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

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

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Chief Justice John Marshall famously described the role of the federal judiciary as declaring "what the law ***is***." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). But like their Complaint, Plaintiffs' Opposition is based on speculation about where the law may be going, or where it has gone in other circuits, not what it ***is*** today in this Circuit. And the law today – in this Circuit – precludes their claims.[1] This Court should decline the invitation to disregard binding precedent, apply the law as it is, and dismiss the Complaint.

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[1] Two cases presenting similar claims are now pending before the Eleventh Circuit. *See Brenner, et al. v. Sec'y of Florida Dep't of Health, et al.*, No. 14-14061 (11th Cir.); *Grimsley, et al. v. Sec'y of Florida Dep't of Health, et al*., No. 14-14066 (11th Cir.). A ruling of the Eleventh Circuit in those cases could well be dispositive of the claims asserted here.

I. *Baker v. Nelson* Forecloses Plaintiffs' Claims.

Plaintiffs argue that *Baker v. Nelson* is inapplicable because (1) they present different claims than those decided in *Baker*, and (2) doctrinal developments since *Baker* have rendered it no longer applicable. Both arguments fail.

A. Plaintiffs Assert the Same Claims as those Decided in *Baker*.

Plaintiffs attempt to distinguish *Baker* by suggesting that they have asserted two claims not decided there. Plaintiffs suggest first that *Baker* was about the issuance of state marriage licenses, not the recognition of out-of-state marriages, and second, this case, unlike *Baker*, includes claims by parents seeking to marry. Plaintiffs' attempt is unavailing.

Neither of these alleged distinctions present different issues from those decided in *Baker*. Although Plaintiffs seek to frame their claims differently, the core of each claim remains the same: does the Due Process Clause or Equal Protection Clause confer a right to marry on same-sex couples? This is the only issue they have posed in this case, and the only claims for relief they have pled. *See* Am. Compl. 93-103 (asserting claim for relief under Due Process Clause for denying same-sex couples the right to marry); 104-27 (asserting claim for relief under Equal Protection Clause for denying same-sex couples the right to marry).

And that is the issue squarely presented and decided in *Baker*. As *Baker* remains binding, Plaintiffs' claims fail.

Plaintiffs' claim about recognition of out-of-state marriages rests on their general Due Process and Equal Protection theories. They do not assert a claim under the Full Faith and Credit Clause or any other legal theory that would distinguish them from their fellow Plaintiffs who seek to be married here. Plaintiffs' claim about parents marrying is similarly grounded. Plaintiffs Elizabeth and Krista Wurz do not assert any claim for adoption, and do not allege that they have sought to adopt jointly and been denied. *See* Am. Compl. ¶¶ 34-41. Rather, they simply assert that the Due Process and Equal Protection Clauses grant them a right to marry. That assertion was squarely presented and rejected in *Baker*.

B. Baker Remains Binding Despite Plaintiffs' Purported "Doctrinal Developments," and Forecloses Plaintiffs' Claims.

Plaintiffs rely on language from the Eleventh Circuit's decision in *Bowers v. Hardwick*, which was subsequently reversed by the Supreme Court. Opp. at 15-16. 19-20. That reversal renders *Bowers* no longer binding. The Eleventh Circuit has explained in the context of the prior panel precedent rule that, "[f]or any part of a decision to be binding under the prior panel precedent rule, the decision must not have been vacated or reversed by the Supreme Court--it must have survived the

possibility of Supreme Court review." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1333 n.7 (11th Cir. 1999).[2]

In reversing the Eleventh Circuit, the Supreme Court explicitly noted that the Eleventh Circuit's analysis of summary affirmance law had been challenged but declined to decide the issue. "Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in [a previous case]. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in [the previous summary affirmance]." *Bowers v. Hardwick*, 478 U.S. 186, 189 n.4 (1986). This disposition by the Supreme Court rendered the Eleventh Circuit's statements in *Bowers* no longer controlling.

Plaintiffs' discussion of doctrinal developments[3] does not rebut the State's argument that the Eleventh Circuit has interpreted *Romer* and *Lawrence* narrowly

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[2] Although the prior panel precedent rule is generally framed in terms focusing on its application to subsequent panels of the Eleventh Circuit, judges in this district have applied it to determine the extent to which a previous decision of the Eleventh Circuit is binding on district courts. *See*, *e.g.*, *Bloodworth v. Colvin*, 2014 U.S. Dist. LEXIS 60386, at *7 n.3 (N.D. Ga. Jan. 15, 2014*); Insituform Techs., Inc. v. AMerik Supplies, Inc.*, 850 F. Supp. 2d 1336, 1360 (N.D. Ga. 2012); *Jan R. Smith Constr. Co. v. DeKalb County*, 18 F. Supp. 2d 1365, 1373 (N.D. Ga. 1998).

[3] Plaintiffs wrongly dismiss the State's argument that subsequent Supreme Court decisions have made clear that lower courts are to follow Supreme Court precedent until the Court informs them otherwise, regardless of lesser doctrinal developments. Opp. at 20 n.5 (arguing subsequent cases irrelevant because they were opinions on the merits, not summary dismissals). Plaintiffs note that the 10th Circuit also rejected this argument on that basis. *Id*. (citing *Kitchen v. Herbert*,

and *Windsor* by its own terms had no bearing on the state definition of marriage. Plaintiffs suggest that Justice Scalia's dissent in *Lawrence* is incompatible with the Eleventh Circuit's reading of *Romer* and *Lawrence*, but that is not an argument this Court can entertain. "Under the prior precedent rule, [courts] are bound to follow a prior binding precedent unless and until it is overruled by [the Eleventh Circuit] *en banc* or by the Supreme Court." *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (citations and quotations omitted). And *Windsor* by its terms did not relate to the state definition of marriage. As Justice Kennedy made explicit in the majority opinion, *Windsor* applied only where a state had determined to permit same-sex marriage and the federal government refused to defer to the traditional state prerogative to define marriage: "[t]his opinion and its holding are confined to those lawful marriages." *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013). None of these cases constitute doctrinal development sufficient to disregard *Baker*.

Plaintiffs also rely heavily on *Loving v. Virginia*. *See*, *e.g.*, Opp. at 10, 11, 23, 25, 26, 27, 38. *Loving*, of course, predated *Baker*, and the appellants in *Baker* relied heavily on it; indeed, they cited *Loving* on all but one page of their argument

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755 F.3d 1193, 1232 (10th Cir. 2014). But their citation is actually to the dissent's discussion of the majority opinion; the dissent, on the very page cited, explains why *Rodriguez* and *Agostini* apply to summary dispositions: The argument of the majority (and Plaintiffs here) "is just another way of stating that a summary disposition is not a merits disposition, which is patently incorrect." *Kitchen*, 755 F.3d at 1232.

section. *See* Exhibit A to Defendants' Motion to Dismiss at 11-16, 18-19. The Supreme Court concluded that these *Loving*-based arguments did not even present a substantial federal question, and, as the State has explained at length, that conclusion is still binding on this Court.

In their supplemental filing, Plaintiffs also make much of the Supreme Court's recent denial of certiorari in cases in which three circuits held that the Constitution does afford same-sex couples the right to marry. But the denial of certiorari is not relevant here at all: "For at least eight decades the Supreme Court has instructed us, time and again, over and over, that the denial of certiorari does not in any way or to any extent reflect or imply any view on the merits." *Powell v. Barrett*, 541 F.3d 1298, 1313 n.5 (11th Cir. 2008) (*en banc*).

Finally, and subsequent to Plaintiffs' most recent filing, the United States District Court for the District of Puerto Rico upheld Puerto Rico's marriage definition against a Due Process and Equal Protection challenge on the grounds that Defendants assert here: *Baker* still binds lower courts until and unless the Supreme Court says otherwise, and nothing in *Romer*, *Lawrence*, or *Windsor* allows a district court to disregard it. *See Conde-Vidal, et al., v. Garcia-Padilla, et al.*, No. 3:14-cv-01253 (D.P.R. Oct. 21, 2014) (attached as Exhibit A to Defendants' Reply Brief).

II. Plaintiffs' Claims Fail As A Matter Of Law Even If *Baker* Does Not Control.

Despite Plaintiffs' rhetoric and appeal to the inevitability of history, this is at bottom a simple case. If the Equal Protection Clause or Due Process Clause confer on same-sex couples an unqualified right to marry, the challenged state statute and constitutional provision are unconstitutional. And conversely, the challenged provisions must be upheld if the Clauses do not confer such a right. They do not, and this Court should dismiss Plaintiffs' challenge.

Plaintiffs assert that courts did not wait on the democratic process before protecting women and racial minorities. Opp. at 9. Plaintiffs forget the 13th, 14th, 15th, 19th, and 24th amendments. These amendments were products of the democratic process directly designed to address those injustices, and the court decisions to which Plaintiffs presumably allude enforced these amendments. But Plaintiffs here ask this Court to do something quite different: presume the 14th Amendment codifies Plaintiffs' vision of the law (and assumptions about what the U.S. Supreme Court is likely to do in the future) and therefore wield that Amendment as a sword to cut off vigorous debate on one of the most hotly contested subjects in our democratic system. As the Eleventh Circuit has observed,

> The focus on the trajectory of contemporary practice ultimately proves too much. The fact that there is an emerging consensus scarcely provides justification for the courts, who often serve as an

> antimajoritarian seawall, to be swept up with the tide of popular culture. If anything, it is added reason for us to permit the democratic process to take its course.

Williams v. AG of Ala., 378 F.3d 1232, 1244 n.14 (11th Cir. 2004).

A. Plaintiffs have Failed to State a Plausible Due Process Claim.

1. *Glucksburg* precludes finding a fundamental right, and thus the rational basis test applies.

Plaintiffs assert that the *Glucksberg* analysis doesn't apply to claims seeking to extend an established fundamental right beyond its previously recognized scope. Opp. at 26-27. Plaintiffs are wrong; at least in the Eleventh Circuit, it does:

> First, in analyzing a request for recognition of a new fundamental right, ***or extension of an existing one***, we must begin with a careful description of the asserted right. Second, and most critically, we must determine whether this asserted right, carefully described, 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."

Williams, 378 F.3d at 1239 (citations and quotations omitted) (emphasis added).

Moreover, the Eleventh Circuit has applied this rule elsewhere in cases seeking to extend an established fundamental right. "A parent's due process right in the care, custody, and control of her children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court," but the Eleventh Circuit applied *Glucksberg*'s fundamental rights analysis to conclude that the right

didn't extend to a parent seeking to exercise them as to her adult child. *See Robertson v. Hecksel*, 420 F.3d 1254, 1257 (11th Cir. 2005).

The right to marry is, of course, a fundamental right. But that right has never previously been understood as extending to same-sex couples. Before a court in this Circuit can extend that right as Plaintiffs request, it must apply the *Glucksburg* analysis. Plaintiffs do not allege or argue that they can survive that analysis, because they cannot.

2. The challenged laws easily clear the rational basis hurdle.

Plaintiffs reject the State's asserted list of interests on the basis that they are matters outside the complaint that cannot be considered on a motion to dismiss, and thus this Court must take as true Plaintiffs' allegation that the State lacks any legitimate interest in the challenged laws. Opp. at 21-23. But Plaintiffs are wrong; the State need not present facts or evidence to support its interests on rational basis review, and Plaintiffs' allegation that the State lacks legitimate interests in the challenged laws are conclusions of law this Court should disregard. On rational basis review, courts can and do consider possible state interests at the motion to dismiss stage. *See*, *e.g.*, *Doe v. Moore*, 410 F.3d 1337, 1345-46 & 1350 (11th Cir. 2005) (affirming grant of motion to dismiss and concluding rational basis was satisfied based on state interests asserted in state's brief). Moreover, "a state has no obligation to produce evidence to sustain the rationality of a statutory

classification. Rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Lofton*, 358 F.3d at 818 (citations and quotations omitted).

a. It is rational for the State to exercise caution before redefining marriage in an unprecedented manner.

Plaintiffs and the State agree on a fundamental principle: the vital importance of marriage and the role it plays in our society. Plaintiffs believe that importance bolsters their claim of access to marriage. The State, on the other hand, believes that the importance of marriage and the critical role it plays in our society demands caution before expanding its scope beyond the definition 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). The Eleventh Circuit has held that similar caution satisfied the rational basis test in the adoption context: "Nor is it irrational for the legislature to proceed with deliberate caution before placing adoptive children in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries." *Lofton*, 358 F.3d at 826. For the same reason, the challenged laws are rationally related to this legitimate state interest. Plaintiffs do not respond to this particular interest.

b. *Windsor* did not reject the State's other asserted interests.

Plaintiffs incorrectly argue *Windsor* rejected the State's other family- and parenting-related interests. Opp. at 28. What the Court actually did in *Windsor* was conclude that marriage regulation is a decision for the states to make, and that the federal government did not have a legitimate purpose to second-guess those state decisions. *Windsor*, 133 S. Ct. at 2696. That conclusion, of course, cuts the other way here.

Plaintiffs are also wrong to suggest that the *Windsor* Court even addressed these interests. It did not; instead, it considered (and rejected) only one asserted interest: "[t]he stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Id*. at 2693; *see also id*. (citing House Report asserting that DOMA "expresses both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality") (quotations omitted). The State has not asserted that interest here, and *Windsor* did not address anything else.

B. Plaintiffs have Failed to State a Plausible Equal Protection Claim.

1. The challenged laws are not impermissible classifications on the basis of sexual orientation.

Plaintiffs argue that sexual orientation is a suspect classification. Opp. at 30-33. Binding Eleventh Circuit precedent holds otherwise. *See Lofton*, 358 F.3d at 818. Plaintiffs urge this Court to disregard *Lofton* because (1) it is ten years old, (2) other circuits have since concluded that heightened scrutiny is appropriate for classifications based on sexual orientation, and (3) the Eleventh Circuit's analysis of the issue in *Lofton* was incomplete. Opp. at 32-33. None of these arguments provide a permissible basis for this Court (or, indeed, a three-judge panel of the Eleventh Circuit) to disregard the on-point holding of *Lofton*. Courts in the Eleventh Circuit "are bound to follow a prior binding precedent [of the Eleventh Circuit] unless and until it is overruled by [that] court *en banc* or by the Supreme Court." *Vega-Castillo*, 540 F.3d at 1236 (citations and quotations omitted).

Because of this, the rational basis test applies, and as explained above, the challenged laws pass that test.

2. The challenged laws are not impermissible classifications on the basis of sex.

As explained in the State's opening brief, the challenged laws do not discriminate on the basis of sex; they apply equally to men and women. Even the majority of courts striking down laws similar to those challenged here agree; of the

cases Plaintiffs cite, only one post-dates *Windsor*. Opp. at 36 n.10. And although that decision (by a Utah district court) was affirmed by the Tenth Circuit, the Tenth Circuit did not affirm on that basis. If Plaintiffs' claims do not succeed under due process or as a classification on the basis of sexual orientation, they cannot succeed on this basis, either.

III. CONCLUSION

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

Respectfully submitted this 22nd day of October, 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 22nd day of October, 2014.

s/Devon Orland 554301

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all CM/ECF participants of record, including the following:

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