of sex.

Georgia's marriage laws do not treat persons of different sex differently; rather, the law treats persons of different sex the same and prohibits men and women from doing the same thing – that is, marrying an individual of the same sex. There is no indication that either sex, as a class, is disadvantaged by Georgia's marriage laws. The law simply states that opposite-sex couples can marry, while same-sex couples cannot. The law is directed towards neither males nor females exclusively, but both male and female couples seeking to enter into a same-sex marriage in Georgia, or to have an out-of-state same-sex marriage recognized by the State. Thus, the challenged laws do not discriminate based on sex or involve disparate treatment based upon sex that might invite intermediate scrutiny.

This conclusion is consistent with the decisions of other federal district courts in similar cases both before and after Windsor.[8] There is no indication that either sex, as a class, is disadvantaged by Georgia's marriage laws.[9] The law applies equally to men and women, treating a same-sex couple comprised of two males the same as a same-sex couple consisting of two females.[10]

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[8] See Baskin v. Bogan, 1:14-CV-00355-RLY, 2014 WL 2884868, at *11 (S.D. Ind. June 25, 2014); Wolf v. Walker, 14-CV-64-BBC, 2014 WL 2558444, at *23 (W.D. Wis. June 6, 2014) ("[T]he general view seems to be that a sex discrimination theory is not viable, even if the government is making a sex-based classification with respect to an individual, because the intent of the laws banning same-sex marriage is not to suppress females or males as a class."); Geiger v. Kitzhaber, 6:13-CV-01834-MC, 2014 WL 2054264, at *7 (D. Or. May 19, 2014) ("The discriminatory laws in Loving, however, are not applicable to Oregon's marriage laws. . . . There is no such invidious gender-based discrimination here."); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012) ("The Court thus agrees with the vast majority of courts considering the issue that an opposite-sex definition of marriage does not constitute gender discrimination.").

[9] See Latta v. Otter, 1:13-CV-00482-CWD, 2014 WL 1909999, at *15 (D. Idaho May 13, 2014) ("This distinction does not prefer one gender over the other—two men have no more right to marry under Idaho law than two women."); Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) ("The distinction might be gender based if only women could marry a person of the same sex, or if only women could marry a transgendered person, or if the restriction included some other asymmetry. . . . But there is no distinction here between men and women.").

[10] See Baskin v. Bogan, 2014 WL 2884868, at *11 ("Moreover, there is no evidence that the purpose of the marriage laws is to ratify a stereotype about the relative abilities of men and women or to impose traditional gender roles on individuals."); Whitewood v. Wolf, 1:13-CV-1861, 2014 WL 2058105, at *10, n.9; (M.D. Pa. May 20, 2014) (citing Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1286 (N.D. Okla. 2014)); Bishop, 962 F. Supp. 2d at 1286 ("Common sense dictates that the intentional discrimination occurring in this case has nothing to do with gender-based prejudice or stereotypes, and the law cannot be subject to heightened scrutiny on that basis.").

Of the ten federal district courts to consider whether traditional state marriage laws are discriminatory on the basis of sex, separate from claims of discrimination on the basis of sexual orientation,[11] nine have held that traditional state marriage laws do not discriminate on the basis of sex.[12] The challenged laws do not discriminate based on sex or involve disparate treatment based upon sex. Thus, because Georgia marriage law does not discriminate on the basis of sex, heightened scrutiny is not appropriate for evaluating the challenged laws.

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[11] See Baskin, 2014 WL 2884868, at *10-11 (holding no discrimination on the basis of gender); Wolf v. Walker, 2014 WL 2558444, at *23 (deciding the case on other grounds but noting that "the general view seems to be that a sex discrimination theory is not viable"); Whitewood, 2014 WL 2058105, at *10, n.9 (deciding the case on other grounds but finding the sex discrimination argument "less compelling" because the Pennsylvania marriage law "has nothing to do with gender-based prejudice or stereotypes" (citation omitted)); Geiger, 2014 WL 2054264, at *7 (holding no discrimination on the basis of gender); Latta, 2014 WL 1909999, at *15 (holding no discrimination on the basis of gender); Bishop, 962 F. Supp. 2d at1286 (holding no discrimination on the basis of gender); Sevcik, 911 F. Supp. 2d at 1005 (holding no discrimination on the basis of gender); Abercrombie, 884 F. Supp. 2d at 1098-99 (holding no discrimination on the basis of gender); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) aff'd sub nom. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) vacated and remanded sub nom. Hollingsworth v. Perry, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013) (determining that plaintiffs' sexual orientation claim was "equivalent to a claim of discrimination based on sex").

[12] The only court the state has identified as holding otherwise was Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) ("[T]he court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex."). The judge in that case applied rational basis review rather than heightened or intermediate scrutiny. Id. at 1206-07. In any event, the Tenth Circuit did not adopt this reasoning on appeal. See generally Kitchen, 2014 U.S. App. LEXIS 11935.

At most, the challenged laws may have the effect of distinguishing based on sexual orientation.[13] In its most recent case involving sexual orientation, the Supreme Court did not discuss whether sexual orientation is a suspect classification. Windsor, 133 S. Ct. at 2675. Similarly, the Supreme Court did not declare what equal protection standard it applied and has yet to decide what level of scrutiny is appropriate for classifications based upon sexual orientation. See id. at 2683-84.

The Eleventh Circuit has squarely held that sexual orientation is not a suspect classification and rejected the use of heightened scrutiny. See Lofton, 358 F.3d at 818.[14] Accordingly, any law that differentiates based on sexual orientation need only be rationally related to a legitimate state interest. It is Plaintiffs' burden to establish that the challenged laws fail rational basis review. Heller v. Doe, 509 U.S. 312, 320-21 (1993).

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[13] The challenged laws, of course, do not contain any such distinction on their face; they apply equally to everyone. The State acknowledges, however, that the laws effect gays and lesbians more profoundly than they do heterosexuals. The State does not concede that this necessarily constitutes a classification on the basis of sexual orientation, but simply explains why even if it is, that classification is constitutionally permissible.

[14] The Ninth Circuit recently interpreted Windsor to mean that sexual orientation is a suspect classification. In SmithKline Beecham Corp. v. Abbott Labs., the Ninth Circuit held that classifications based on sexual orientation are subject to heightened scrutiny and that in jury selection, equal protection prohibits peremptory strikes based on a perception that a juror was gay. 740 F.3d 471, 480-84 (9th Cir. 2014). Under Lofton, however, courts in the Eleventh Circuit are bound to apply rational basis review to classifications made based on sexual orientation.

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). "This standard is easily met." Leib v. Hillsborough Cnty. Pub. Transp. Comm'n, 558 F.3d 1301, 1306 (11th Cir. 2009); Deen v. Egleston, 597 F.3d 1223, 1230 (11th Cir. 2010) (under rational basis review, states have "wide latitude" when crafting "social or economic" legislation). The Supreme Court has instructed that review must be deferential:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14 (1993); see also Panama City Med. Diagnostic, Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir. 1994) (deference must be given to legislature "because lawmakers are presumed to have acted constitutionally despite the fact that, in practice, their laws result in some inequality") (internal citations and quotations omitted).

On a "rational-basis review," a challenged classification bears a "strong presumption of validity" and a party challenging the classification must "negative every conceivable basis which might support it." Beach Commc'ns, 508 U.S. at

314-15. "Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." Id. at 315-16 (internal quotations omitted). As discussed earlier, Georgia's laws are premised upon the unique ability of opposite-sex couples to procreate. This distinction between opposite-sex couples and same-sex couples is relevant to marriage and, thus, sufficient to survive rational basis review. Lofton, 358 F.3d at 819-20.

III. CONCLUSION

For the reasons set forth herein, Defendant's Motion to Dismiss should be GRANTED.

Respectfully submitted this 21st day of July, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with Local Rule 5.1(B) in 14-point New Times Roman type face**.**

This 21st day of July, 2014.

s/Devon Orland 554301

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANT DEBORAH ADERHOLD'S BRIEF IN SUPPORT OF HER MOTION TO DISMISS THE COMPLAINT** with the Clerk of Court using the CM/ECF system, including the following:

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This 21st day of July, 2014.

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