UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, *et al,*

Plaintiffs,

v

RICHARD SNYDER, *et al*

Defendants.

Civil Action No. 12-cv-10285

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STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLANTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2004, a majority of the people of the State of Michigan chose to adopt the Michigan Marriage Amendment. Additionally, the people's representatives elected to limit joint adoptions under the Michigan Adoption Code. Those choices were not an attack on the gay and lesbian community, but rather a reaffirmation of the traditional definition of marriage as being between a man and a woman and a decision by the State to promote the optimal family structure for childrearing. To suggest otherwise is to paint the majority of the people of this State as bigots, which is both unfounded and inaccurate.

In this lawsuit, State Defendants seek to uphold the laws of this State and the will of its people—nothing more, nothing less. And those laws do not violate Plaintiffs' constitutional rights, notwithstanding Plaintiffs' disagreement with them or any change in the public's opinion of same-sex relationships that *may* have occurred since 2004.

Indeed, if, as some contend, a change in public opinion has occurred, that does not in and of itself make Michigan's Marriage Amendment or its Adoption Code unconstitutional. At best, it would make them misaligned with public opinion, and there is an appropriate forum for remedying that—the democratic process—not this Court.

Quite simply, Plaintiffs have chosen the wrong forum to effectuate the result they seek. It would be inappropriate for this Court to impose its will on the people of the State of Michigan. Short of a constitutional violation, which Plaintiffs fail to establish, this Court—indeed, no court—should usurp the State's sovereign authority to govern domestic relations. Rather, the people of the State of Michigan should be allowed to decide how they want to define marriage and who should be allowed to adopt children when and if those questions are posed to them in 2016.

ARGUMENT

I. This Court should deny Plaintiffs' motion for summary judgment because they have not—and cannot—establish that either the Michigan Marriage Amendment or Michigan's Adoption Code violate their constitutional rights.

Post *Windsor*, it is clear that Michigan has exclusive authority to govern domestic relations, and that authority should not be disrupted short of constitutional violations. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citation omitted)("[S]ubject to [constitutional] guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the

States.'"); *McLaughlin v. Cotner*, 193 F.3d 410, 412-413 (6th Cir. 1999). Here, because no fundamental right is implicated, because Plaintiffs are not part of a suspect class, and because Michigan has articulated multiple legitimate interests that are furthered by—and are thus rationally related to—both the Michigan Marriage Amendment Act and its Adoption Code, Plaintiffs have failed to establish any constitutional violation. Their claims thus should be dismissed.

A. Plaintiffs' constitutional challenge to the Michigan Marriage Amendment fails under *Baker v. Nelson.*

Again, Plaintiffs' constitutional claims against the Michigan Marriage Amendment are foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1972). (*See* State Defendants' Brief in Support of Motion for Summary Judgment, Doc. # 69-1, pp. 10-11; *see also Amicus Curiae* Brief of the Michigan Catholic Conference, Doc. # 70-1, pp. 15-17). Notably, Plaintiffs do not even address *Baker*, in their motion for summary judgment; likely because they have no response to the fact it is binding, dispositive precedent that forecloses their claims. Rather, Plaintiffs refer this Court to other cases—*Romer v. Evans*, 517 U.S. 620 (1996) (involving a withdrawal of existing rights); *Lawrence v. Texas*, 539 U.S. 558 (2003) (addressing the criminalizing of consensual sex, not same-

sex marriage)—that are clearly distinguishable from the instant action. (*See* State Defendants' Reply Brief, Doc. 48, pp. 10-12.) This Court cannot simply disregard *Baker* in favor of *Romer* and *Lawrence*. Accordingly, Plaintiffs' claims against the Michigan Marriage Amendment must be dismissed.

B. Rational basis is the level of scrutiny that must be applied to Plaintiffs' claims—Plaintiffs' arguments to the contrary directly contravene binding precedent.

Even if *Baker* were not dispositive of Plaintiffs' constitutional challenge to the Michigan Marriage Amendment, rational basis is the appropriate level of scrutiny to be applied to their claims. *Davis v. Prison Health Serv.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). In asking this Court to apply a heightened level of scrutiny, Plaintiffs once again confuse what the law *is* with what they *want the law to be*. There is no fundamental right to same-sex marriage,[1] and binding Sixth

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[1] Same-sex marriage is not firmly rooted in this nation's history. (*See* State Defendants' Brief in Support of Motion for Summary Judgment, Doc. #69-1, pp. 12-15, as well as *Amicus Curiae* Brief of the Michigan Catholic Conference, Doc. # 70-1, p.18, n 5.) Further, Defendant Brown's reliance an "intimate association" to support a constitutional violation is misplaced here for two reasons. First, the cases Brown refers this Court to have nothing to do with same-sex marriage.

Circuit precedent dictates that sexual orientation is not a suspect classification. *Davis*, 679 F.3d at 438; *Scarbrough,* 470 F.3d at 261. Therefore, rational-basis review applies to Plaintiffs' claims.

C. The Michigan Marriage Amendment satisfies rational-basis review.

Under rational-basis review, a court does not judge the perceived wisdom or fairness of a law, but asks *only* whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The question of rationality is a matter of law for which a state need not provide evidence but may rely on rational speculation alone. *Heller*, 509 U.S. at 320. In the summary-judgment context, if the facts determining a question that is subject only to rational-basis review are "at least debatable," the State is entitled to summary judgment. *See Jackson v.*

Second, the State is not impeding Plaintiffs from "intimately associating" with one another. Indeed, Plaintiffs have been involved in an intimate relationship for several years before this suit was filed and will likely to continue on long after it is decided. *See Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 at * 35-39 (E.D. Mich. 2013), attached as Exhibit 1.

Abercrombie, 884 F. Supp. 2d 1065, 1072, 1115-1116 (D. Haw. 2012) (citing *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979)).

Given this standard, State Defendants are entitled to summary judgment for the following reason: an opposite-sex definition of marriage furthers State interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry. Plaintiffs and Defendant Brown wholly miss this fundamental point.

1. Responsible procreation and childrearing are well-recognized as legitimate State interests served by marriage.

One of the paramount purposes of marriage in Michigan—and at least 37 other states that define marriage as a union between a man and a woman—is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. The understanding of marriage as a union of man and woman, uniquely involving the rearing of children born of their union, is age-old, universal, and enduring. As illustrated by a plethora of research, social

scientists have consistently recognized the essential connection between marriage and responsible procreation and childrearing.[2]

Before 2004, when the Massachusetts courts decided to redefine marriage to include same-sex relationships, it was commonly understood that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. Undoubtedly, that is why the Supreme Court has long recognized marriage as "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1997).

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[2]Bradford Wilcox, *et al*., eds., *Why Marriage Matters* 15 (2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."); James Q. Wilson, *The Marriage Problem 41* (2002)("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the more desire for children, and the sex that makes children possible, does not solve."); Gladys Robina Quale, *A History of Marriage Systems* (1988) ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); Bronislaw Malinowski, *Sex, Culture, and Myth 11* (1962)("[T]he institution of marriage is primarily determined by the needs of offspring, by the dependence of the children upon their parents."); Joel Prentiss Bishop, *Commentaries on the Law of Marriage & Divorce* § 39 (1st ed. 1852) ("The husband is under obligation to support his wife; so is he to support his children. . . . The relation of parent and child equally with that of husband and wife, from which the former relations proceeds, is a civil status.").

Through marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and fathers who conceived them. *What is Marriage*?, Harv. J. L. & Pub. Pol'y, Vol. 34, No. 1, Winter 2010. That is what is meant by the phrase "responsible procreation and childrearing." Sociologist Kingsley Davis explained it this way:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. . . . . By identifying children with their [biological] parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning & Significance of Marriage in Contemporary Society 7-8, in Contemporary Marriage: Comparative Perspectives on a Changing Institution (Kingsley Davis, ed. 1985).

Likewise, Robert P. George pondered in *What is Marriage?*, if "human beings reproduced asexually and . . . human offspring were self-sufficient [,] . . . would any culture have developed an institution anything like what we know as marriage? It seems clear that the answer is no." Robert P. George, *et al., What is Marriage?* 34 Harv. J. L. & Pub. Pol'y 245, 286-7 (Winter 2010). Accordingly, it should not be surprising that federal and state courts have, *en masse*, agreed that

responsible procreation and childrearing are well-recognized as legitimate state interests served by marriage.[3]

In seeking to foster the optimal setting in which to raise children, it is rational to define marriage based on the relationship – one man and one woman – out of which children are ordinarily born. In traditional marriage, there is then both a mother and a father to serve as role models for the children, and the potential for the children to be the offspring of the married couple. Every child has a mother and a father.

Both procreation and ensuring the well-being of children, in and of themselves, are widely accepted as legitimate rationales for the State's

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[3]*See, e.g., Jackson*, 884 F. Supp. 2d at 1113; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015-1016 (D. Nev. 2012); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867, 868 (8th Cir. 2006); *Smelt v. County of Orange*, 374 F. Supp.2d 861, 880 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298,1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004); *Standhardt v. Super. Court*, 77 P.3d 451, 461-62 (Ariz. Ct. App. 2003); *Baehr v. Lewin*, 852 P.2d 44, 55-56 (Haw. 1993); *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. App. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *Conaway v. Deane*, 401 Md. 219, 300-01 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 312-13 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1, 21 (N.Y. 2006); *Matter of Cooper*, 187 A.D.2d 128, 133 (N.Y. App. Div. 1993); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 674-75 (Tx. Ct. App. 2010); *Anderson v. King County*, 138 P.3d 963, 985, 990 (Wash. 2006);*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

recognition of, and providing unique benefits to, opposite-sex relationships. Indeed, it was this State's desire to promote procreation in a manner to encourage stable families that motivated the passage of Michigan's Marriage Amendment.

2. The Michigan Marriage Amendment is not motivated by animus for same-sex couples.

Plaintiffs, Defendant Brown, and their supporting *amici curiae* now allege that Michigan's decision to adhere to the traditional definition of marriage is a result of discriminatory animus based on "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." (*See* Defendant Brown's Brief in Support of Summary Judgment for Plaintiffs, Doc. # 68, pp. 23, 25 and Plaintiffs' Brief in Support of Motion for Summary Judgment, Doc. # 67, p. 21.) Along these same lines, Defendant Brown further insists that the amendment reflects a "bare desire to harm a politically unpopular group," for no other reason than "to further discriminate against, disempower, and disadvantage homosexuals in the State of Michigan." Simply put, these allegations are untrue and unfounded, making unfair assumptions about the 59% of the Michigan electorate (including

319,948 of Oakland County residents) who voted to define marriage as the union of one man and one woman.[4]

As pointed out in *Bruning*, 455 F.3d 859, in a multi-tiered democracy, it is inevitable that interest groups will strive to make it more difficult for competing interest groups to achieve contrary legislative objectives. This can be done by having the electorate adopt a constitutional amendment barring future legislation. While it is certainly true that both the *supporters* of retention of the traditional definition of marriage and *opponents*, who ask this Court to change the definition, have deeply felt moral beliefs, the constitutionality of Michigan's Marriage Amendment does not turn on the beliefs or passions of its supporters or opponents. It turns, rather, on whether it is rationally related to legitimate government interests. *See Beach Commc'ns,* 508 U.S. at 315.

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[4] Michigan Department of State, Election Results, General Election, November 2, 2004, State Proposal 04-2: Constitutional Amendment: recognition of "marriage," http://miboecfr.nicusa.com/election/results/04GEN/90000002.html.

3. Because the Michigan Marriage Amendment is rationally related to legitimate State interests, the assertions of animus fail.

Because the Michigan Marriage Amendment advances several legitimate, compelling government interests as discussed above, judicial "inquiry is at an end." *United States R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 179 (1980). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*, 508 U.S. at 315 (quotation marks omitted). It is only when a law is "unrelated to the achievement of any combination of legitimate purposes" that courts will find "that [a lawmaker's] actions were irrational." *Vance*, 440 U.S. at 97.

Courts do not, however, perform an independent, stand-alone inquiry into the motivations of a law's supporters to determine its rationality. While "biases" such as "negative attitudes or fear . . . may often accompany irrational . . . discrimination, their presence *alone* does not a constitutional violation make." *Bd. of Trustees v. Garrett,* 531 U.S. 356, 367 (2001) (emphasis added). A law "will not be found unconstitutional on the basis that it was motivated by animus unless it . . . lacks any rational relationship to a legitimate governmental

purpose." *Anderson*, 138 P.3d at 985, 981. Neither Plaintiffs, Defendant Brown, nor their supporting *amici* can meet this burden of proof.

And while Defendant Brown cites *Romer* in support of her contention this State's legislature was motivated by discriminatory animus, *Romer* only reinforces these well-established principles. In *Romer*, the Court recounted that, under rational-basis review, a "legislative classification [will be upheld] so long as it bears a rational relation to some legitimate end." *Romer,* 517 U.S. at 631 (citing *Heller,* 509 U.S. at 319-20). The *Romer* Court also explained that the device courts use to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law" is to insist that "the classification bear a rational relationship to an independent and legitimate legislative end." *Id.* at 633. The Court struck down Colorado's Amendment 2 because the law did not serve "any identifiable legitimate purpose or discrete objective." In doing so, the Court did not perform a wide-ranging inquiry into the statements, beliefs, or motives of Colorado's voters and legislators. Its conclusion that Amendment 2 reflected animosity toward gays and lesbians *followed* from its finding

that the law failed "conventional and venerable" rational-basis scrutiny." *Id.* at 634-35.

Michigan's Marriage Amendment is completely different from Colorado's Amendment 2 in *Romer*. The Michigan Marriage Amendment *is not* "unprecedented in our jurisprudence," or contrary to "our constitutional tradition." *Id.* Instead, the amendment reaffirmed the traditional definition of marriage as it has existed throughout this State's history. Also unlike Amendment 2, the Michigan Marriage Amendment neither "imposes a broad and undifferentiated disability" on gays and lesbians nor "denies them protection across the board." *Id.* at 632, 633. And finally, unlike Amendment 2, the Michigan Marriage Amendment does not single out gays and lesbians for unique disabilities. Again, it simply reaffirms the definition of marriage as the union of a man and a woman, the form it has traditionally taken.

Thus, Defendant Brown's reliance on *Romer* to claim that Michigan voters and legislative body were motivated by animus is misplaced. The marriage amendment has not eliminated or stripped same-sex couples of any fundamental constitutional right.

Similarly, Defendant Brown's reliance on *Windsor* is equally misplaced. In an effort to validate Plaintiffs' and her arguments of

animus, she broadens the *Windsor* holding to what it was not.[5] *Windsor* did not hold that the definition of marriage as the union between one man and one woman is unconstitutional. *Windsor* held that the definition of marriage is regulated by each state. *Windsor*, 133 S. Ct. at 2689–90.

4. Support for traditional marriage is not a mark of bigotry.

Until a few decades ago, it was accepted that marriages could only be between participants of opposite sex. A court should not lightly conclude that "everyone who held this belief was irrational, ignorant or bigoted." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

Michigan's Marriage Amendment is not "inexplicable by anything but *animus*" towards homosexuals. *Romer,* 517 U.S. at 632. "[P]reserving the traditional institution of marriage" is a "legitimate state interest." *Lawrence,* 539 U.S. at 585 (O'Connor, J., concurring). And contrary to Plaintiffs' and Defendant Brown's arguments

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[5] Likewise, Plaintiffs' claim that § 3 of the Defense of Marriage Act (DOMA) is identical to the Michigan Marriage Amendment is just plain wrong. Section 3 of DOMA, stripped same-sex couples of their State-recognized marriages for purposes of federal law. Conversely, Michigan's Marriage Amendment takes nothing away from same-sex couples; it merely reaffirms the traditional definition of marriage.

otherwise, many legislators and voters who supported the constitutional amendment could have reasonably "acted from a variety of motives," including the "central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries." *See Massachusetts v. United States Dep't of HHS*, 682 F.3d 1, 11 (1st Cir. 2012).

"Preserving th[e] institution [of traditional marriage] is not the same as mere moral disapproval of an excluded group, ..." *Id.* Justice O'Connor explained, in her concurrence in *Lawrence*, that "[u]nlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). In light of the history of marriage, as well as the purpose it serves, it is simplistic and unfair to equate moral support for marriage with the moral judgments at issue in *Lawrence v. Texas,* 539 U.S. at 585. *See, e.g., Hernandez,* 855 N.E.2d at 7. It should be obvious that there are other grounds for supporting the traditional institution of marriage that have *nothing* to do with disapproval of homosexual conduct.

It is clear that the definition of marriage invokes the deeply held moral views of many people—on both sides of the issue. But it is

equally clear that advocating for the traditional definition of marriage does not somehow impugn the legitimacy of the other vital interests supporting that definition. It does not mean that the advocate is a bigot or homophobic. Indeed, by proceeding incrementally, Michigan has allowed the earnest and profound debate to continue in the democratic arena—where the debate belongs—on whether the definition of marriage should change.

D. The Michigan Adoption Code is rationally related to legitimate State interests.

Under rational-basis review, when social legislation is at issue, the Equal Protection Clause allows states wide latitude, and the Constitution presumes that the democratic process will provide an adequate resolution of such issues. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The legislature is not required to choose between addressing all aspects of a situation or none of them, so long as the choice made by that legislature is rational. *Heller*, 509 U.S. at 320-21.

Here, the Michigan legislature rationally determined that the best interests of children *and* the interests of familial stability would be promoted by limiting adoptions to situations in which: (1) the adopting

parents are able to provide the adoptee with the optimal family structure, *i.e.,* families with married mothers and fathers, (2) the adopting married parent is similarly able to provide the adoptee with a dual-gender parenting environment, or (3) the adopting single parent has a greater probability of providing their adoptee with the optimal family structure. *See* Lynn Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 Ave Maria L. Rev. 561, 615 (2005).

Determining whether this legislative decision is in keeping with the changing social mores of the public at large is the role of the democratic process and not the courts. *Cleburne*, 473 U.S. at 440. "Even if [a] classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is . . . the rule that . . . perfection is by no means required." *Vance*, 440 U.S. at 108. A state is not required to produce evidence to sustain the rationality of a statutory classification and courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 320-21.

To be sure, Michigan has a legitimate interest in regulating who may and may not jointly adopt. Adoption is a statutory privilege. It is wholly a creature of the State. *In re Adams*, 189 Mich. App. 540, 542;

473 N.W.2d 712 (1991). And Michigan has articulated legitimate State interests served by its adoption law: promoting the best interest of children, family stability, avoiding untenable multiple party adoptions, and optimal family structure.

While Plaintiffs are quick to explain that there is a strong consensus among social welfare and other health communities that children in same-sex homes do just as well as those raised in opposite-sex homes, as previously stated, the social science, medical and psychological research is not settled.[6]

Further, Plaintiffs' claim that the Michigan Adoption Code is irrational because it allows unmarried couples, including gay and lesbian couples, to be foster parents and legal guardians is without

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[6] *See* Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752 (2012); Lorens Marks, *Same sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, Soc. Sci. Research Network (October 3, 2011); Lynn Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 Ave Maria L. Rev. 561, 615 (2005); Kristin Anderson Moore, *et al., Marriage From a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief (June 2002); Mary Parke, *Are Married Parents Really Better for Children?*, Center for Law and Social Policy, Policy Brief (May 2003). See also *Amicus Curiae* Brief of the Michigan Family Forum Doc. # 71-1, pp. 11-25.

merit. As an initial matter, the fact that Michigan law allows same-sex couples to serve as foster parents does not address whether the same care-givers may later serve as adoptive parents. In specific, Michigan law allows others to serve in this role who are not able to marry, *e.g.,* a brother and a sister may serve as foster parents, and the State will also license three persons in the same household to register as foster parents. Under Michigan law, neither a foster parent nor a legal guardian could have a justifiable expectation of a permanent relationship with his or her foster child or child placed in a legal guardianship free from state oversight or intervention. *See, Lofton v. Sec'y of the Dep't of Children & Family Serv.*, 358 F.3d 804, 814 (11th Cir. 2004). Under Michigan law, foster care is designed to be a court-ordered short-term substitute care for children placed away from their parents. *See* Mich. Comp. Laws 400.115f(l); Mich. Comp. Laws 712A.13a(1)(e); Mich. Comp. Laws 722.131(b); Mich. Comp. Laws 722.922(n); Mich. Comp. Laws 722.952(j); and Mich. Comp. Laws 722.981(2)(e). Similarly, legal guardians in Michigan are subject to ongoing oversight, including the duty to file annual guardianship reports and annual review by the appointing court, and they can be removed for a wide variety of reasons. Mich. Comp. Laws 700.5201 *et.*

seq. In both cases, the State is not interfering with natural family units that exist independent of its power, but is regulating ones created by it.

There is no precedent for Plaintiffs' suggestion that substitute care arrangements, such as foster care and guardianships, are entitled to constitutional protection akin to that accorded to natural and adoptive families. *Lofton,* 358 F.3d 804. As licensed foster parents, Plaintiffs entered into contracts to establish a foster home with an understanding that these relationships would be subject to State oversight and would be permitted to continue only with State approval; the same with guardianships. Consequently, neither a foster parent nor a legal guardian could have a justifiable expectation of permanency in their relationships. *Lofton,* 358 F.3d at 814. Nor could they, or any other single couple for that matter, have reasonably developed expectations that they would be allowed to jointly adopt, in light of the Michigan adoption provisions.

In an attempt to bolster their position, Plaintiffs point out that Michigan has "throngs of unwanted children . . . in foster care" and "the State should be so fortunate to have" multiple people attempting to jointly adopt these children. (*See* Plaintiffs' Brief in Support of Motion for Summary Judgment, Doc. # 67, p. 31.) State Defendants refer this

Court to *Lofton*, 358 F.3d at 823, which addressed and rejected this very same argument:

> We do not agree that the statute does not further the state's interest in promoting nuclear-family adoption because it may delay the adoption of some children. Appellants misconstrue Florida's interest, which is not simply to place children in a permanent home as quickly as possible, but, when placing them, to do so in an optimal home, *i.e.*, one in which there is a heterosexual couple or the potential for one. According to Appellants' logic, every restriction on adoptive-parent candidates, such as income, in-state residency, and criminal record—none of which creates more available married couples—are likewise constitutionally suspect as long as Florida has a backlog of unadopted foster children. The best interests of children, however, are not automatically served by adoption into any available home merely because it is permanent.

This analysis equally applies to Plaintiffs' argument that multiple people should be allowed to jointly adopt because of the number of children in foster care.

Finally, Plaintiffs' assertion that they are not asking "this Court to grant petitions for second-parent adoptions," *see* Plaintiffs' Brief in Support of Motion for Summary Judgment, Doc. # 67, p. 31, is wrong. By seeking relief here, Plaintiffs *are* asking this Court to sit as a one-man legislature and rewrite Michigan's adoption law to permit second-parent adoptions. And Plaintiffs do so by fashioning their requested relief as being applicable only to them. To suggest that if this Court

were to grant Plaintiffs' request, the order would be limited solely to Plaintiffs is wrong. It would affect more than just the Plaintiffs here. And if this limitation in Michigan law regarding adoption is rejected, there will be then further challenges to Michigan's limits, including an effort to allow more than two persons to adopt. Such an order would also needlessly increase friction between our federal and state courts. *See Grand Trunk Western R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984) (citation omitted).

This Court should exercise great caution when asked to take sides in an ongoing public policy debate regarding domestic relations. *Lofton*, 358 F.3d at 827. It is the legislature that is "charged with formulating public policy." *Schall v. Martin*, 467 U.S. 253, 281 (1984). Accordingly, Plaintiffs' motion for summary judgment should be denied, and State Defendants' motion should be granted.

II. This Court is not the proper forum for the change that Plaintiffs seek.

Recent polling suggests that public opinion in Michigan may be shifting where same-sex relationships are concerned.[7] Perhaps, the

[7] *See* David Eggert, *Gay marriage vote may come to Michigan in 2016*, Detroit Free Press, June 8, 2013, available at MLive

people of the State of Michigan are now ready to support the changes that Plaintiffs yearn for.[8] But, to be clear, a shift in public opinion does not make the Michigan Marriage Amendment or the Adoption Code, as they stand today, unconstitutional. At best, it makes them out of alignment with public opinion, and there is an appropriate process for remedying that—the democratic process—not this Court. If Michigan's definition of marriage is to be changed, and if joint unmarried adoptions are to be authorized, both should be done by the people of the State of Michigan. It would be inappropriate for this Court—or any court—to usurp the State's authority to govern domestic relations and impose its will on the people of Michigan. Rather, the people of Michigan—either by a ballot initiative in 2016 or through their elected officials—should be allowed to decide whether marriage should be redefined to include

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http://www.mlive.com/politics/index.ssf/2013/06/gay_marriage_vote_may_come_to.html; *see also Same-sex marriage needs a new vote,* LANSING STATE JOURNAL, August 17, 2013, available at http://www.lansingstatejournal.com/article/20130818/OPINION01/308180073/Editorial-Same-sex-marriage-needs-new-vote?nclick_check=1\

[8] See pending legislation addressing second-parent adoptions, H.B. 4060 of 2013, S.B. 457 of 2013 and pending legislation addressing same-sex marriage, H.B. 4909 of 2013, H.B. 4910 of 2013, S.B. 405 of 2013 and S.B. 406 of 2013. http://www.legislature.mi.gov/(S(lg3brn55kx0es423uhq5yb45))/mileg.aspx?page=Bills.

same-sex relationships and whether unmarried persons should be allowed to jointly adopt a child.

CONCLUSION AND RELIEF REQUESTED

State Defendants respectfully request this Court deny Plaintiffs' Motion for Summary Judgment, grant its Motion for Summary Judgment, award State Defendants their attorneys' fees and costs, and grant further relief this Court deems just and equitable.

Respectfully submitted,

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Dated: September 9, 2013

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on September 9, 2013, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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