

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
THIRD DIVISION**

**M. KENDALL WRIGHT, et al**

**PLAINTIFFS**

**VS.**

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

**THE STATE OF ARKANSAS, et al**

**DEFENDANTS**

**MOTION TO DISMISS**

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

1. At the general election held on November 2, 2004, Arkansas voters approved a constitutional amendment by a vote of 753,770 (74.95%) for, to 251,914 (25.05%) against, *see* [www.sos.arkansas.gov/electionresults/index.php?elecid=66](http://www.sos.arkansas.gov/electionresults/index.php?elecid=66), which became Amendment 83 to the Arkansas Constitution. The Arkansas General Assembly had previously adopted Act 144 of 1997, codified at Ark. Code Ann. § 9-11-109, which declared that “[m]arriage shall only be between a man and a woman. A marriage between persons of the same sex is void.” *See also* Ark. Code Ann. § 9-11-107(b) (Arkansas recognition of certain foreign marriages “shall not apply to a marriage between persons of the same sex”). Act 144 is also codified at Ark. Code Ann. § 9-11-208. Plaintiffs, twenty gay and lesbian couples living in Arkansas and three children (“Plaintiffs”), challenge the constitutionality of Amendment 83 to the Constitution of Arkansas, and Arkansas Act 144 of 1997.

2. Plaintiffs contend that Amendment 83: violates their constitutionally protected rights to due process (Second Amended Complaint filed August 5, 2013 (“Complaint”), ¶¶ 218 – 222) and equal protection (*id.*, ¶¶ 223 – 227) under both the Arkansas and United States Constitutions; violates the Full Faith and Credit Clause of the United States Constitution (*id.*, ¶¶ 228 – 231); impairs the obligation of contracts in violation of the Arkansas Constitution and the United States Constitution (*id.*, ¶¶ 232 – 241); and causes irreparable injury to Plaintiffs (*id.*, ¶¶ 242 – 245). Plaintiffs request a declaration that Amendment 83 is unconstitutional, and a permanent injunction barring enforcement of Amendment 83. *Id.* Plaintiffs have also recently filed a separate motion in which they request a preliminary injunction.

3. The United States Supreme Court has cautioned restraint in the recognition of new substantive constitutional rights not anchored in the text of the federal Constitution, *see Washington v. Glucksberg*, 521 U.S. 702 (1997), urging lower courts to exercise the utmost care

“lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences” of a shifting court majority. *Id.* at 720. The Due Process Clause protects only those fundamental rights and liberties that are “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Id.* at 720-21. As discussed in detail in the Brief filed contemporaneously herewith, Plaintiffs’ challenges to Amendment 83 and Act 144 of 1997 fail under binding precedent of the United States Supreme Court and the Arkansas Supreme Court. Accordingly, the Complaint should be dismissed with prejudice for failure to state a claim upon which any relief can be granted.

4. Plaintiffs’ claims against the State of Arkansas are barred by the doctrine of sovereign immunity. The State of Arkansas should be dismissed as a party defendant.

5. Plaintiffs’ claims against the Governor of Arkansas and the Attorney General of Arkansas are barred by the doctrine of sovereign immunity. The Governor and the Attorney General are also not proper defendants, because they have no responsibility or authority to enforce Amendment 83 or Act 144 of 1997. This Court therefore lacks jurisdiction over the claims against the Governor and the Attorney General. The Governor and the Attorney General should be dismissed as party defendants.

6. Plaintiffs’ claims brought pursuant to the Arkansas Constitution are barred as a matter of law. As a matter of well-established Arkansas law, a constitutional provision cannot violate the Constitution. Where there is an inconsistency between an earlier provision of the Arkansas Constitution and a later amendment, the amendment, being the sovereign expression of the will of the people, prevails. The citizens of Arkansas have the authority to amend the state constitution, and the people did so by enacting Amendment 83. Plaintiffs’ state-law claims

should be dismissed, including Plaintiffs' claims that: Amendment 83 violates due process protected by the Arkansas Constitution (Complaint, ¶ 219); Amendment 83 denies equal protection protected by the Arkansas Constitution (*id.*, ¶ 224); Amendment 83 impairs obligation of contracts in violation of the Arkansas Constitution (*id.*, ¶¶ 232 – 241); and any other state-law claims raised by Plaintiffs. Plaintiffs' state-law challenges to Arkansas Act 146 of 1997, Ark. Code Ann. § 9-11-208, and Ark. Code Ann. § 9-11-107(b), likewise fail on the merits, because these laws are entirely consistent with, and explicitly authorized by, Amendment 83, which is a valid part of the Arkansas Constitution. Plaintiffs' claims under Arkansas law are entirely barred, *because of* Amendment 83 to the Arkansas Constitution. All of Plaintiffs' state-law claims should be dismissed accordingly.

7. Plaintiffs' federal due process and equal protection claims fail on the merits under established federal law. *See United States v. Windsor*, No. 12-1307, Slip Op. (U.S. June 26, 2013); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Plaintiffs' federal due process and equal protection claims should be dismissed accordingly.

8. Plaintiffs' claims pursuant to the Full Faith and Credit Clause of the United States Constitution fail on the merits under established federal law. A litigant may not bring a claim for violation of the Full Faith and Credit Clause against individual state actors, under 42 U.S.C. § 1983 or otherwise. The Full Faith and Credit Clause applies only to actions by courts. Plaintiffs' claims under the Full Faith and Credit Clause should be dismissed accordingly.

9. Plaintiffs' claims pursuant to the Contract Clause of the United States Constitution fail on the merits under established federal law. Courts have consistently held that the Contract Clause has no application to marriage contracts. States are free to enact legislation

regulating marriage without running afoul of the Contract Clause. Plaintiffs' claims under the Contract Clause should be dismissed accordingly.

10. The Complaint mentions in its factual allegations certain children of the Plaintiffs and it is possible that the Complaint intended to assert a substantive due process or other claim on behalf of those children. There is, however, no mention of the children in the portions of the Complaint addressing the Plaintiffs' claims for relief. *See* Complaint, ¶¶ 218-245. The Complaint does not allege sufficient facts, nor articulate any legal theory, to state a claim upon which any relief could be granted with respect to any child. Likewise, the Complaint does not allege sufficient facts, nor articulate any legal theory, to state a claim upon which relief could be granted to the partner of the biological parent of any child. Any potential claims by the child Plaintiffs and any potential claims by the partners of the biological parents of the child Plaintiffs should be dismissed for this reason alone.

11. Even including the factual allegations in Plaintiffs' separately filed motion for a preliminary injunction, Plaintiffs fail to state a claim upon which relief can be granted on behalf of the child Plaintiffs or on behalf of the partners of the biological parents of the child Plaintiffs. Amendment 83 and Arkansas marriage laws do not determine who may appear as a "parent" on an Arkansas birth certificate. Amendment 83 does not burden any constitutionally protected liberty interest of any child. Likewise, an adult who is not a biological parent of a child has no constitutionally protected liberty interest in the care and custody of the child. The claims of the child Plaintiffs and the partners of the biological parents of the child Plaintiffs should be dismissed accordingly.

12. Amendment 83 and Arkansas Act 144 of 1997 meet the rational-basis test. Amendment 83 and the Arkansas marriage laws therefore pass constitutional muster, and the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

13. In support of this Motion to Dismiss, the State relies upon the Brief being filed contemporaneously herewith.

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

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

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

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