

**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  
FISHER-BORNE, EL AL. V. SMTIH, 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’ First Amended 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 1-14

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 1-14 are denied.

Paragraphs 15-16

These paragraphs contain conclusions of law to which no response is, or may be, required. Other than as admitted, the allegations contained in paragraphs 15-16 are denied.

Paragraph 17

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 17 is denied.

Paragraphs 18-19

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 18-19 are denied.

Paragraph 20

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 20 is denied.

Paragraphs 21-22

Admit.

Paragraphs 23-55

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 23-55 are denied.

Paragraphs 56-63

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 56-63 are denied.

Paragraphs 64-65

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 64-65 are denied.

Paragraph 66-67

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 66-67 are denied.

Paragraph 68

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 68 is denied.

Paragraphs 69-70

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 69-70 are denied.

Paragraphs 71-88

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 71-88 are denied.

Paragraph 89

To the extent these paragraphs state factual allegations, Intervenor's lack knowledge or information sufficient to form a basis as to the truth of these allegations. The remaining statements are recitations or conclusions of law to which no response is, or may be, required. To the extent an answer may be required, Intervenor's deny that North Carolina's adoption and marriage laws are subject to heightened or strict scrutiny. Even if *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972) was not controlling in this matter, the challenged laws are, at most, subject to a rational basis test. *See, e.g., Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (applying "careful consideration" to the *federal* defense of marriage act because it was a classification "of an unusual character" in an area historically reserved to the States); *but see Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014) (applying strict scrutiny after concession by Virginia Attorney General on that point). Other than as admitted, the allegation contained in paragraph 89 is denied.

Paragraphs 90-104

Intervenor's 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 90-104 are denied.

Paragraphs 105-282

To the extent these paragraphs state factual allegations, Intervenor's 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 105-282 are denied.

Paragraphs 282-329

To the extent these paragraphs state factual allegations, Intervenor's 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 282-329 are denied.

Paragraphs 330-348

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 330-348 are denied.

Paragraphs 349-359

To the extent these paragraphs state factual allegations, Intervenor's 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 349-359 are denied.

#### Paragraphs 360-371

Intervenors incorporate their responses to Paragraphs 1-359 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 360-371 are denied.

### Paragraphs 372-381

Intervenors incorporate their responses to Paragraphs 1-359 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 372-381 are denied.

### Paragraphs 382-388

Intervenors incorporate their responses to Paragraphs 1-359 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* failed to apply 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 382-388 are denied.

#### Paragraphs 389-395

Intervenors incorporate their responses to Paragraphs 1-359 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* failed to apply 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 389-395 are denied.

#### Paragraphs 396-404

Intervenors incorporate their responses to Paragraphs 1-359 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* failed to apply 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 396-404 are denied.

#### Paragraphs 405-413

Intervenors incorporate their responses to Paragraphs 1-359 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* failed to apply 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 405-413 are denied.

#### Paragraphs 414-425

Intervenors incorporate their responses to Paragraphs 1-359 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* failed to apply 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 414-425 are denied.

### Paragraphs 426-432

Intervenors incorporate their responses to Paragraphs 1-359 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* failed to apply 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 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 426-432 are denied.

### Paragraphs 433-440

Intervenors incorporate their responses to Paragraphs 1-432 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 433-440 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.

/s/ Robert D. Potter, Jr.

Robert D. Potter, Jr.  
NC State Bar No. 17553  
Attorney at Law  
5821 Fairview Road, Suite 207  
Charlotte, NC 28209  
(704) 552-7742  
(704) 552-9287 Fax  
rdpotter@rdpotterlaw.com

Noel Johnson\*  
ACTRIGHT LEGAL FOUNDATION  
209 West Main Street  
Plainfield, IN 46168  
(317) 203-5599  
(888) 815-5641 Fax  
njohnson@actrightlegal.org

John C. Eastman\*  
CENTER FOR CONSTITUTIONAL  
JURISPRUDENCE  
c/o Chapman University Fowler School  
of Law  
One University Dr.  
Orange, CA 92866  
(877) 855-3330  
(714) 844-4817 Fax  
jeastman@chapman.edu  
*Lead Counsel for Intervenors*

*Attorneys for Proposed Defendant-  
Intervenors*

*\* Notice of Special Appearance to be file*