

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MARCIE FISHER-BORNE, *et al.*,
Plaintiffs,

v.

JOHN W. SMITH, *et al.*, *Defendants*,

Case No.: 1:12-cv-00589

ELLEN W. GERBER, *et al.*, *Plaintiffs*,

v.

ROY COOPER, *et al.*, *Defendants*,

Case No.: 1:14-cv-00299

and

THOM TILLIS, North Carolina Speaker of
the House of Representatives and PHIL
BERGER, President Pro Tempore of the
North Carolina Senate,

Proposed Intervenor-Defendants.

**DEFENDANTS-INTERVENORS' ANSWER AND DEFENSES IN
GERBER, ET AL. V. COOPER, ET AL.**

Introduction

Proposed Intervenor-Defendants Thom Tillis, in his capacity as North Carolina Speaker of the House of Representatives, and Phil Berger, in his capacity as President Pro Tempore of the North Carolina Senate, on behalf of themselves, and their members and constituents (“Intervenors”), by and through counsel, and without waiving any motions or defenses, hereby answer Plaintiffs’ Complaint.

Many of the paragraphs in the complaint state conclusions of law, to which no response is required. Many others make factual allegations related to the Plaintiffs' relationships to other Plaintiffs or family members that are outside the scope of Intervenor's knowledge; as a result, they can neither be admitted nor denied by Intervenor and thus are deemed denied. Any other allegations not admitted are deemed denied.

Paragraphs 1-15

Intervenor admits that Plaintiffs have brought this action to challenge the constitutionality of North Carolina's adoption and marriage laws. To the extent these paragraphs state factual allegations, Intervenor lacks knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 1-15 are denied.

Paragraphs 16-17

These paragraphs contain conclusions of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 16-17 are denied.

Paragraph 18

This paragraph is a characterization of the Amended Complaint to which no response is, or may be, required. Other than as admitted, the allegation contained in paragraph 18 is denied.

Paragraphs 19-20

Intervenors admit that this action is brought under 42 U.S.C. § 1983. The remaining statements are conclusions of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 19-20 are denied.

Paragraph 21

Intervenors deny that this Court has subject-matter jurisdiction over this matter. Intervenors contend that this matter should be dismissed for want of substantial federal question. *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972). Other than as admitted, the allegation contained in paragraph 21 is denied.

Paragraphs 22-23

Admit.

Paragraphs 24-25

These paragraphs contain recitations or conclusions of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 24-25 are denied.

Paragraph 26-27

Intervenors admit that Article XIV, Section 6 of the North Carolina Constitution was amended on May 8, 2012. To the extent these paragraphs alleges a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraphs 26-27 are denied.

Paragraph 28

Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. Other than as admitted, the allegation contained in paragraph 28 is denied.

Paragraphs 29-30

These paragraphs contain recitations or conclusions of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 29-30 are denied.

Paragraphs 31-47

To the extent these paragraphs state factual allegations, Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 31-47 are denied.

Paragraphs 48-64

Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. Other than as admitted, the allegations contained in paragraphs 48-64 are denied.

Paragraphs 65-96

To the extent these paragraphs state factual allegations, Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response

is, or may be, required. Other than as admitted, the allegations contained in paragraphs 65-96 are denied.

Paragraphs 97-104

Intervenors contend that North Carolina's second parent adoption law advances a compelling state purpose. To the extent these paragraphs state factual allegations, Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 97-104 are denied.

Paragraphs 105-147

To the extent these paragraphs state factual allegations, Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 105-147 are denied.

Paragraphs 148-194

To the extent these paragraphs state factual allegations, Intervenors lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 148-194 are denied.

Paragraphs 195-210

To the extent these paragraphs describe the defendants and their respective legal duties and obligations, they are admitted. The remaining statements in these paragraphs are characterizations of the Amended Complaint to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 195-210 are denied.

Paragraphs 211-219

To the extent these paragraphs state factual allegations, Intervenor lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining paragraphs contain conclusions or recitations of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 211-219 are denied.

Paragraphs 220-227

Intervenor incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenor deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenor further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in *Bostic* was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court

determines that *Bostic* controls, Intervenor wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 220-227 are denied.

Paragraphs 228-234

Intervenor incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenor deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenor further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in *Bostic* was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court determines that *Bostic* controls, Intervenor wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order

by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 228-234 are denied.

Paragraphs 235-246

Intervenors incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenors deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenors further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in *Bostic* was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court determines that *Bostic* controls, Intervenors wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 235-246 are denied.

Paragraphs 247-258

Intervenors incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenors deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenors further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in *Bostic* was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court determines that *Bostic* controls, Intervenors wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 247-258 are denied.

Paragraphs 259-268

Intervenors incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenors deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenors further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)

addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in *Bostic* was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court determines that *Bostic* controls, Intervenor wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 259-268 are denied.

Paragraphs 269-275

Intervenor incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenor deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenor further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in

Bostic was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court determines that *Bostic* controls, Intervenors wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 269-275 are denied.

Paragraphs 276-282

Intervenors incorporate their responses to Paragraphs 1-219 as though fully set forth herein. Intervenors deny that Plaintiffs are entitled to the relief requested in these paragraphs. Intervenors further deny that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) addresses and resolves the issues raised by Plaintiffs' requested relief because (1) *Bostic* did not follow binding Supreme Court precedent, *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972); (2) *Bostic* inappropriately applied heightened or strict scrutiny to the challenged laws after unnecessary concessions made by the defendants; and (3) the outcome in *Bostic* was tainted by unnecessary factual concessions and omissions made by the defendants which were not made in this litigation. Moreover, even if this Court determines that *Bostic* controls, Intervenors wish to preserve the issues for reconsideration by the Fourth Circuit panel or *en banc* Court, or for consideration by the

Supreme Court, in light of a subsequent decision upholding a state marriage law, *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (D. La. Sept. 3, 2014), and a subsequent order by Justice Kennedy staying a Ninth Circuit decision invalidating Idaho's marriage law after subjecting it to strict scrutiny, *Otter v. Latta*, No. 14A37 (October 8, 2014) (Kennedy, J.). Other than as admitted, the allegations contained in paragraphs 276-282 are denied.

Paragraphs 283-290

Intervenors incorporate their responses to Paragraphs 1-282 as though fully set forth herein. Intervenors deny that Plaintiffs are entitled to any of the relief requested in these paragraphs. Other than as admitted, the allegations contained in paragraphs 283-290 are denied.

AFFIRMATIVE DEFENSE

**Federal Rule of Civil Procedure 12(b)(1)
Lack of Subject-matter Jurisdiction**

In *Baker v. Nelson*, the Supreme Court dismissed an appeal asking whether the Constitution forces a state to recognize same-gender marriage “for want of a substantial federal question.” 409 U.S. 810 (1972). That dismissal should foreclose the Plaintiffs’ claims.

Respectfully submitted, this the 10th day of October, 2014.

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** Notice of Special Appearance to be file*