



War on Marriage

The Battle for North Carolina

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IN APRIL 2014, EQUALITY NC'S EXECUTIVE DIRECTOR, CHRIS SGRO, TOLD A CROWD OF SAME-SEX "MARRIAGE" ADVOCATES GATHERED AT PULLEN MEMORIAL BAPTIST CHURCH IN RALEIGH, "WHETHER IT'S THIS YEAR OR NEXT, FULL MARRIAGE EQUALITY IS COMING TO NORTH CAROLINA."¹

Homosexual activists like Sgro are feeling pretty confident these days about their efforts to force the redefinition of marriage on the citizens of this State—and for good reason. Along with their legal and political allies, they have successfully launched an all-out war on marriage in North Carolina. Their in-your-face attack on marriage is being waged on every front—from staged attempts to convince local elected officials to illegally issue marriage licenses to same-sex couples, to a recent public protest in Raleigh of the state's tax policy.²

Ultimately, though, marriage redefinition proponents are pinning their hopes on the federal courts, where three lawsuits challenging the constitutionality of North Carolina's marriage laws are pending. Two of the lawsuits are part of a concerted national effort to use the U.S. Supreme Court's June 2013 ruling in *U.S. v. Windsor*, which struck down

Section 3 of the federal Defense of Marriage Act (DOMA), to overturn the state laws of 30 states where marriage is still defined as one man and one woman. Although the *Windsor* decision recognized the historic right of states to define and regulate marriage, marriage redefinition proponents have used it to attack state marriage laws through the courts. Since *Windsor* was handed down, over 60 lawsuits challenging state marriage laws have been filed in state and federal courts in 31 states or territories, including North Carolina. Additionally, federal judges have issued rulings favorable to marriage redefinition in 11 states (Utah, Oklahoma, Virginia, Texas, Michigan, Kentucky, Ohio, Tennessee, Idaho, Illinois, and Indiana), although most of these rulings are on hold, pending appeal.³ See sidebar for more on *Windsor's* "domino-like effect" in the courts.

The following is a brief overview of the three lawsuits challenging North Carolina's marriage protection laws, and a look at where North Carolina fits in the broader national battle for marriage.

Fisher-Borne v. Smith

In July 2013—just two weeks after the U.S. Supreme Court's *Windsor* ruling—the ACLU and

The “Domino” Effect of *Windsor*. A Timeline

- **June 2013**—U.S. Supreme Court strikes down Section 3 of the federal Defense of Marriage Act (DOMA) as unconstitutional in a 5 to 4 decision in *United States v. Windsor*, but recognizes the authority of states to define and regulate marriage.
- **July 2013**—Citing the *Windsor* ruling, the American Civil Liberties Union (ACLU) files the first of several “post-DOMA” lawsuits challenging the constitutionality of state marriage laws, including Marriage Protection Amendments (MPA), in North Carolina, Pennsylvania, and Virginia. As of May 2014, over 60 lawsuits challenging state marriage laws have been filed since the *Windsor* ruling.
- **October 21, 2013**—New Jersey becomes the 14th state to issue marriage licenses to same-sex couples (and the fifth state to do so by court order), following a series of state court rulings.
- **December 19, 2013**—The New Mexico Supreme Court rules that, “the State of New Mexico is constitutionally required to allow same-gender couples to marry...”
- **December 20, 2013**—U.S. District Judge Robert Shelby overturns Utah’s voter-approved MPA as unconstitutional, and the state begins issuing marriage licenses to homosexual couples.
- **December 23, 2013**—U.S. District Judge Timothy Black issues a limited ruling that Ohio must recognize the “valid out-of-state same-sex marriages between same-sex couples on Ohio death certificates.”
- **January 6, 2014**—U. S. Supreme Court halts the issuing of marriage licenses to same-sex couples in Utah, pending the State’s appeal of the ruling to the U.S. Court of Appeals for the Tenth Circuit.
- **January 10, 2014**—U.S. Attorney General Eric Holder announces that the federal government will recognize the “marriages” of homosexual couples that obtained marriage licenses in Utah prior to the U.S. Supreme Court’s stay.
- **January 14, 2014**—U.S. Senior District Judge Terence Kern declares Oklahoma’s voter-approved MPA unconstitutional, but stays decision, pending appeal.
- **February 12, 2014**— U.S. District Judge John G. Heyburn II rules that Kentucky must recognize the out-of-state same-sex “marriages” of homosexual couples living in Kentucky, but stays decision pending appeal.
- **February 13, 2014**—U.S. District Judge Arenda L. Wright Allen strikes down Virginia’s MPA, but stays decision, pending appeal.
- **February 26, 2014**—Federal Judge Orlando Garcia rules that Texas’ MPA is unconstitutional, but places the ruling on hold, pending appeal.
- **March 14, 2014**—U.S. District Judge Aleta A. Trauger orders Tennessee officials to recognize the out-of-state same-sex “marriages” of three homosexual couples. That decision is on hold, pending appeal.
- **March 21, 2014**—U.S. District Court Judge Bernard Friedman rules that Michigan’s marriage laws are unconstitutional. On March 22, after hundreds of same-sex couples were issued marriage licenses, the U.S. Court of Appeals for the Sixth Circuit issues a stay of Judge Friedman’s ruling, pending appeal.
- **March 28, 2014**—U.S. Attorney General Eric Holder announces that the federal government will recognize the 300 same-sex “marriages” performed in Michigan prior to the Sixth Circuit’s order that halted the practice.
- **April 10, 2014**—U.S. District Judge Richard Young issues a temporary emergency restraining order in Indiana, requiring the State to immediately recognize the same-sex “marriage” of a lesbian couple.
- **April 14, 2014**—U.S. District Court Judge Timothy Black strikes down Ohio’s law prohibiting recognition of same-sex “marriages” performed in states where the practice is legal, but stays his ruling pending appeal.

the ACLU of North Carolina Legal Foundation (ACLU-NCLF) filed a motion to amend its 2012 *Fisher-Borne v. Smith* lawsuit by adding a challenge to North Carolina’s marriage laws. Soon thereafter, the office of North Carolina Attorney General Roy Cooper announced that it would not oppose the ACLU’s request, and U.S. Magistrate Judge Joi Elizabeth Peake approved the motion.

The original *Fisher-Borne* lawsuit sought to legalize so-called “second-parent” adoption in North Carolina, which would allow a same-sex individual to become the legal parent of their homosexual partner’s child. The amended lawsuit adds a challenge to the state’s marriage statutes that define marriage as the union of one man and one woman and prohibit recognition of out-of-state same-sex “marriages.” It also seeks to overturn the Marriage Protection Amendment (MPA) that was adopted by 61 percent of North Carolina voters in May 2012.⁴

Gerber and Berlin v. Cooper

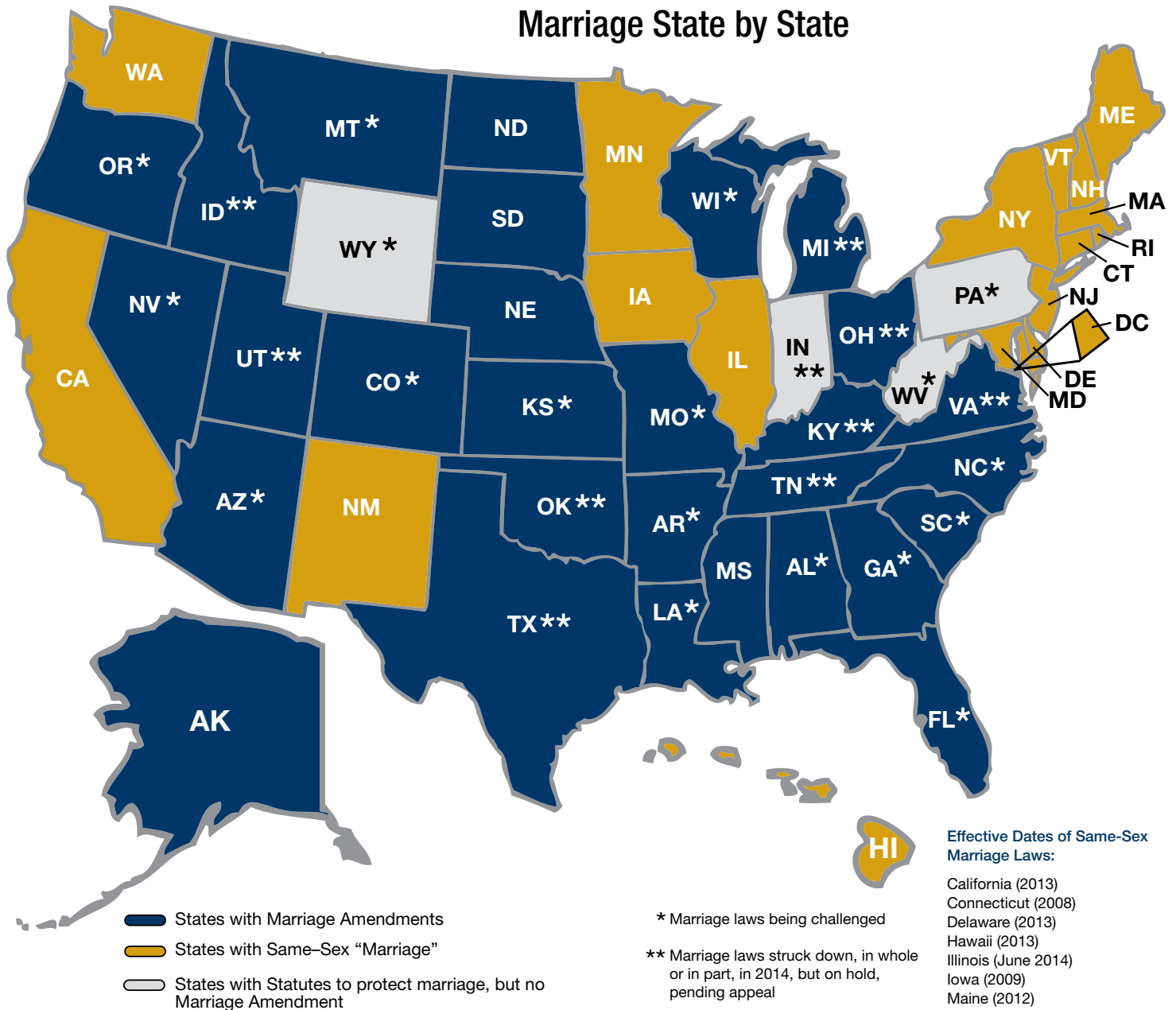
On April 9, 2014, the ACLU and two private law firms filed a second lawsuit challenging North Carolina’s marriage laws in federal district court, but this time they tried a new tactic aimed at getting the court to issue an immediate ruling in the case due to the “life-threatening medical issues” of the same-sex couples involved in the lawsuit. Marriage redefinition proponents have used a similar tactic in other states, most recently in Indiana.⁵

The *Gerber* lawsuit asks the federal district court to: declare North Carolina’s Marriage Protection Amendment and marriage statutes unconstitutional; force the State to immediately recognize three homosexual couples’ out-of-state same-sex unions, in part, because “one member of each couple” in the case has a serious medical condition; and force North Carolina to allow second-parent adoption by the same-sex partner of a child’s legal parent.

General Synod of the United Church of Christ vs. Cooper

On April 28, 2014, marriage redefinition proponents attempted to open “a new front” in the war on marriage by filing a third federal lawsuit challenging North Carolina’s marriage protection laws on the grounds that they violate the “religious freedom” of clergy that wish to perform same-sex “marriages.” The new lawsuit, filed in the Western District of North Carolina in Charlotte, is reportedly the first in the nation to use First Amendment religious freedom claims to challenge a state marriage law in addition to using Equal Protection and Due Process Claims. Plaintiffs in the lawsuit include the General Synod of the United Church of Christ (UCC), several clergy from liberal churches in North Carolina, including the UCC, and several same-sex couples.⁶

Marriage State by State



Targeting North Carolina

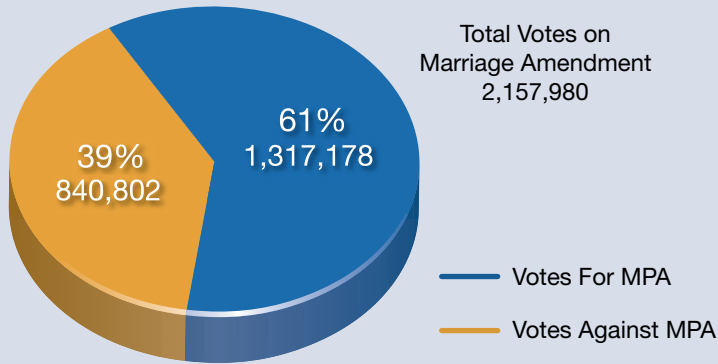
North Carolina was among the first states to be targeted with a marriage redefinition lawsuit immediately following the *Windsor* ruling. At the time, the ACLU described its actions in North Carolina as part of its “post-DOMA, post-Prop 8 [California’s marriage amendment, which was struck down] plan for winning the freedom to marry nationwide.”⁷⁷ That plan is aimed at ensuring that a lawsuit dealing with the constitutionality of a state marriage protection law ends up before the U.S. Supreme Court in the next few years. With a total of nine marriage lawsuits currently before federal appeals courts in the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits,⁸ it is almost certain that the Supreme Court will consider a marriage redefinition lawsuit in the near future.

So where does North Carolina fit into the big picture of the national battle over marriage, and how

vulnerable are the state’s marriage laws to redefinition by the courts? There are two areas of vulnerability for North Carolina that make it a key target in the effort to redefine marriage: the current Attorney General who favors marriage redefinition, and North Carolina’s inclusion in the Fourth Circuit.

The Defense. North Carolina’s marriage protection laws are being defended by Attorney General Cooper, who served as the keynote speaker at a major fundraiser for Equality NC in November 2013.⁹ Although Mr. Cooper is not shy about publicly voicing his personal support for redefining marriage, he has continuously stated that he intends to do his duty to defend the State’s statutes and Constitution.¹⁰ Even so, his public statements against the Marriage Protection Amendment, and his involvement with groups that are seeking to have it overturned, have caused understandable

North Carolina Marriage Amendment



2012 Primary Election Official Results. North Carolina State Board of Elections. 13 June 2012.

concern among state leaders, who fear that he could follow in the footsteps of the attorneys general of several other states, who have refused to defend their state marriage laws because they personally support redefining marriage.

To try to avoid this scenario, in December 2013, President Pro Tempore of the N.C. Senate Phil Berger (R–Rockingham) and Speaker of the N.C. House Thom Tillis (R–Mecklenburg) announced their decision to hire outside legal counsel to advise them on how Attorney General Cooper is handling the defense of North Carolina’s marriage laws.¹¹ Although the leaders of the General Assembly have not jointly intervened as defendants in the lawsuit—which they have the right to do under legislation enacted in 2013—an attorney with Alliance Defending Freedom (ADF) is providing pro-bono legal services to legislative leaders about the marriage lawsuits.¹²

The Fourth Circuit. This May, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit will hold a hearing to review a lower court’s decision in *Bostic v. Schaefer*, a federal lawsuit challenging Virginia’s marriage protection laws.¹³ In February 2014, a federal district judge struck down Virginia’s marriage laws as unconstitutional, and the Fourth Circuit is expected to issue a ruling later this year on whether or not to allow that lower court decision to stand.¹⁴

How the Fourth Circuit rules in the Virginia case will impact more than just the marriage laws of Virginia—it will also affect the marriage laws of other states that are in the Fourth Circuit, including North Carolina. That is why, on April 28, Attorney General Cooper filed a request with U.S. Magistrate Judge Peake, asking the court to delay a ruling in the North Carolina marriage lawsuits until the Fourth Circuit issues its decision in the Virginia case.¹⁵ It is also why a coalition of homosexual advocacy groups, including Equality NC, filed an amicus brief in the Virginia case, asking the Fourth Circuit to uphold the lower court ruling.¹⁶ Simi-

larly the Family Research Council, the NC Values Coalition, and the Liberty, Life, and Law Foundation, filed amicus briefs encouraging the Court of Appeals to reverse the lower court and protect the institution of marriage.¹⁷

If the Fourth Circuit upholds the federal district court’s ruling in *Bostic v. Schaefer*, there is the possibility that the court could limit its ruling to only Virginia; however, most experts believe the ruling would apply to the marriage protection laws of all states within the Fourth Circuit, including North Carolina.

All Eyes on the Supreme Court

Regardless of how the Fourth Circuit rules in the Virginia case, legal experts on both sides estimate that the constitutionality of state marriage protection laws will reach the U.S. Supreme Court within the next two to three years.¹⁸ For traditional marriage supporters, the hope is that the Court will not allow activists to continue to misuse *Windsor* to force the redefinition of marriage on the nation via the courts. Instead, the high court should reinforce its own acknowledgement of the right of the states to define and regulate marriage, and respect the people’s right to debate and decide how marriage will be defined.¹⁹

In its opening brief filed with the Fourth Circuit on behalf of a Prince William County clerk of court in *Bostic v. Schaefer*, ADF argued: “that States have the right to define marriage for themselves, that States may differ in their marriage laws concerning which couples are permitted to marry, and that federalism demands deference to state marriage policies.” The ADF brief went on to explain that, “Virginians (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage for their community,” and “[a]ny other outcome would contravene *Windsor* by federalizing a definition of marriage, and overriding the policy decisions of States (like Virginia) that have chosen to maintain the man-woman marriage institution.”²⁰

As the 60-plus marriage redefinition lawsuits continue their march toward the U.S. Supreme Court, attorney Kellie Fiedorek, who serves on ADF’s marriage litigation team, advises traditional marriage supporters to stay engaged in the battle.

“We will ultimately win because the effort to redefine marriage is contrary to human flourishing, to the welfare of our children and to our children’s children, and to the truth about men and women,” Fiedorek said recently on the N.C. Family Policy Council’s weekly radio program, *Family Policy Matters*. “I would just encourage folks to... live lives that testify to the beauty of marriage, [and] get engaged in your community... encourage your pastors to speak out and talk about why marriage is important—witness to the truth about marriage!”²¹ ❖

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Endnotes

1. Sgro, Chris, Equality NC Twitter post, dated 4/15/14, as found at: <http://instagram.com/p/m0v9E7RaNe/>
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3. *Rulings as of May 7, 2014. Note that the online version reflects changes to the number of rulings by federal judges, as these rulings occurred after the print version went to press.* See: Polaski, Adam, “Q&A: What’s Happening with Marriage in the Courts?” Freedom to Marry, 4/22/14, as found at: <http://www.freedomtomarry.org/blog/entry/qa-whats-happening-with-marriage-in-the-courts>
4. NCFPC, “ACLU Officially Challenges NC Marriage Laws,” 7/23/13, as found at: <http://www.ncfamily.org/stories/130723s1.html>
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10. Ibid.
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12. Ibid.
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16. Equality NC, “Equality NC to File Amicus Brief in Marriage Equality Lawsuit Championing Military Families,” 4/17/14, as found at: http://equalitync.org/latest/news/equality_nc_files_military_amicus_brief/
17. Note: The NC Values Coalition and Liberty, Life and Law foundation filed an amicus brief with the Fourth Circuit on 4/04/14, as found here: http://ncvalues.org/wp-content/uploads/2014/04/BRIEF-NCVC_LLLF-Bostic-04-04-14.pdf. The Family Research Council filed a separate amicus brief with the court on 4/04/14, as found here: http://frcblog.com/media/filer/2014/04/09/frc_va_amicus_bostic_v_schaefer_v05_20140404_fnl.pdf
18. Interview with Ryan Anderson of The Heritage Foundation, NCFPC “Family Policy Matters” radio program, aired 3/15/14, as found at: <http://www.ncfamily.org/radioshow.html>. See also: Polaski, Adam, “Q&A: What’s Happening with Marriage in the Courts?” Freedom to Marry, 4/22/14, as found at: <http://www.freedomtomarry.org/blog/entry/qa-whats-happening-with-marriage-in-the-courts>
19. The majority opinion in *Windsor*, authored by Justice Kennedy, states, “By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States.” *U.S. v. Windsor*, as found here: <http://www.adfmedia.org/files/US-WindsorSCopinion.pdf>
20. ADF, “County Clerk to Fourth Circuit: Uphold Virginia Marriage Amendment,” PR, 4/1/14. Brief available here: <http://www.adfmedia.org/files/Schaefer-AppellateBrief.pdf>
21. Interview with Kellie Fiedorek of Alliance Defending Freedom, NCFPC “Family Policy Matters” radio program, aired 5/3/14, as found at: <http://www.ncfamily.org/radioshow.html>.