
In The
United States Court Of Appeals
For The Fourth Circuit

**KAY DIANE ANSLEY; CATHERINE McGAUGHEY; CAROL ANN PERSON;
THOMAS ROGER PERSON; KELLEY PENN; SONJA GOODMAN,**
Plaintiffs – Appellants,

v.

**MARION WARREN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS,**
Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
AT ASHEVILLE**

JOINT APPENDIX

Meghann K. Burke
BRAZIL & BURKE, P.A.
77 Central Avenue
Suite E
Asheville, NC 28801
(828) 255-5400

S. Luke Largess
Jacob H. Sussman
John W. Gresham
Cheyenne N. Chambers
TIN FULTON WALKER
& OWEN, PLLC
301 East Park Avenue
Charlotte, NC 28203
(704) 338-1220

Crystal M. Richardson
LAW OFFICE OF
CRYSTAL M. RICHARDSON
2437 Reid Oaks Drive
Charlotte, NC 28208
(980) 220-2523

Amar Majmundar
Olga E. Vysotskaya de Brito
NORTH CAROLINA DEPARTMENT
OF JUSTICE
P. O. Box 629
Raleigh, NC 27602
(919) 716-6821

Counsel for Appellants

Counsel for Appellants

Counsel for Appellants

Counsel for Appellee

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**U.S. District Court
Western District of North Carolina (Asheville)
CIVIL DOCKET FOR CASE #: 1:16-cv-00054-MOC-DLH**

Ansley et al v. Warren
Assigned to: District Judge Max O. Cogburn, Jr
Referred to: Magistrate Judge Dennis Howell
Related Cases: [3:14-cv-00213-MOC-DLH](#)
[1:15-cv-00274-MOC-DLH](#)

Date Filed: 03/07/2016
Date Terminated: 09/20/2016
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Case in other court: 4th Circuit, 16-02082
WDNC, 3:14-cv-213-MOC-DLH
Cause: 28:1331 Fed. Question: Civil Rights Violation

Plaintiff

Kay Diane Ansley

represented by **Jacob H. Sussman**
Tin Fulton Walker & Owen, PLLC
301 Park Avenue
Charlotte, NC 28203
704-338-1220
Fax: 704-338-1312
Email: jsussman@tinfulton.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John West Gresham
Tin, Fulton, Walker & Owens
301 East Park Ave.
Charlotte, NC 28203
704-338-1220 Ext. 257
Fax: 704-338-1312
Email: Jgresham@tinfulton.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meghann K. Burke
Brazil & Burke, P.A.
77 Central Ave. #E
Asheville, NC 28801
828-255-5400
Fax: 828-258-8972
Email: meghann@brazilburkelaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cheyenne N. Chambers
Tin Fulton Walker & Owen, PLLC
301 East Park Avenue
Charlotte, NC 28203
704-338-1220

Email: cchambers@tinfulton.com
ATTORNEY TO BE NOTICED

Crystal M. Richardson
The Law Office of Crystal M Richardson
2437 Reid Oaks Drive
Charlotte, NC 28208
980-220-2523
Email: crystalrichardsonlaw@aol.com
ATTORNEY TO BE NOTICED

Katherine Lewis Parker
Tin Fulton Walker & Owen, PLLC
228 N. Front Street, Suite 201
Wilmington, NC 28401
910-228-5200
Fax: 910-401-1155
Email: kparker@tinfulton.com
ATTORNEY TO BE NOTICED

S. Luke Largess
Tin, Fulton, Walker & Owen
301 East Park Ave.
Charlotte, NC 28203
704-338-1220
Fax: 704-338-1312
Email: llargess@tinfulton.com
ATTORNEY TO BE NOTICED

Plaintiff

Catherine McGaughey

represented by **Jacob H. Sussman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meghann K. Burke
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cheyenne N. Chambers
(See above for address)
ATTORNEY TO BE NOTICED

Crystal M. Richardson
(See above for address)
ATTORNEY TO BE NOTICED

Katherine Lewis Parker
(See above for address)
ATTORNEY TO BE NOTICED

S. Luke Largess

(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Carol Ann Person

represented by **Jacob H. Sussman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meghann K. Burke
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cheyenne N. Chambers
(See above for address)
ATTORNEY TO BE NOTICED

Crystal M. Richardson
(See above for address)
ATTORNEY TO BE NOTICED

Katherine Lewis Parker
(See above for address)
ATTORNEY TO BE NOTICED

S. Luke Largess
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Thomas Roger Person

represented by **Jacob H. Sussman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meghann K. Burke
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cheyenne N. Chambers
(See above for address)
ATTORNEY TO BE NOTICED

Crystal M. Richardson
(See above for address)
ATTORNEY TO BE NOTICED

Katherine Lewis Parker
(See above for address)
ATTORNEY TO BE NOTICED

S. Luke Largess
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Kelley Penn

represented by **Jacob H. Sussman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meghann K. Burke
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cheyenne N. Chambers
(See above for address)
ATTORNEY TO BE NOTICED

Crystal M. Richardson
(See above for address)
ATTORNEY TO BE NOTICED

Katherine Lewis Parker
(See above for address)
ATTORNEY TO BE NOTICED

S. Luke Largess
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Sonja Goodman

represented by **Jacob H. Sussman**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Meghann K. Burke
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cheyenne N. Chambers
(See above for address)
ATTORNEY TO BE NOTICED

Crystal M. Richardson
(See above for address)
ATTORNEY TO BE NOTICED

Katherine Lewis Parker
(See above for address)
ATTORNEY TO BE NOTICED

S. Luke Largess
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Marion Warren
*in his Official Capacity as Director of the
North Carolina Administrative Office of the
Courts*

represented by **Amar Majmundar**
NC Dept. of Justice
PO Box 629
114 West Edenton Street
9001 MSC
Raleigh, NC 27602
919-716-6821
Email: AMajmundar@ncdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Olga Eugenia Vysotskaya de Brito
N.C. Department of Justice
114 W. Edenton Street
P.O. Box 629
Raleigh, NC 27602-0629
919-716-0185
Fax: 919-716-6759
Email: ovysotskaya@ncdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Brenda Bumgarner
(Proposed Defendant-Intervenor)
*individually and on behalf of other similarly
situated Jane and John Doe Magistrate
Judges*
TERMINATED: 07/07/2016

represented by **Daniel Joseph Schmid**
Liberty Counsel
PO Box 540774
Orlando, FL 32854
407-875-1776
Fax: 407-875-0770
Email: dschmid@lc.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Horatio G. Mihet
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
800-671-1776
Fax: 407-875-0770
Email: hmihet@lc.org
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jonathan David Christman
Liberty Counsel
PO Box 540774
Orlando, FL 32854
407-875-1776
Fax: 407-875-0770
Email: jchristman@lc.org
TERMINATED: 07/11/2016
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Stuart D. Sloan
Stuart Sloan, Attorney
53 E. Main Street, Suite B
Franklin, NC 28734
828-634-1115
Email: sloan.stu@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Gayle Myrick
(Proposed Defendant-Intervenor)
TERMINATED: 07/07/2016

represented by **W. Ellis Boyle**
Knott & Boyle, PLLC
4800 Six Forks Road
Suite 100
Raleigh, NC 27609
919-783-5900
Fax: 919-783-9650
Email: ellis@knottbodyle.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Thomas Holland
(Proposed Defendant-Intervenor)
TERMINATED: 07/07/2016

represented by **W. Ellis Boyle**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Magistrate Doe
(Proposed Defendant-Intervenor)
TERMINATED: 07/07/2016

represented by **W. Ellis Boyle**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Phil Berger
(Proposed Defendant-Intervenor) President
Pro Tempore of the NC Senate
TERMINATED: 07/07/2016

represented by **Douglas G. Wardlow**
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: dwardlow@ADFlegal.org

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

James A. Campbell
Alliance Defending Freedom
15100 N. 90th St
Scottsdale, AZ 85260
480-444-0028
Fax: 480-444-0028
Email: jcampbell@ADFlegal.org
TERMINATED: 08/30/2016
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Jonathan Caleb Dalton
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: cdalton@ADFlegal.org
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Kenneth J. Connelly
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: kconnelly@ADFlegal.org
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

John C. Eastman
Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of
Law
One University Drive
Orange, CA 92866
877-855-3330
Fax: 714-844-4817
Email: jeastman@chapman.edu
ATTORNEY TO BE NOTICED

Robert D. Potter , Jr.
5821 Fairview Road, Suite 207
Charlotte, NC 28209
704-552-7742
Fax: 704-552-9287
Email: rdpotter@bellsouth.net
ATTORNEY TO BE NOTICED

Tim Moore
 (Proposed Defendant-Intervenor) Speaker
 of the NC House of Representatives, on
 behalf of the NC General Assembly
 TERMINATED: 07/07/2016

represented by **Douglas G. Wardlow**
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

James A. Campbell
 (See above for address)
 TERMINATED: 08/30/2016
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Jonathan Caleb Dalton
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Kenneth J. Connelly
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

John C. Eastman
 (See above for address)
 ATTORNEY TO BE NOTICED

Robert D. Potter , Jr.
 (See above for address)
 ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/07/2016	1	COMPLAINT against Marion Warren (Filing fee \$ 400 receipt number 0419-2928981), filed by Sonja Goodman, Thomas Roger Person, Kay Diane Ansley, Carol Ann Person, Catherine McGaughey, Kelley Penn.(Largess, S.) (Main Document 1 replaced on 3/8/2016) (eef). (Main Document 1 replaced on 3/8/2016) (eef). (Main Document 1 replaced on 3/9/2016) (eef). (Entered: 03/07/2016)
03/07/2016	2	NOTICE of Appearance by Jacob H. Sussman on behalf of All Plaintiffs (Sussman, Jacob) (Entered: 03/07/2016)
03/08/2016	3	NOTICE of Appearance by Meghann K. Burke on behalf of All Plaintiffs (Burke, Meghann) (Entered: 03/08/2016)
03/08/2016	4	NOTICE of Appearance by Katherine Lewis Parker on behalf of All Plaintiffs (Parker, Katherine) (Entered: 03/08/2016)
03/08/2016		Case assigned to District Judge Max O. Cogburn, Jr and Magistrate Judge Dennis Howell. Notice: You must click this link to retrieve the Case Assignment Packet . <i>This is your only notice - you will not receive a separate document.</i> (eef) (Entered: 03/08/2016)
03/08/2016	5	Summons Issued Electronically as to Marion Warren. NOTICE: Counsel shall print the summons and serve with other case opening documents in accordance with Fed.R.Civ.P.4 . (eef) (Entered: 03/08/2016)
03/08/2016	6	NOTICE of Appearance by John West Gresham on behalf of Kay Diane Ansley (Gresham,

		John) (Entered: 03/08/2016)
03/09/2016		NOTICE: Case was filed in wrong division. Case has been copied from 3:16-cv-114 to 1:16-cv-54. Please use 1:16-cv-54 for all future pleadings. (eef) (Entered: 03/09/2016)
03/10/2016	7	Summons Reissued Electronically as to Marion Warren. (Reflecting corrected case number.) NOTICE: Counsel shall print the summons and serve with other case opening documents in accordance with Fed.R.Civ.P.4 and Local Rule 73.1(A)(2). (ejb) (Entered: 03/10/2016)
03/11/2016	8	MOTION to Intervene by Brenda Bumgarner. Responses due by 3/28/2016 (Attachments: # 1 Exhibit Declaration of Brenda Bumgarner, # 2 Proposed Order, # 3 Exhibit Motion to Dismiss, # 4 Memorandum of Law (Motion to Dismiss), # 5 Proposed Order)(Sloan, Stuart). Motions referred to Dennis Howell. Modified text on 3/11/2016 (ejb). (Entered: 03/11/2016)
03/11/2016	9	MEMORANDUM in Support re 8 MOTION to Intervene by Brenda Bumgarner. (Sloan, Stuart) (Entered: 03/11/2016)
03/11/2016	10	MOTION for Leave to Appear Pro Hac Vice as to Jonathan D. Christman Filing fee \$ 276, receipt number 0419-2932995, by Brenda Bumgarner. (Sloan, Stuart). Motions referred to Dennis Howell. (Main Document 10 replaced on 3/11/2016 with correct PDF) (ejb). NEF Regenerated. (Entered: 03/11/2016)
03/11/2016	11	MOTION for Leave to Appear Pro Hac Vice as to Horatio G. Mihet Filing fee \$ 276, receipt number 0419-2932999, by Brenda Bumgarner. (Sloan, Stuart). Motions referred to Dennis Howell. (Main Document 11 replaced on 3/11/2016 with correct PDF) (ejb). NEF Regenerated. (Entered: 03/11/2016)
03/11/2016	12	MOTION to Intervene by Gayle Myrick, Thomas Holland, Magistrate Doe, and MOTION to Proceed Anonymously by Magistrate Doe. Responses due by 3/28/2016 (Boyle, William). Motions referred to Dennis Howell. Added additional MOTION relief sought on 3/11/2016 (ejb). NEF Regenerated. (Entered: 03/11/2016)
03/11/2016	13	MEMORANDUM in Support re 12 MOTION to Intervene by Magistrate Doe, Thomas Holland, Gayle Myrick. (Attachments: # 1 Exhibit 1 - Index to Exhibits, # 2 Exhibit 2 - Attachment A - Myrick Declaration with Exhibits, # 3 Exhibit 3 - Attachment B - Doe Declaration with Exhibits, # 4 Exhibit 4 - Attachment C - Holland Declaration with Exhibits, # 5 Exhibit 5 - Answer in Intervention, # 6 Exhibit 6 - Text of Proposed Order) (Boyle, William) (Entered: 03/11/2016)
03/11/2016	14	NOTICE of Appearance by William Ellis Boyle on behalf of Magistrate Doe, Thomas Holland, Gayle Myrick (Boyle, William) (Entered: 03/11/2016)
03/14/2016	15	ORDER granting 11 Motion for Leave to Appear Pro Hac Vice, added Horatio G. Mihet for Brenda Bumgarner. Signed by Magistrate Judge Dennis Howell on 3/14/16. (ejb) (Entered: 03/14/2016)
03/14/2016	16	ORDER granting 10 Motion for Leave to Appear Pro Hac Vice, added Jonathan David Christman for Brenda Bumgarner. Signed by Magistrate Judge Dennis Howell on 3/14/16. (ejb) (Entered: 03/14/2016)
03/16/2016	17	MOTION for Extension of Time to File Response/Reply re: 8 MOTION to Intervene , 12 MOTION to Intervene by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Responses due by 4/4/2016 (Largess, S.). Motions referred to Dennis Howell. (Entered: 03/16/2016)
03/16/2016	18	RESPONSE in Opposition re 17 MOTION for Extension of Time to File Response/Reply re: 8 MOTION to Intervene , 12 MOTION to Intervene by Brenda Bumgarner. Replies due

		by 3/28/2016 (Attachments: # 1 Exhibit 1 - E-mails between Counsel, # 2 Exhibit 2 - E-mail from Plaintiffs' Counsel)(Christman, Jonathan) (Entered: 03/16/2016)
03/17/2016	19	MOTION to Intervene by Phil Berger, Tim Moore. Responses due by 4/4/2016 (Attachments: # 1 Proposed Order Granting Motion to Intervene)(Potter, Robert). Motions referred to Dennis Howell. Modified text on 3/17/2016 (ejb). (Entered: 03/17/2016)
03/17/2016	20	MEMORANDUM/BRIEF <i>In Support of Motion to Intervene</i> by Phil Berger, Tim Moore re: 19 Motion to Intervene (Potter, Robert) (Entered: 03/17/2016)
03/17/2016	21	Miscellaneous Filing by Phil Berger, Tim Moore. re: 19 Motion to Intervene <i>Proposed Motion to Dismiss</i> (Attachments: # 1 Memorandum Brief in Support of Proposed Motion to Dismiss)(Potter, Robert) (Entered: 03/17/2016)
03/17/2016	22	NOTICE of Appearance by Jonathan Caleb Dalton on behalf of Phil Berger, Tim Moore (Dalton, Jonathan) (Entered: 03/17/2016)
03/17/2016	23	NOTICE of Appearance by James A. Campbell on behalf of Phil Berger, Tim Moore (Campbell, James) (Entered: 03/17/2016)
03/17/2016	24	NOTICE of Appearance by Douglas G. Wardlow on behalf of Phil Berger, Tim Moore (Wardlow, Douglas) (Entered: 03/17/2016)
03/17/2016	25	NOTICE of Appearance by Kenneth J. Connelly on behalf of Phil Berger, Tim Moore (Connelly, Kenneth) (Entered: 03/17/2016)
03/17/2016	26	NOTICE of Appearance by John C. Eastman on behalf of Phil Berger, Tim Moore (Eastman, John) (Entered: 03/17/2016)
03/21/2016	27	AFFIDAVIT of Service filed by Sonja Goodman, Carol Ann Person, Catherine McGaughey, Kay Diane Ansley, Thomas Roger Person, Kelley Penn. All Defendants. Answer due 4/05/2016. (Largess, S.) Modified text on 3/22/2016 (ejb). (Entered: 03/21/2016)
03/28/2016	28	REPLY to Response to Motion re 17 MOTION for Extension of Time to File Response/Reply re: 8 MOTION to Intervene , 12 MOTION to Intervene by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. (Largess, S.) (Entered: 03/28/2016)
03/28/2016	29	MOTION for Extension of Time to File Response/Reply re: 19 MOTION to Intervene <i>by Berger and Moore</i> by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Responses due by 4/14/2016 (Largess, S.). Motions referred to Dennis Howell. (Entered: 03/28/2016)
03/29/2016	30	ORDER granting 17 Motion for Extension of Time to File Response/Reply. Plaintiffs shall have fourteen (14) days from the date the Defendant files an answer or otherwise responds to the Complaint to respond to the Motion to Intervene [# 12]. Signed by Magistrate Judge Dennis Howell on 03/29/16. (emw) (Entered: 03/29/2016)
03/30/2016	31	MOTION to Amend/Correct 30 Order on Motion for Extension of Time, by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Responses due by 4/18/2016 (Largess, S.). Motions referred to Dennis Howell. (Entered: 03/30/2016)
03/31/2016	32	ORDER granting in part 31 Motion to Amend/Correct 30 Order on Motion for Extension of Time. (See Order for further details.) Signed by Magistrate Judge Dennis Howell on 3/31/16. (ejb) (Entered: 03/31/2016)
03/31/2016	33	NOTICE of Appearance by Olga Eugenia Vysotskaya de Brito on behalf of Marion Warren (Vysotskaya de Brito, Olga) (Entered: 03/31/2016)

03/31/2016	34	Unopposed MOTION for Extension of Time to Answer re: 1 Complaint, by Marion Warren. (Attachments: # 1 Proposed Order)(Vysotskaya de Brito, Olga). Motions referred to Dennis Howell. Modified attachment #1 text on 4/1/2016 (ejb). (Entered: 03/31/2016)
04/04/2016	35	ORDER granting 34 Motion for Extension of Time to Answer re 1 Complaint. Marion Warren answer due 5/5/2016. Signed by Magistrate Judge Dennis Howell on 4/4/16. (ejb) (Entered: 04/04/2016)
04/07/2016	36	NOTICE of Appearance by Amar Majmundar on behalf of Marion Warren (Majmundar, Amar) (Entered: 04/07/2016)
04/28/2016	37	ORDER granting 29 Motion for Extension of Time to File Response. Plaintiffs shall have 14 days after the filing of a responsive pleading by Defendant to respond to all pending Motions to Intervene. Signed by Magistrate Judge Dennis Howell on 4/27/2016. (kby) (Entered: 04/28/2016)
05/05/2016	38	MOTION to Dismiss for Lack of Jurisdiction , MOTION to Dismiss for Failure to State a Claim , MOTION to Dismiss by Marion Warren. Responses due by 5/23/2016 (Vysotskaya de Brito, Olga) (Entered: 05/05/2016)
05/05/2016	39	MEMORANDUM in Support re 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss by Marion Warren. (Vysotskaya de Brito, Olga) (Entered: 05/05/2016)
05/19/2016	40	RESPONSE in Opposition re 8 MOTION to Intervene , 12 MOTION to Intervene , 19 MOTION to Intervene by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Replies due by 5/31/2016 (Sussman, Jacob) (Entered: 05/19/2016)
05/20/2016	41	Unopposed MOTION for Extension of Time to File Response/Reply re: 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Responses due by 6/6/2016 (Largess, S.). Motions referred to Dennis Howell. (Entered: 05/20/2016)
05/20/2016	42	ORDER granting Pltfs' 41 Unopposed Motion for Extension of Time to File Response/Reply re 38 MOTION to Dismiss. Pltfs' Responses due by 5/31/2016. Signed by District Judge Max O. Cogburn, Jr. on 5/20/16. (ejb) (Entered: 05/20/2016)
05/26/2016	43	REPLY to Response to Motion re 12 MOTION to Intervene by Magistrate Doe, Thomas Holland, Gayle Myrick. (Boyle, W.) (Entered: 05/26/2016)
05/31/2016	44	REPLY to Response to Motion re 19 MOTION to Intervene by Phil Berger, Tim Moore. (Potter, Robert) (Entered: 05/31/2016)
05/31/2016	45	REPLY to Response to Motion re 8 MOTION to Intervene by Brenda Bumgarner. (Christman, Jonathan) (Entered: 05/31/2016)
05/31/2016	46	RESPONSE in Opposition re 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Replies due by 6/10/2016 (Attachments: # 1 Brody v. NC SBE)(Sussman, Jacob) (Entered: 05/31/2016)
06/02/2016	47	Consent MOTION for Extension of Time to File Response/Reply re: 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss by Marion Warren. Responses due by 6/20/2016 (Attachments: # 1

		Proposed Order.pdf Version of the Proposed Order)(Vysotskaya de Brito, Olga). Motions referred to Dennis Howell. (Entered: 06/02/2016)
06/06/2016	48	ORDER granting 47 Consent Motion for Extension of Time to File Response/Reply re 38 MOTION to Dismiss for Lack of Jurisdiction, MOTION to Dismiss for Failure to State a Claim, MOTION to Dismiss. Def't's Reply due by 6/24/2016. Signed by Magistrate Judge Dennis Howell on 6/6/16. (ejb) (Entered: 06/06/2016)
06/24/2016	49	REPLY to Response to Motion re 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss by Marion Warren. (Vysotskaya de Brito, Olga) (Entered: 06/24/2016)
06/27/2016	50	ORDER that the Clerk of Court calendar and notice Def't's 38 MOTION to Dismiss for oral arguments during the court's August 2016 mixed trial term in Asheville. Signed by District Judge Max O. Cogburn, Jr. on 6/27/16. (ejb) (Entered: 06/27/2016)
06/27/2016		NOTICE of Hearing on Motion re: 38 MOTION to Dismiss: ORAL ARGUMENTS set for 8/8/2016 09:30 AM in Courtroom 1, 100 Otis St, Asheville, NC 28801 before District Judge Max O. Cogburn Jr. <i>This is your only notice - you will not receive a separate document.</i> (ejb) (Entered: 06/27/2016)
07/07/2016	51	ORDER denying 8 , 12 & 19 Motions to Intervene. The Court, however, will allow Movants to renew their motions at later date if District Court allows this case to go forward and the State indicates it no longer intends to defend constitutionality of Senate Bill 2. Signed by Magistrate Judge Dennis Howell on 7/7/16. (ejb) (Entered: 07/07/2016)
07/08/2016	52	MOTION to Withdraw as Attorney <i>Jonathan D. Christman, Esq.</i> by Brenda Bumgarner. (Attachments: # 1 Proposed Order)(Christman, Jonathan). Motions referred to Dennis Howell. (Entered: 07/08/2016)
07/11/2016	53	ORDER granting 52 Motion to Withdraw as Attorney and directing the Clerk to remove Attorney Jonathan David Christman as attorney of record in this case. Signed by Magistrate Judge Dennis Howell on 7/8/2016. (kby) (Entered: 07/11/2016)
07/16/2016	54	NOTICE of Appearance by Crystal M. Richardson on behalf of All Plaintiffs (Richardson, Crystal) (Entered: 07/16/2016)
07/21/2016	55	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Phil Berger, Tim Moore re 51 Order on Motion to Intervene,, Order on Motion for Miscellaneous Relief,,,, (Campbell, James) (Entered: 07/21/2016)
07/21/2016	56	Objection to Magistrate Judge's Decision (Rule 72(a)) re 51 Order on Motion to Intervene,, Order on Motion for Miscellaneous Relief,,,, . Responses due by 8/8/2016 (Attachments: # 1 Exhibit A - Scheduling Order Pre-Hearing Telephone Conference Call dated June 27, 2016)(Boyle, W.) (Entered: 07/21/2016)
07/21/2016	57	Objection to Magistrate Judge's Decision (Rule 72(a)) re 51 Order on Motion to Intervene,, Order on Motion for Miscellaneous Relief,,,, . Responses due by 8/8/2016 (Mihet, Horatio) (Entered: 07/21/2016)
07/22/2016		Response Deadlines set to respond to 55 APPEAL OF MAGISTRATE JUDGE DECISION due by 8/8/2016 (nvc) (Entered: 07/22/2016)
07/28/2016		NOTICE of Hearing on 57 Objection to Magistrate Judge's Decision (Rule 72(a) , 56 Objection to Magistrate Judge's Decision (Rule 72(a) and 55 Appeal on Magistrate Judge Decision : Oral Arguments set for 8/8/2016 09:30 AM in Courtroom 1, 100 Otis St, Asheville, NC 28801 before District Judge Max O. Cogburn Jr. <i>This is your only notice -</i>

		<i>you will not receive a separate document.</i> (nvc) Modified text to include DE# 55 on 7/28/2016 (nvc). (Entered: 07/28/2016)
08/01/2016	58	MOTION for Leave to Appear Pro Hac Vice as to Daniel Joseph Schmid Filing fee \$ 276, receipt number 0419-3061268. by Brenda Bumgarner. (Sloan, Stuart). Motions referred to Dennis Howell. (Entered: 08/01/2016)
08/02/2016	59	ORDER granting 58 Motion for Leave to Appear Pro Hac Vice, added Daniel Joseph Schmid for Brenda Bumgarner. Signed by Magistrate Judge Dennis Howell on 8/2/16. (ejb) (Entered: 08/02/2016)
08/02/2016		Notice to Attorney Daniel Joseph Schmid: Pursuant to Local Rule 83.1 you are required to Register for ECF at www.ncwd.uscourts.gov . Deadline by 8/12/2016. (ejb) (Entered: 08/02/2016)
08/05/2016	60	RESPONSE in Opposition re 56 & 57 Objections to Magistrate Judge's Decision (Rule 72(a)) re 51 Order on Motion to Intervene filed by Proposed Intervenor, by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Replies due by 8/15/2016 (Sussman, Jacob) Modified text on 8/08/2016. NEF Regenerated. (Entered: 08/05/2016)
08/08/2016		Minute Entry: HEARING Re: 57 Objection to Magistrate Judge's Decision (Rule 72(a)), 51 Order on Motion to Intervene, , 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss , 56 Objection to Magistrate Judge's Decision (Rule 72(a)). Motions taken under advisement, order to issue. Plaintiffs attorney: Crystal M. Richardson, Jacob H. Sussman, Meghann K. Burke, S. Luke Largess. Defendants attorney: Amar Majmundar, Olga Eugenia Vysotskaya de Brito. Movant attorney Daniel Joseph Schmid, Stuart Danial Sloan, Robert D. Potter, Jr., W. Ellis Boyle. Court reporter: Tracy Dunlap 828-771-7217. (nvc) (Entered: 08/08/2016)
08/12/2016	61	Order affirming 51 Order of Magistrate Judge denying Motions to Intervene (##8, 12, 19), which the court has treated as a Memorandum and Recommendation for reasons explained herein; overruling Proposed Intervenor's Objections; and the court further affirming Judge Howell's Order insofar as it provides that Proposed Intervenor will be allowed to renew their Motions at a later date if, assuming the court denies Deft's pending Motion to Dismiss (#38), and the State indicates that it no longer intends to defend the constitutionality of Senate Bill 2. Signed by District Judge Max O. Cogburn, Jr. on 8/12/16. (ejb) (Entered: 08/12/2016)
08/16/2016	62	NOTICE of Appearance by Cheyenne N. Chambers on behalf of All Plaintiffs (Chambers, Cheyenne) (Entered: 08/16/2016)
08/26/2016	63	MOTION to Withdraw as Attorney by Phil Berger, Tim Moore. (Attachments: # 1 Proposed Order, # 2 Exhibit Client Consent Letter)(Campbell, James). Motions referred to Dennis Howell. Modified on 8/29/2016 to remove the text "Consent" (ejb). NEF Regenerated. (Attachment 1 replaced on 8/29/2016 with correct PDF) (ejb). NEF Regenerated. (Entered: 08/26/2016)
08/30/2016	64	ORDER granting 63 Motion to Withdraw as Attorney. Attorney James A. Campbell terminated. Signed by Magistrate Judge Dennis Howell on 08/30/16. (emw) (Main Document 64 replaced on 9/13/2016 with PDF reflecting corrected Deft's name in case heading) (ejb). NEF Regenerated (ejb). (Entered: 08/30/2016)
09/06/2016	65	TRANSCRIPT of Motions Hearing held on August 8, 2016 before Judge Max O. Cogburn, Jr.. Court Reporter Tracy Dunlap, telephone number 828.771.7217. NOTICE RE: REDACTION OF TRANSCRIPTS: The parties have 5 business days to file a Notice of Intent to Request Redaction and 21 calendar days to file a Redaction Request. If no notice is filed, this transcript will be made electronically available to the public

		without redaction after 90 calendar days. Transcript may be viewed at the court public terminal or purchased through the court reporter before the 90 day deadline. After that date it may be obtained through PACER. Policy at www.ncwd.uscourts.gov Release of Transcript Restriction set for 12/5/2016. (Reporter: Tracy Dunlap, 828-771-7217) (Entered: 09/06/2016)
09/20/2016	66	NOTICE by Marion Warren re 38 MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss for Failure to State a Claim MOTION to Dismiss , 39 Memorandum in Support of Motion <i>Notice of Subsequently Decided Authority</i> (Attachments: # 1 Exhibit N.C. Ct. App. Opinion, Breedlove v Warren)(Vysotskaya de Brito, Olga) (Entered: 09/20/2016)
09/20/2016	67	ORDER granting Deft's 38 Motion to Dismiss, and this action is DISMISSED for lack of subject matter jurisdiction. Signed by District Judge Max O. Cogburn, Jr. on 9/20/16. (ejb) (Entered: 09/20/2016)
09/20/2016	68	CLERK'S JUDGMENT is hereby entered in accordance with the Court's Order dated 09/20/2016. Signed by Clerk, Frank G. Johns. (ejb) (Entered: 09/20/2016)
09/21/2016	69	NOTICE OF APPEAL by Kay Diane Ansley, Sonja Goodman, Catherine McGaughey, Kelley Penn, Carol Ann Person, Thomas Roger Person. Filing fee \$ 505, receipt number 0419-3112350. <i>Use this link www.ca4.uscourts.gov to retrieve 4th Circuit case opening documents, i.e. Appearance of Counsel, Docketing Statement, Disclosure Statement, and Transcript Order Form.</i> Note: Your Transcript Order Form must be served on the District Court as well as the Circuit Court. (Sussman, Jacob) (Main Document 69 replaced on 9/21/2016) (eef). NEF Regenerated. (Entered: 09/21/2016)
09/21/2016	70	Transmission of Notice of Appeal to US Court of Appeals re 69 Notice of Appeal. (ejb) (Entered: 09/21/2016)
09/21/2016	71	USCA Case Number 16-2082 for 69 Notice of Appeal, USCA Case Manager: RJ Warren. (ejb) (Entered: 09/21/2016)

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11/18/2016 12:26:20			
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Description:	Docket Report	Search Criteria:	1:16-cv-00054-MOC-DLH
Billable Pages:	14	Cost:	1.40

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
Case No.: 1:16-cv-0054**

**Kay Diane Ansley, Catherine “Cathy”
McGaughey, Carol Ann Person, Thomas
Roger Person, Kelley Penn, and Sonja
Goodman,**

Plaintiffs,

v.

**Marion Warren, in his Official Capacity as
Director of the North Carolina
Administrative Office of the Courts,**

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs, pursuant to 28 U.S.C. § 2201, seeking a declaration that actions taken by Defendant to use public funds for a religious purpose under the state legislation known as “Senate Bill 2” violates the Establishment Clause of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and ask this Court to enjoin such conduct and the underlying statute as unconstitutional, allege the following against Defendant:

PARTIES

1. Plaintiffs Kay Diane Ansley and Catherine “Cathy” McGaughey are citizens and residents of McDowell County, North Carolina and are North Carolina taxpayers. Diane and Cathy were married on October 14, 2014 after this Court struck down state laws forbidding their marriage in *General Synod of the United Church of Christ v. Reisinger*, No. 3:14-cv-213-MOC (W.D.N.C.). Diane earned a Bachelor of Science degree from the University of West Georgia in 1983 and a degree from

the American Institute for Paralegal Studies in 1993. She previously worked in law enforcement for 22 years and now works for a local physician as a Patient Scheduler and Medical Records Custodian. In 1982, Cathy earned a Bachelor of Science degree from Georgia State University's College of Urban Life in 1982. She currently works for a local physician as a bookkeeper, and also does bookkeeping for two faith-based non-profit groups and a small retail business.

2. Plaintiffs Carol Ann Person and Thomas Roger Person are citizens and residents of Moore County, North Carolina and are North Carolina taxpayers. Both are legally blind and met at the Governor Morehead School for the Blind in the 1970s and both worked for many years at Industries for the Blind in Winston-Salem. Carol Ann is white and Thomas is African-American. In 1976, two magistrates in Forsyth County refused to marry Carol Ann and Thomas because of the magistrates' religious beliefs against interracial marriage. One of the magistrates read to them from the Old Testament to justify his refusal to marry the Persons, and the other recited the "Our Father" prayer to justify his refusal. Both magistrates declared that interracial marriage was against God's will and the Bible. In 1978, a federal district court found that the two magistrates had violated the Fourteenth Amendment rights of Carol Ann and Thomas, ordered that their marriage be performed and ordered the magistrates to pay the Persons' legal fees.

3. Plaintiffs Kelley Penn and Sonja Goodman are citizens and residents of Swain County, North Carolina and are North Carolina taxpayers. They live and work together and are engaged to be married. Plaintiffs Penn and Goodman wish to be married by a magistrate in a civil marriage, untainted by the stigma of animus arising from the recusal of magistrates in their home county.

4. Defendant Marion Warren (hereinafter "Defendant") is Director of the North Carolina Administrative Office of the Courts ("NCAOC"). The NCAOC manages and oversees the administrative services provided to the Judicial Branch of North Carolina's more than 6,000 employees

and hundreds of courthouses and facilities in every county of the state. The Judicial Branch is an equal and distinctively separate branch and core function of government. Defendant, as Director of the NCAOC, is authorized to use public funds for a religious purpose. He is sued in his official capacity under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908) for conduct taken under color of state law that violates the First and Fourteenth Amendments.

JURISDICTION AND VENUE

5. The District Court has federal question jurisdiction over the subject matter under 28 U.S.C. § 1331.

6. Plaintiffs have standing as state taxpayers under *Flast v. Cohen*, 392 U.S. 83 (1968) and its progeny, as they challenge the spending of tax funds by Defendant Warren as approved by the state legislature for the express and primary religious purpose in violation of the First Amendment.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the majority of Plaintiffs live within the Western District; some of the challenged spending under the statute that violates the First Amendment has occurred in the Asheville Division of the Western District; and Defendant Warren's office manages and oversees judicial services provided throughout the state, including every state judicial district located in the Western District.

8. Further, Defendant Warren's unconstitutional spending is taking place in purposeful defiance of the Order of this Court in a related case involving Plaintiffs Ansley and McGaughey: *General Synod of the United Church of Christ v. Reisinger*, No. 3:14-cv-213-MOC (W.D.N.C.).

FACTS

A. The Obligation of Each State's Judiciary to Support and Uphold the United States Constitution is at the Foundation of Our Constitutional Democracy.

9. On November 21, 1789, North Carolina became the twelfth state to ratify the newly formed United States to ratify the federal constitution.

10. In ratifying the second clause of Article VI, North Carolina agreed that the federal constitution is the superseding law of the nation that all North Carolina judges must uphold. As stated under Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11. In ratifying the third clause of Article VI, North Carolina further agreed that its public judicial officials “shall be bound by oath or affirmation, to support this Constitution.”

12. On July 4, 1868, North Carolina ratified the Fourteenth Amendment of the federal constitution, which mandates that the State provide each of its citizens the right to equal protection and due process of law.

13. Thus, since July 4, 1868, all judicial officials in North Carolina have been “bound by oath or affirmation” to support the Fourteenth Amendment. In 1970, North Carolina rewrote its state constitution. Under Article VI, § 7 of the 1970 North Carolina Constitution, all persons elected or appointed to public office must swear to or affirm the following oath (with emphasis added):

“I, _____, do solemnly swear (or affirm) that **I will support and maintain the Constitution and laws of the United States**, and the Constitution and laws of North Carolina not inconsistent therewith and that I will faithfully discharge the duties of my office as _____, so help me God.”

14. Defendant Warren has taken this oath of office, as he served for over a decade as a state district court judge. He now oversees the state court system in which every judge has been required to take this oath.

15. To further this state constitutional requirement, the North Carolina Legislature set out in N.C.G.S. § 11-7 a required oath for all elected and appointed public officials, including judicial officers. It reads (with emphasis added):

“I, (name), do solemnly and sincerely swear **that I will support the Constitution of the United States**; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, **not inconsistent with the Constitution of the United States**, to the best of my knowledge and ability; so help me God.”

16. Defendant Warren has taken this oath of office as well.

17. N.C.G.S. § 11-11 then sets forth additional oaths for each public official, including an oath for judges to perform the duties of judicial office fairly and impartially. Defendant Warren has taken that oath as well and knows of the obligation it imposes on all judicial officials who work under his office in this state.

B. North Carolina Magistrates are Judicial Officials.

18. Under subchapters IV and VI of Chapter 7A of North Carolina’s General Statutes, magistrates are judicial officials who preside over certain matters in North Carolina’s District Courts.

19. Under N.C.G.S. § 7A-170, magistrates are required to take the judicial oath of office, consisting of the oath of all public officials set out in N.C.G.S. § 11-7 and the specific oath for judges found in N.C.G.S. § 11-11.

20. Under N.C.G.S. § 7A-173, a magistrate may be removed from judicial office for the same reasons that apply to all judges of the state’s General Court of Justice.

21. The North Carolina Magistrate Association explains:

The mission of the Magistrate is to protect and preserve the rights and liberties of all of the people, as guaranteed by the Constitution and laws of the United States and North Carolina, by providing a fair, independent and accessible forum the just, timely and economical resolution of their legal affairs.¹

¹ North Carolina Magistrate Association, *Mission Statement*, <http://www.aoc.state.nc.us/magistrate/AboutUs/index.htm> (last visited Mar. 7, 2016).

22. The North Carolina Magistrate Association further states:

In many instances, a citizen's first contact with the judicial system comes through the office of the magistrate as magistrates are the front-line protection of peoples' constitutional rights.²

23. Magistrates are judicial officials empowered by North Carolina law to:

- a. Accept guilty pleas, admission of responsibility and enter judgment for Infractions;
- b. Handle misdemeanor and infractions for cases involving: alcohol; boating offenses; state park/recreational areas; littering offenses; and wildlife offenses (e.g., hunting, fishing, etc.);
- c. Accept written appearances, waivers of trial or hearing and guilty pleas;
- d. Enter judgment and collect fines, penalties and costs;
- e. Issue arrest warrants;
- f. Issue search warrants;
- g. Grant bail or set release conditions (non-capital offenses);
- h. Hear and enter judgments on worthless checks less than \$2000;
- i. Conduct initial appearances;
- j. Serve as Child Support Hearing Officers;
- k. Hear small claims complaints and Requests for Assignment;
- l. Administer oaths;
- m. Provide punishment for direct criminal contempt;
- n. Take depositions and examination before trial;
- o. Issue subpoenas and capiases;
- p. Take affidavits for verification of pleadings;
- q. Assign years allowances to surviving spouses and children;
- r. Perform marriage ceremonies;
- s. Take acknowledgment of written contract or separation agreement;
- t. Accept applications for involuntary commitments;
- u. Conduct hearing for driver license revocations;
- v. Validate vehicle towing by law enforcement; and
- w. Validate impounding of vehicles in certain DWI/DWLR charges.

24. Performing marriages is included in this list. Under N.C.G.S. § 7A-292(b)(9), North Carolina has assigned magistrates the power and judicial duty “to perform the marriage ceremony under N.C.G.S. § 51-1.”

² North Carolina Magistrate Association, *About Us*, <http://www.aoc.state.nc.us/magistrate/AboutUs/index.htm> (last visited Mar. 7, 2016).

25. Chapter 51 of the General Statutes contains North Carolina's marriage laws. N.C.G.S. § 51-1 authorizes magistrates to solemnize marriages by ceremony, and N.C.G.S. § 51-7 authorizes magistrates to sign marriage licenses and submit them for registration.

26. These marriages are wholly civil in nature. By statute, there is absolutely no religious component to a magistrate's performance of a marriage ceremony.

27. Under N.C.G.S. § 14-230, any magistrate who violates the oath of office or willfully refuses to discharge a duty of office is subject to removal from office on a misdemeanor charge.

28. Defendant Warren oversees and manages the administration of the judicial system and is well aware that magistrates are judicial officers subject to these provisions of law as well as the judicial oath of office.

C. Amendment One and Corollary Marriage Laws Declared Unconstitutional.

29. In September 2011, the North Carolina legislature voted to place on a statewide ballot an initiative, commonly called Amendment One, to amend the North Carolina Constitution to limit marriage to opposite-sex couples and to prohibit the recognition of marriages between same-sex couples.

30. Chapter 51 of the General Statutes already contained similar limiting provisions.

31. Many public officials voiced strident support for Amendment One based on a religious belief that the Bible limited marriage to heterosexual couples and that homosexuality was sinful. For example, State Senator James Forrester stated: "The Lord intended for a family to have one man and one woman."³ State Senator Wesley Meredith stated: "We need to regulate marriage because I believe

³ State Senator James Forrester, Sponsor of Amendment One, *Wedding Bills*, The News & Observer (Mar. 2, 2011), <http://www.newsobserver.com/2011/03/02/1022741/wedding-bills.html>.

that marriage is between a man and woman,” and expressed the view that the Bible provides the basis that marriage should be limited to a relationship between a man and a woman.⁴

32. The Amendment One referendum passed on May 10, 2012, amending the state constitution.

33. On Friday, October 10, 2014, this Court declared Amendment One, and its corollary provisions in Chapter 51 of the General Statutes, unconstitutional. This Court found that the ban on marriage between same-sex couples violated the Fourteenth Amendment under the Fourth Circuit’s decision in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014). See *General Synod of the United Church of Christ v. Reisinger*, No. 3:14-cv-213-MOC, Doc. 121 (W.D.N.C. Oct. 10, 2014).

34. This Court entered its order shortly after the Supreme Court denied *certiorari* in *Bostic*.

35. The President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives sought to intervene in *General Synod of the United Church of Christ v. Reisinger*, No. 3:14-cv-213-MOC, after the Supreme Court denied *certiorari* in *Bostic* and North Carolina’s Attorney General stated publicly that he saw no legal basis to defend Amendment One or to appeal this Court’s order in light of *Bostic*.

36. This Court denied that motion to intervene. See *General Synod of the United Church of Christ v. Reisinger*, No. 3:14-cv-213-MOC, Doc. 120 (W.D.N.C. Oct. 10, 2014).

37. This Court’s ruling in *General Synod* led immediately to the issuance of marriage licenses to same-sex couples in North Carolina, as well as the marriage of same-sex couples by magistrates. Thousands of marriage licenses were issued to same-sex couples in North Carolina, and those couples were married, in the ensuing days, weeks, and months.

⁴ Paul Woolverton, *N.C. Senate Approves Amendment to Block Gay Marriage*, Fayetteville Observer (Sept. 14, 2011), http://www.fayobserver.com/news/state/article_df7d48cf-1770-5f59-9975-11bc83b05347.html.

38. On Monday, October 13, 2014, Defendant Warren’s predecessor as director of the Administrative Office of the Courts, Judge John W. Smith, issued a directive that “[m]agistrates should begin immediately conducting marriages of all couples presenting a marriage license issued by the Register of Deeds.”

39. On Tuesday, October 14, 2014, General Counsel for the Administrative Office of the Courts issued a legal memorandum stating that magistrates would violate their judicial oath to uphold the United States Constitution if they refused to marry same-sex couples.

40. On October 14, 2014, the District Court for the Middle District of North Carolina issued an Order and Judgment also striking down Amendment One and corollary marriage laws prohibiting marriage equality. *See Fisher-Borne v. Smith*, No. 1:12-cv-589-WO (M.D.N.C. Oct. 14, 2014); *Gerber v. Cooper*, No. 1:14-cv-299-WO (M.D.N.C. Oct. 14, 2014).⁵

41. The President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives were allowed to intervene in the *Fisher-Borne* and *Gerber* cases for the limited purpose of lodging an objection and preserving that objection to the district court’s application of the *Bostic* case.

42. Also on October 14, 2014, Michael Crowell, Professor of Public Law and Government, School of Government, University of North Carolina—Chapel Hill, sent an email to all Chief District Court Judges, who supervise the magistrates in their judicial districts, with the subject title: “Magistrates and same-sex marriage.”

43. Professor Crowell wrote, in part, that he was responding to inquiries concerning how to address the issue of “magistrates [who] would prefer not to perform ceremonies for same-sex couples.”

⁵ An amended Order and Judgment striking down Amendment One and related marriage laws were entered the following day in the Middle District cases.

44. After acknowledging the binding effect of this Court's ruling statewide, Professor Crowell wrote, in part, "A magistrate has taken an oath of office to perform the duties of the office and, just like you [District Court Judges], does not get to choose which laws to follow and which not. Everyone would agree that it would not be proper for a magistrate to refuse to marry an interracial couple because the magistrate does not approve of such marriages. The same principle would apply to same-sex couples now. No doubt you can think of lots of other examples of laws which a judge might not approve personally but is obligated to uphold."

45. Professor Crowell continued: "This is an issue about which people have strong opinions, and magistrates no doubt are divided just as other citizens are. The difference is that magistrates have taken an oath of office and are public officers. They, like you, are required to put their personal feelings aside when necessary. The judicial system could not work if individual officers acted otherwise."

46. Professor Crowell concluded by stating: "I hope this does not sound preachy or heavy handed, but I do think it is important to remind magistrates of the majesty of their position. They, like you, are judicial officials. They should be proud of the public trust that has been placed in them, in the importance of their office, and the need to sustain the rule of law regardless of the discomfort it causes. In the end the one thing that should make them proudest is being judicial."

47. The North Carolina Court System posted Professor Crowell's e-mail to the Chief District Court Judges on its website, where it remains as of this filing.⁶

48. On October 24, 2014, various members of the North Carolina General Assembly, including Phil Berger, President Pro Tempore of the Senate, sent a letter to the Director of the

⁶ Email from Michael Crowell, Professor of Public Law and Government, School of Government, UNC-CH (Oct. 14, 2014), http://www.nccourts.org/News/Documents/Marriage/crowell_email_magistrates_and_same_sex_marriages.pdf (last visited Mar. 7, 2016).

Administrative Office of the Courts. The members of the General Assembly voiced their criticisms of the NCAOC's directives concerning the implementation of marriage equality, as outlined in a memorandum issued by the NCAOC on October 14, 2014.⁷ The objecting members of the General Assembly "encourage[d] [the NCAOC] to revise the memorandum to include a comprehensive and correct statement of federal and state law on the doctrine of reasonable accommodation and management flexibility."⁸

49. On November 5, 2014, the Director of the NCAOC responded to Senator Berger's letter, writing, among other things:

I want to assure you and all of the people of our state that I respect our magistrates who hold sincere and deep religious beliefs that have placed them in conflict with the duties of their appointed judicial office. Those who have resigned demonstrated their thoughtful choices in resolving their moral dilemmas. At the same time, other magistrates with equally sincere and deep religious beliefs recognize a quite clear distinction between marriage as a civil ceremony conferring legal status, and marriage as a religious institution quite apart from temporal concerns.⁹

50. On March 2, 2015, Smith announced he was retiring, effective May 1, 2015. Warren replaced him.

51. On information and belief, some magistrates, including magistrates from counties within the Western District, resigned in the face of this Court's Order and the directive from Defendant Warren's predecessor at the Administrative Office of the Courts rather than uphold their oath of office and perform marriages for same-sex couples.

⁷ Memorandum from Pamela Weaver Best to Superior Court Judges, Chief District Court Judges, District Court Judges, Clerks of Superior Court, Magistrates (Oct. 14, 2014), <http://www.nccourts.org/News/Documents/Marriage/legal-counsel-memo-same-sex-marriages-UPDATE.pdf> (last visited Mar. 7, 2016).

⁸ Letter from Phil Berger et al. to Hon. John W. Smith (Oct. 24, 2014), <http://christianactionleague.org/wp-content/Republican-Senators-Letter-to-AOC-Smith.pdf> (last visited Mar. 7, 2016).

⁹ Letter from Judge John W. Smith to Senator Phil Berger (Nov. 5, 2014), <http://www.nccourts.org/News/Documents/Marriage/Response-on-Marriages-by-Magistrates.pdf> (last visited Mar. 7, 2016).

D. North Carolina Adopted Senate Bill 2 in Defiance of These Court Rulings.

52. On January 28, 2015, the President Pro Tempore of the Senate filed the second bill of the new legislative session: a proposed law to allow magistrates to opt out of performing marriages on religious grounds (and also to allow assistant and deputy registers of deeds to opt out of issuing marriage licenses).

53. The long name of the bill read (with emphasis added):

**A BILL TO BE ENTITLED AN ACT TO ALLOW MAGISTRATES AND
REGISTERS OF DEEDS TO RECUSE THEMSELVES FROM
PERFORMING DUTIES RELATED TO MARRIAGE CEREMONIES DUE
TO SINCERELY HELD RELIGIOUS OBJECTION.**

54. The official “short title” of the bill was “Magistrates [sic] Recusal of Civil Ceremonies.”

55. The bill became known as “Senate Bill 2” based of the filing number.

56. Section 1 of the proposed bill created a new statute, N.C.G.S. § 51-5.5, that would grant magistrates the right to recuse themselves from conducting any marriages, and separately would grant assistant and deputy registers of deeds the right to recuse themselves from issuing marriage licenses, for six-month intervals, based upon “any sincerely held religious belief.”

57. N.C.G.S. § 51-5.5 permits recusal based on “any” religious belief regarding marriage, which could include religious opposition to marriage between two men, two women, two people of different faiths, or, like Plaintiffs Carol Ann and Thomas Person, two people of different races.

58. The statute’s obvious purpose and timing, however, were in response to this Court’s ruling, and the effort to exempt magistrates who oppose constitutionally-protected, equal marriage rights for gay and lesbian citizens from their mandatory judicial oath to support and uphold the constitution.

59. The statute allowed magistrates to refuse to support the Fourteenth Amendment regarding the right to marry but still remain judicial officials, notwithstanding the requirements imposed of Article VI of the United States Constitution and Article VI, § 7 of the North Carolina Constitution that all judges be “bound” to uphold the federal constitution.

60. To achieve that end, Senate Bill 2 also amended N.C.G.S. § 14-230 to add subsection (b) to expressly exclude a magistrate’s refusal to perform marriage ceremonies as an act that “violated his oath of office” or that constituted a form of “misbehavior in office” or otherwise provided cause for removal from office on a Class 1 misdemeanor.

61. Senate Bill 2 also amended N.C.G.S. § 161-27 to add a subsection (b) that expressly protects assistant and deputy registers of deeds from being charged with a Class 1 misdemeanor for “recusal to issue marriage licenses in accordance with Chapter 51 of the General Statutes.”

E. Senate Bill 2 Directed that Public Funds Be Used to Accomplish its Religious Goal.

62. Senate Bill 2 also authorized the expenditure of public funds to accomplish the goal of exempting magistrates from their oath of office on religious grounds. The law does so in at least two ways.

63. First, language in N.C.G.S. § 51-5.5 provides that if all of the magistrates in a given county recuse themselves due to a “sincerely held religious objection” from performing marriages, the Administrative Office of the Courts shall arrange to bring a willing magistrate from another county to perform marriages in the county—an act that requires the expenditure of state funds. A district court judge would perform marriages until such an arrangement could be made.

64. Second, under Section 5 of Senate Bill 2, any magistrate who had resigned his or her position after this Court’s order in *General Synod* and then applied and was reappointed within 90 days

of the effective date of Senate Bill 2, would receive full service credit towards retirement for that gap in service from the magistrate's resignation to his or her reinstatement.

65. To accomplish that end, Section 5 of Senate Bill 2 requires the "Judicial Department" or the Administrative Office of the Courts to pay into the state retirement system on behalf of each reappointed magistrate both the employee's and employer's share of retirement contributions to cover that gap in service.

F. Senate Bill 2 Became Law over the Governor's Veto.

66. Senate Bill 2 was approved by the full Senate on February 25, 2015.

67. Debate on the Senate Floor made clear that moral disapproval of gay citizens exercising the fundamental right to marry motivated Senate Bill 2's passage: "I will not stand idly by and watch the demands of a few insist that a magistrate perform a wedding that he or she strongly believes to be immoral," said Sen. Buck Newton, co-sponsor of the bill.¹⁰

68. On May 1, 2015, Defendant Warren became interim Director of the Administrative Office of the Courts.

69. The House approved Senate Bill 2 on May 28, 2015.

70. The Governor vetoed Senate Bill 2 that same day, issuing a formal statement explaining the reason for his veto:

I recognize that for many North Carolinians, including myself, opinions on same-sex marriage come from sincerely held religious beliefs that marriage is between a man and a woman. However, we are a nation and a state of laws. Whether it is the president, governor, mayor, a law enforcement officer, or magistrate, no public official who voluntarily swears to support and defend the Constitution and to discharge all duties of their office should be exempt from upholding that oath; therefore, I veto Senate Bill 2.

¹⁰ Colin Campbell, *NC Senate's Move to Exempt Magistrates Rekindles Marriage Debate*, The News & Observer (Feb. 25, 2015), <http://www.newsobserver.com/news/politics-government/state-politics/article11312021.html>.

71. Despite the Governor's warning that Senate Bill 2 created a constitutional problem in allowing public officials to claim a religious exemption from their judicial oath of office, the legislature overrode the Governor's veto on June 11, 2015.

72. On June 26, 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 576 U.S. ____, 135 S. Ct. 2584 (2015), that state bans on marriage between same-sex couples violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment.

73. The legislature did not seek to modify or change Senate Bill 2 in the wake of the Supreme Court's decision in *Obergefell*.

G. North Carolina Has Expended Public Funds to Accomplish the Goals of Senate Bill 2.

74. Since Senate Bill 2 became law, on information and belief, at least 32 magistrates across North Carolina have invoked religious beliefs to recuse themselves from performing marriages because of their opposition to the constitutional right of gay and lesbian Americans to marry.

75. On information and belief, these magistrates had previously performed marriages for opposite-sex couples freely and without compunction, but opted out of performing marriages solely because of their opposition to performing marriages for same-sex couples. On information and belief, they do not have any general religious objection to marriage between opposite-sex couples.

76. On information and belief, all of the magistrates in McDowell County recused themselves from performing marriages under Senate Bill 2 because of their opposition to marriage equality for same-sex couples.

77. On information and belief, these McDowell County magistrates had previously performed marriages for opposite-sex couples freely and without compunction, and opted out of performing marriages solely because of their opposition to performing marriages for same-sex couples.

On information and belief, they do not have any general religious objection to marriage between opposite-sex couples.

78. By opting out of performing marriages, these magistrates in McDowell County and across North Carolina have renounced the oath to uphold the United States Constitution; they have rejected and refused to defend, support, uphold and be bound by the Fourteenth Amendment rights of same-sex couples to marry.

79. On information and belief, Defendant Warren has expended public funds monthly under N.C.G.S. § 51-5.5(c) to further this religious exemption from the oath of office for all of McDowell County's magistrates, and to support and facilitate their renunciation of the judicial oath to be bound by the federal constitution, and oath he has taken as well.

80. As required by Senate Bill 2, Defendant Warren has paid and is paying and will continue to pay from public funds the costs necessary to transport an oath-abiding magistrate from Rutherford County to perform marriages in McDowell County, and to transport one or more of the oath-renouncing magistrates to Rutherford County to perform other judicial duties there while the oath-abiding, travelling magistrate performs constitutionally required marriages in McDowell County.

81. Defendant Warren knows that gay and lesbian citizens of McDowell County may need to appear before these oath-renouncing magistrates in other civil or criminal matters, but every magistrate in McDowell County believes that gay and lesbian Americans are second-class citizens not entitled to full Equal Protection and Due Process of law under the Fourteenth Amendment.

82. The gay and lesbian citizens of McDowell County also know that Defendant Warren has used their tax money specifically to support and aid these magistrates in their religious renunciation of the Fourteenth Amendment.

83. On information and belief, after Senate Bill 2 became law, several former magistrates in the Western District who had resigned rather than be bound by this Court's October 10, 2014 ruling were reappointed as magistrates; other magistrates in other parts of the states who had resigned rather than perform same-sex marriages were similarly reappointed.

84. For each of these reappointed magistrates, Defendant Warren paid tax dollars into the state employees' retirement system, both the employee and employer contributions, to purchase service credits for the gap in service from the time of each magistrate resigned -- rather the accept and uphold the federal constitution after this Court's ruling and after being ordered by Defendant Warren's predecessor to honor their oath and perform marriages, until the time of his or her reappointment as a magistrate under the provisions of Senate Bill 2.

85. By paying public moneys pursuant to Senate Bill 2 to facilitate the renunciation of the judicial oath, Defendant Warren has expended tax dollars for an express religious purpose, and has sent and continues to send a deliberate, purposeful message to gay and lesbian citizens that they are not full citizens in the eyes of the state's judicial system, notwithstanding the ruling of this Court, the Fourth Circuit Court of Appeals and the Supreme Court, that the Equal Protection and Due Process Clauses of the U.S. Constitution included a fundamental right of gay and lesbian Americans to marry.

CLAIM I
First Amendment – Establishment Clause Violation
(Applicable to Defendant Warren Pursuant to the Fourteenth Amendment)
(All Plaintiffs)

86. All prior paragraphs are incorporated by reference.

87. Plaintiffs bring this claim pursuant to 42 U.S.C. § 1983 to challenge Defendant Warren's actions, taken under color of state law, that violate the First Amendment to the U.S. Constitution, which applies to the state officials like Defendant under the Fourteenth Amendment.

88. Defendant Warren's expenditure of public funds to further the statutory "right" of magistrates to renounce their judicial oath upon "any" "sincere" religious belief about marriage and not be "bound" by the Constitution violates the Establishment Clause of the First Amendment.

89. Defendant Warren's spends public funds under Senate Bill 2 to aid religion – to accomplish a religious disavowal of the judicial obligation to uphold the federal constitution. His expenditures permits judicial officials to assert their religious beliefs as supreme to their judicial oath to uphold the federal constitution, and thus violate the Establishment Clause of the First Amendment.

90. The primary purpose and effect of these expenditures is to endorse and further the primacy of a specific religious belief about marriage equality above the constitutional recognition of the right of those citizens to marry. They funding guarantees every magistrate who opposes the constitutional right to marriage equality a religious exemption from the judicial oath to support the constitution. The expenditure of taxpayer funds to achieve this religious purpose violates the Establishment Clause.

91. Defendant Warren's expenditure of funds endorses and support single religious view of marriage equality that defies this Court's ruling that gay and lesbian Americans have a due process right to marry. These expenditures are made pursuant to legislation that did not undertake any balancing of the individual and state interests at stake, as required in adopting any legislation with a religious impact. Defendant Warren now spends the money without balancing the interests as stake.

92. In the drafting of Senate Bill 2 and passing it into law, North Carolina failed to balance the public's societal interest in having all judges bound by their judicial oath to support and evenly apply the United States Constitution to all citizens, against the magistrates' interests in asserting their personal religious beliefs about marriage equality in the face of that judicial oath.

93. From the face of the legislation, North Carolina failed to undertake this required balancing of interests, rendering Senate Bill 2 constitutionally infirm. That also makes Defendant Warren's spending of the money unconstitutional.

94. Further, this legislation does not have a legitimate secular purpose.

95. The legislation's sole purpose is to advance a specific religious belief about marriage equality. That also makes Defendant Warren's spending of the money unconstitutional.

96. Moreover, Senate Bill 2 entangles the state in religious affairs, because it establishes a sincerity test for a magistrate's religious-based recusal from the duty to perform marriages. That also makes Defendant Warren's spending of the money unconstitutional.

97. Finally, the spending by Defendant Warren under Senate Bill 2 harms third parties because it compromises, impairs, and violates the constitutional integrity of the judicial system to the detriment of the citizens of North Carolina by protecting the employment of magistrates unwilling to recognize and protect the constitutional rights of a segment of the public: gay and lesbian citizens of McDowell County and every other county in the state. Defendant Warren recognizes this threat to the integrity of the judicial system but still spends the funds.

98. Under Senate Bill 2, the actions of the two magistrates who refused to conduct an interracial marriage for Carol Ann and Thomas Person on religious grounds, later found by a federal court to violate the Fourteenth Amendment, is sanctioned and protected conduct. Defendant Warren recognizes that fact but still expends the funds.

99. Plaintiffs seek and are entitled to a declaration that the spending of taxpayer funds by Defendant Warren to further Senate Bill 2 violates the First Amendment, and to an Order enjoining any further spending and enjoining the laws contained in the legislation.

100. Plaintiffs also seek and are entitled to costs and attorneys' fees under 42 U.S.C. § 1988 and *Hutto v. Finney*, 437 U.S. 678 (1978).

CLAIM II
Fourteenth Amendment – Equal Protection Violation
(Plaintiffs Ansley, McGaughey, Penn, and Goodman)

101. All prior paragraphs are incorporated by reference.

102. Plaintiffs bring this claim pursuant to 42 U.S.C. § 1983 to challenge Defendant Warren's actions, taken under color of state law, that violate the Fourteenth Amendment to the U.S. Constitution, which applies to the State of North Carolina.

103. Defendant Warren's actions to support the provisions of Senate Bill 2 through his department, including the expenditure of funds, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as it applies to Plaintiffs Ansley, McGaughey, Penn, Goodman, and all other gay and lesbian citizens of North Carolina.

104. Gay or lesbian citizens like Plaintiffs Ansley, McGaughey, Penn, and Goodman are exposed to the real, immediate, and substantial risk of discrimination in the enumerated civil or criminal proceedings before magistrates who believe as a matter of publicly sanctioned religious creed that gay and lesbian Americans are not entitled to the full rights of other citizens. Through his actions and efforts, Defendant Warren deliberately compromises, impairs, and violates the constitutional integrity of the judicial system that *must* provide equal protection of the law to gay and lesbian citizens in McDowell County and throughout North Carolina.

105. Gay and lesbian citizens in any other county where a magistrate has been recused from performing marriages under Senate Bill 2 must endure this same risk of appearing before a magistrate judge who believes they are not full citizens as a matter of state sanctioned religious belief.

106. Specifically, Plaintiffs Penn and Goodman are deprived of the opportunity to have their secular marriage ceremony solemnized by a duly appointed magistrate untainted by the stigma of animus arising from the recusal of magistrates in Swain County.

107. At its bottom, the actions of Defendant Warren taken under Senate Bill 2 single out gay and lesbian couples, and reject with animus the fundamental and equal right to the dignity of marriage afforded for gay and lesbian citizens protected under the Fourteenth Amendment, as held by this Court, the Fourth Circuit and in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). Defendant Warren's actions in administering the terms of Senate Bill 2 protect and support magistrates who deny gay and lesbian citizens equal treatment under the law, including Plaintiffs Ansley, McGaughey, Penn, and Goodman.

108. Plaintiffs seek and are entitled to a declaration that Defendant Warren's actions to further Senate Bill 2's state-sanctioned recusal of oath-objecting magistrates from performing marriages of gay and lesbian citizens violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and to an Order enjoining Warren from taking further actions to in support of the goals of this legislation.

109. Plaintiffs seek and are entitled to costs and attorneys' fees on Claim II under 42 U.S.C. § 1988 under *Hutto v. Finney*, 437 U.S. 678 (1978).

CLAIM III
Fourteenth Amendment – Due Process Violation
(Plaintiffs Ansley, McGaughey, Penn, and Goodman)

110. All prior paragraphs are incorporated by reference.

111. Plaintiffs bring this claim pursuant to 42 U.S.C. § 1983 to challenge Defendant Warren's actions, taken under color of state law, that violate the Fourteenth Amendment to the U.S. Constitution, which applies to the State of North Carolina.

112. Warren's actions in furtherance of the goals of Senate Bill 2 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and thus the rights of Plaintiffs Ansley, McGaughey, Penn, and Goodman and all other gay and lesbian citizens of North Carolina.

113. Warren's actions in furtherance of the goals of Senate Bill 2 Senate Bill 2 compromises, impairs, and violates the constitutional integrity of the judicial system. Although North Carolina Magistrates are judicial officers who are often a citizen's first contact with the judicial system and who are charged with protecting the constitutional rights of those who appear before them, gay or lesbian citizens, like Plaintiffs Ansley, McGaughey, Penn, and Goodman, will lose these protections and be exposed to the real, immediate, and substantial risk of discrimination in civil or criminal proceedings before magistrates who believe as a matter of publicly sanctioned religious creed that gay and lesbian citizens are not entitled to the full rights of other citizens.

114. Gay and lesbian citizens in other counties where magistrates have recused themselves under Warren's actions, both in providing funds and administering the program, also must endure this same situation in derogation of their rights.

115. Because of Warren's actions in furtherance of the goals Senate Bill 2, gay and lesbian citizens across the State of North Carolina must appear before judicial officials who are empowered and supported by Warren to adjudicate matters of significant importance while denying and defying the full constitutional rights of gay and lesbian citizens.

116. Therefore, Warren's actions in furtherance of the goals of Senate Bill 2, deliberately compromises, impairs, and violates the constitutional integrity of the judicial system that must guarantee Due Process of the law to gay and lesbian citizens in McDowell County.

117. Accordingly, Warren's actions in furtherance of the goals of Senate Bill 2 denies gay and lesbian citizens their fundamental right to access government services.

118. At its bottom, Warren's actions in furtherance of the goals of Senate Bill 2 single out gay and lesbian North Carolinians, reject with animus the substantive due process rights of gay and lesbian citizens to the dignity of marriage as protected under the Fourteenth Amendment by the U.S. Supreme Court in *Obergefell v. Hodges*, 576 U.S. ____, 135 S. Ct. 2584 (2015), and protect and support magistrates who deny and defy the constitutional right of gay and lesbian citizens to equal treatment under the law.

119. Plaintiffs seek and are entitled to costs and attorneys' fees on Claim III under 42 U.S.C. § 1988 under *Hutto v. Finney*, 437 U.S. 678 (1978).

PRAYER FOR RELIEF

WHEREFORE, upon consideration of this matter, Plaintiffs pray for the following relief from the Court:

1. A Declaration that Defendant Warren's spending in furtherance of the goals Senate Bill 2 violates Article VI of the U.S. Constitution and the First Amendment, as applied to North Carolina under the Fourteenth Amendment;
2. A Declaration that Defendant Warren cannot support and protect magistrates who disavow the required Article VI judicial oath and duties on religious grounds;
3. A Declaration that Defendant Warren's use of public funds to advance a specific religious view of marriage equality is unconstitutional;
4. A Declaration that Defendant Warren's actions in furtherance of Senate Bill 2 violates the Due Process and Equal Protection Clauses under the Fourteenth Amendment;
5. An Order enjoining Defendant Warren's from further actions to implement Senate Bill 2, including the expenditure of public funds and the provision of administrative support to renouncing magistrates;

6. The costs and expenses in this action, including reasonable attorneys' fees under 42 U.S.C. § 1988; and,

7. Such other and further relief as the Court deems just and necessary.

Date: March 7, 2016

Respectfully submitted,

/s/ S. Luke Largess
N.C. Bar 17486
llargess@tinfulton.com

/s/ Jacob H. Sussman
N.C. Bar No. 31821
jsussman@tinfulton.com

/s/ John W. Gresham
N.C. Bar No. 6647
jgresham@tinfulton.com

TIN FULTON WALKER & OWEN, PLLC
301 East Park Avenue
Charlotte, NC 28203
Tel: 704-338-1220
Fax: 704-338-1312

/s/ Katherine Lewis Parker
N.C. Bar No. 36263
kparker@tinfulton.com

TIN FULTON WALKER & OWEN, PLLC
1213 Culbreth Drive
Wilmington, NC 28405
Tel: 910-228-5200
Fax: 910-401-1155

/s/ Meghann Burke
N.C. Bar No. 42209
meghann@brazilburkelaw.com

BRAZIL & BURKE, P.A.
77 Central Avenue, Suite E
Asheville, NC 28801
Tel: 828-350-3812
Fax: 828-258-8972

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
 ASHEVILLE DIVISION
 Civil Case No. 1:16-cv-0054

Kay Diane Ansley, Catherine “Cathy”)
 McGaughey, Carol Ann Person, Thomas)
 Roger Person, Kelley Penn, and Sonja)
 Goodman,)
 Plaintiffs,)
 v.)
 Marion Warren, in his Official Capacity as)
 Director of the North Carolina Administrative)
 Office of the Courts,)
 Defendant.)

Civil Case No. 1:16-cv-0054

**DEFENDANT’S MOTION TO
 DISMISS PLAINTIFFS’
 COMPLAINT**

[Fed. R. Civ. P. 12(b)(1), (2), (3) and (6)]

Now comes Defendant, Marion Warren in his Official Capacity, by and through the North Carolina Attorney General and the undersigned attorneys, and respectfully moves the Court to dismiss Plaintiffs’ Complaint against Defendant in the above-captioned matter pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6). Plaintiffs’ Complaint should be dismissed for lack of personal jurisdiction, improper venue, and Plaintiffs’ failure to state a claim upon which relief can be granted. Furthermore, this Court lacks subject matter jurisdiction to adjudicate this cause of action due to Plaintiffs’ lack of standing.

In support of this motion, Defendant relies on the factual grounds, arguments and legal authorities set forth in the accompanying brief.

Respectfully submitted, this the 5th day of May, 2016.

ROY COOPER
 North Carolina Attorney General

/s/ Olga E. Vysotskaya de Brito
 Ms. Olga E. Vysotskaya de Brito
 Special Deputy Attorney General

North Carolina State Bar No. 31846
North Carolina Dept. of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-0185
Facsimile: (919) 716-6759
Email: ovysotskaya@ncdoj.gov

/s/ Amar Majmundar
Amar Majmundar
Special Deputy Attorney General
North Carolina State Bar No. 24668
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6821
Facsimile: (919) 716-6759
Email: amajmundar@ncdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 5, 2016, I electronically filed the foregoing **MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Olga E. Vysotskaya de Brito
Ms. Olga E. Vysotskaya de Brito
Special Deputy Attorney General

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
3 (Asheville Division)

3 -----x
4 KAY DIANE ANSLEY, et al, :
5 Plaintiffs, :
6 vs : Civil Action:1:16-CV-54
7 MARION WARREN, :
8 Defendant. :
9 -----x

9 Monday, August 8, 2016
10 Asheville, North Carolina

11 The above-entitled action came on for a Motions
12 Hearing Proceeding before the HONORABLE MAX O. COGBURN,
13 Jr., United States District Judge, in Courtroom 1
14 commencing at 9:32 a.m.

13 **APPEARANCES:**

14 On behalf of the Plaintiffs:
15 **S. LUKE LARGESS, Esquire**
16 **JACOB H. SUSSMAN Esquire**
17 Tin Fulton Walker & Owen, PLLC
18 301 Park Avenue
19 Charlotte, North Carolina 28203

18 **MEGHANN K. BURKE, Esquire**
19 Brazil & Burke, P.A.
20 77 Central Avenue, #E
21 Asheville, North Carolina 28801

20 On behalf of Defendant:
21 **AMAR MAJMUNDAR, Esquire**
22 **OLGA E. VYSOTSKAYA de BRITO, Esquire**
23 N.C. Department of Justice
24 114 West Edenton Street
25 Post Office Box 629
Raleigh, North Carolina 27602

24 Tracy Rae Dunlap, RMR, CRR 828.771.7217
25 Official Court Reporter

I N D E X

On behalf of the Proposed Intervenors:

W. ELLIS BOYLE, Esquire

Knott & Boyle, PLLC
4800 Six Forks Road, Suite 100
Raleigh, North Carolina 27609

ROBERT D. POTTER, Jr., Esquire

5821 Fairview Road, Suite 207
Charlotte, North Carolina 28209

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1 not doing that you all need to intervene in this matter?

2 MR. POTTER: Your Honor, at least on behalf of
3 the legislative intervenors, I would say that it's just
4 repeated persistent public adverse statements against the
5 law. You can't possibly represent it adequately if he is
6 such an outspoken, vocal critic of it. I mean nobody
7 would ask that their -- would want to have an attorney
8 who's out on the courthouse steps talking about how
9 terrible they are and how bad the case is and then turn
10 around and say well I'm your lawyer and you've got to
11 stick with me. So that is the -- that's the nub of the
12 problem with the attorney general's representation.

13 THE COURT: Didn't Judge Schroeder have this same
14 issue down there in the Middle District though with the
15 attorney general? And it sounds like at least at the
16 district level the attorney general did pretty good down
17 there.

18 MR. POTTER: And which case are you.

19 THE COURT: On the voter. Voter IDs.

20 MR. POTTER: Oh I wasn't involved in that case
21 Your Honor so I don't know.

22 THE COURT: Okay.

23 MR. POTTER: The Fourth Circuit of course has
24 taken care of that.

25 THE COURT: That's -- cases go up and the law

1 comes down. We just follow the law at the district court
2 level. They tell us when we're wrong; they tell us and
3 we change.

4 MR. POTTER: I think it's important to note you
5 know that the attorney general's statements weren't made
6 just when this was an idea. They were made to the
7 associated press when the bill was passed they were
8 treated after the bill passed they were repeated this law
9 will probably be challenged constitutionally and he knew
10 he was going to be the attorney representing it and yet
11 he was making all these statements and at the same time
12 saying I'm going to defend it. You know, Mr. Warren
13 unfortunately doesn't have a lot of choice on who his
14 lawyer is and the legislature has an adverse interest to
15 what the attorney general is doing.

16 THE COURT: Thank you sir.

17 MR. SCHMID: (Inaudible.)

18 COURT REPORTER: You're going to have to get
19 closer to a microphone, sir.

20 MR. SCHMID: Daniel Schmid on behalf of proposed
21 intervenor Bumgarner I think there's a material issue on
22 what they're arguing Your Honor. I think what the
23 attorney general is putting forward is that this is some
24 permissive legislative enactment and that that's all it
25 is. On behalf of the proposed intervenor Bumgarner's her

1 position has been add it's not one of strategic
2 differences it's a material difference in kind that this
3 is a constitutionally mandated protection that's been
4 trying under the First Amendment and others, and she also
5 has different interests that the attorney general doesn't
6 represent. Namely, her own constitutional rights to free
7 expression, free exercise, due process, and the other
8 constitutionally guaranteed liberties that she raises in
9 her proposed intervention motion.

10 And I think there's a difference there that the AG
11 doesn't have an interest in representing. These are
12 personal freedoms that are enshrined to the constitution
13 to her and if it's just per miss sieve what the
14 legislature can permit or may allow it can take away
15 subsequently. If it's constitutionally mandated at the
16 proposed intervenor Bumgarner argues, then it doesn't
17 matter whether the AG abandons the defense tomorrow,
18 whether he enters into some settlement discussions or
19 some other type of alternative dispute resolution during
20 the pendency of this while she's not an intervenor. And
21 those things can't happen if it's constitutionally
22 mandated.

23 If the constitution mandates then it doesn't
24 matter who the next attorney general is. It doesn't
25 matter what the attorney general's position is going

1 forward. It doesn't matter if he opposes it if it's
2 constitutionally mandated as proposed intervenor
3 Bumgarner says. If it stays, it will be proposed in the
4 text as well. And I think this is where this may versus
5 must distinction comes in. And I think that's critical
6 to proposed intervenor Bumgarner's position as to why the
7 attorney general can't adequately join the legislature
8 intervenor. No one disputes we have an adequate
9 representation. How can you have adequate representation
10 to someone who's pope?

11 It seems to me, Your Honor, we have a history, a
12 track record here, of the attorney general abandoning
13 positions he didn't support in previous litigation. The
14 marriage cases themselves, when it got down to subsequent
15 pieces of the litigation, he abandoned the defense
16 evidence. So we have no guarantee that tomorrow proposed
17 intervenor Bumgarner will have any adequate protection
18 for her constitutional liberties when there is a track
19 record and when there's open opposition to the position
20 she holds.

21 So I think intervention here is required because
22 those liberties need a defense. She is entitled to
23 participate in a record development that will aid this
24 court in seeing why it is mandated versus why it's
25 permissive. I don't think the attorney general could put

1 forward the record evidence that she can put forward
2 concerning her own constitutional liberties and why this
3 bill is required to accommodate them. And for all those
4 reasons I think the attorney general can't adequately
5 represent her interest and we would ask that you grant
6 intervention.

7 THE COURT: Thank you.

8 MR. BOYLE: Your Honor, thank you.

9 THE COURT: Yes, sir.

10 MR. BOYLE: Even more compelling than the prior
11 argument you just heard about the attorney general's
12 inability to adequately represent a magistrate's
13 interests here. Two of my clients Mr. Holland and Mrs.
14 Myrick are actively engaged in litigation against the
15 attorney general as we speak today in matters in which
16 Judge Warren is the defendant and is taking a directly
17 adverse and adversarial position against my two client s.
18 Mr. Holland is pursuing a lawsuit against --

19 THE COURT: What are your claims in that case?

20 MR. BOYLE: Yes, sir. Mr. Holland and another
21 magistrate who resigned in October of 2014 are pursuing
22 North Carolina constitutional claims in a North Carolina
23 state court action against the AOC. That case is
24 currently on appeal at the court of appeals in North
25 Carolina pending resolution of a standing issue. Mr.

1 Holland has also filed an EEOC complaint against the AOC.
2 Ms. Myrick has not only filed an EEOC complaint, but it
3 has been referred to an administrative law judge under
4 GERA, the Government Employee Rights Act of 1991, and is
5 currently set for trial on September 7th. We're actually
6 filing a Motion for Summary Judgment in that case on
7 behalf of Ms. Myrick today. So the attorney general
8 cannot take positions in this case or should not I should
9 say that are in contravention to positions that the
10 attorney general has taken the same with Judge Warren
11 cannot take positions in this case that he has taken the
12 opposite position in those other cases. So my clients,
13 the proposed intervenors have a unique ability to bring
14 their perspective and it mirrors what Mr. Schmid was just
15 talking about with the permissive versus constitutional
16 -- constitutionally required accommodation issue. On
17 that particular issue the attorney general and this
18 defendant cannot adequately represent my client's
19 interests.

20 THE COURT: Okay thank you very much. Attorney
21 Joan want to say anything right now? I know you're not
22 opposing the intervention. You take no position on it is
23 that right.

24 MR. MAJMUNDAR: Just briefly Your Honor we're
25 here not on behalf of the attorney general but rather on

1 behalf of defendant and in that regard we're satisfied
2 with the order that was issued by the magistrate judge
3 regarding the proposed motions to intervene.

4 THE COURT: All right. Let me hear from the
5 plaintiffs.

6 MR. LARGESS: Mr. Sussman.

7 MR. SUSSMAN: Good morning, Your Honor,
8 Jacob Sussman for the plaintiffs. As we've laid out in
9 our pleadings Your Honor we believe that under 24(a) and
10 under 24(b) these proposed intervenors have not made a
11 showing a sufficient showing that they should be
12 intervening. We've seen the motion to dismiss filed on
13 behalf of defendant Warren. It covers all the parent
14 bases that the proposed intervenors are suggesting that
15 they would bring to bear in this lawsuit. There is no
16 daylight in that regard with what is before this court.
17 I would note that -- I think it's note worthy that the
18 motions to intervene and the assertions of inadequate
19 representation by the attorney general's office were made
20 prior to any filing done by the attorney general's office
21 based on out of court public statements by attorney
22 general cooper who I imagine is not going to be appearing
23 in this matter personally is not going to be making
24 arguments personally on behalf of defendant Warren. And
25 to take those political matters and insert them into this

1 litigation is of no moment and doesn't speak to any real
2 inadequacy. It's complete speculation.

3 Just briefly and we laid this out in our response
4 that we filed on Friday, Your Honor. The attorney
5 general's office is legally obligated to defend this
6 lawsuit. They are doing that. Taking in order the
7 issues raised by Berger.

8 THE COURT: What they're worried about is you will
9 damn them with fake praise. They're worried he's going
10 to just sort of do it and say okay, that's my argument.

11 MR. SUSSMAN: Your Honor, I think the proof is in
12 the pudding. First of all, just look what's been filed.

13 THE COURT: I agree. I agree it's very strong.
14 In fact, there's going to be -- I'm really going to have
15 to -- I'm really going to have to hear what the standing
16 in this case is. That's where the Court has got some
17 real problems with plaintiff's case in this. The
18 attorney general's office is the one that made the strong
19 argument on standing in this case. That's -- I mean
20 before you get to things you've got to have something
21 there to be some kind of standing. And if it was just
22 taxpayer standing, and we can get into that, I think
23 probably everybody in this room's got a lawsuit they can
24 bring against North Carolina because they can probably
25 figure money is being spent and they don't like the way

1 it's being spent. I know I've got a few items but I
2 can't bring those.

3 MR. SUSSMAN: Yes, Your Honor. And just -- and,
4 briefly, I think that the Court raises what's the
5 litigation in the Middle District in the voting case.
6 The same issue appeared there, and there was vigorous
7 defense and prevailing in the district court by the
8 attorney general's office notwithstanding public
9 statements by Attorney General Cooper that he would see
10 this -- he would have a different view of this law.

11 I think with respect to Magistrate Bumgarner, this
12 issue of permissive legislative enactment versus -- and
13 it also applies, I think, to intervenors Myrick and
14 Holland. Again, that's trying to create an adversity of
15 interest where there doesn't really appear to be one. I
16 believe Bumgarner, as laid out in her pleadings, had
17 filed a lawsuit previously in state court and voluntarily
18 dismissed it. Myrick and Holland are pursuing -- there
19 are independent grounds that they are challenging. There
20 are predicaments in other matters involving the state as
21 defense -- as defendants in those cases. However the
22 Court adjudicates this matter in this courtroom will
23 arguably have no impact on their ability to prevail on a
24 state constitutional grounds or on GERA.

25 So this is creating matters that particularly with

1 Myrick and Holland that were filed before the enactment
2 of Senate Bill II. It's of no moment, Your Honor, and it
3 does not speak to any -- again, if you look at the proof
4 of the four corners of what has been filed in this case,
5 there is no daylight. And in fact, they're being more
6 than adequately represented by the state attorney
7 general's office.

8 And then just one other matter, Your Honor, with
9 respect to want Berger and Moore. We've raised it. It's
10 not been addressed by them in their response. And
11 without clouding matters because, again, we think that
12 what we've seen from the responses filed by the attorney
13 general's office more than gives this court what it needs
14 under Stewart and other case law to deny these motions.
15 There is this issue of legislative immunity that has not
16 been addressed but we think would be implicated by their
17 involvement as parties in this lawsuit and how that --
18 how that will unfold if they were permitted to be parties
19 and whether they are waiving any legislative immunity,
20 and they are open to deposition and that opens all
21 members of the legislature. That's not an issue that's
22 been addressed by them in their pleadings, but we think
23 it's something that would have to be addressed and
24 addressed up front by the Court.

25 So our position, as we fairly lay out, is that

1 under 24(a) they've not made that showing that is
2 required under 24(b). We think that Magistrate Judge
3 Howell's analysis -- he sees what's in front of him. The
4 Court's in the best position how to manage this
5 litigation. To be candid, Your Honor, we want to move
6 forward as quickly as possible to get an answer so we can
7 continue this litigation, but we feel that those rulings
8 should remain and that these parties should not be
9 permitted to intervene.

10 THE COURT: Okay.

11 MR. SUSSMAN: Thank you.

12 MR. POTTER: Your Honor, may I say just one quick
13 thing?

14 THE COURT: Yes, sir, Mr. Potter.

15 MR. POTTER: The point of whether or not you have
16 to show inadequacy of representation before intervention,
17 the United States Guaranty case addressed that.
18 Particularly, it's cited in Stewart. And it says the
19 argument that the bank must have failed to perform its
20 duty before intervention should be permitted has been
21 rejected in Turbovich. The discussion will demonstrate
22 compliance of the case which will follow. I understand
23 that Stewart thought that Turbovich and United States
24 Guaranty did not apply to the situation in that case but
25 the principal is still correct. Otherwise, you could

1 never intervene until the other party, the party in the
2 case, did something draconian which prejudiced you.

3 The second quick point I wanted to make was that
4 the idea that the attorney general's interests are the
5 same or that -- are the same in the brief is belied by
6 the briefs themselves. We filed a proposed motion to
7 dismiss and a long brief. And not only did we deal with
8 the standing issue but we also spend ten pages talking
9 about the policy. The attorney general's interest is to
10 avoid the policy because he doesn't agree with the law.
11 So that's another example of how there's an adversity of
12 interest between the attorney general's office and the
13 legislature. Thank you, Your Honor.

14 THE COURT: All right. Thank you.

15 Good lawyers for the intervenors, by the way, and
16 good papers. What I would say -- what I would say at
17 this point is what the Court's going to do today. I've
18 looked at what Judge Howell wrote, and I'm going to go
19 ahead and review it de novo. But it would appear that at
20 this point that using much the same logic that Judge
21 Schroeder used in Winston Salem -- and he's an
22 outstanding judge that could hear anything that I've got.
23 That's one of the nice things about federal court is that
24 although we all come to this with different ideas in
25 terms of where our minds are and our mindset is, we're

1 not politicians and rogues in robes, and we're not
2 subject to massive amounts of money for election so that
3 we become politicians in robes. So any federal judge
4 around I'll trust with what decision that they do.

5 And, again, there's a process involved in this
6 district court. You guys are going to be able to find
7 out if it I'm right about this. I mean we have a process
8 here that it goes through. It starts out with a judge
9 like me, at the lowest trial, or the lowest Article III
10 level, and then it's going to go -- it goes to the
11 Circuit, and then the Circuit hears it, and you know it's
12 going to be dependent on how who hears it and what
13 happens there to a certain extent. But ultimately the
14 Supreme Court takes it -- it goes to the Supreme Court.

15 I'm not telling you guys anything you don't know
16 but people don't understand there is a process involved.
17 There aren't, on the federal court, loose cannon judges
18 at the trial level doing things that can't be stopped.
19 They can be stopped quick at the Circuit level and they
20 can be stopped at the Supreme Court level. So we make
21 just as many mistakes up here as anybody else does, but
22 there's a review process that goes up and the cases go up
23 and the law comes down. And a good example of that would
24 be if anybody wants to read on the marriage case, the
25 Bostic case, which was the first one the Fourth Circuit

1 out of Virginia. The Fourth Circuit opinion in that,
2 there is a strong dissent for states' rights in this.
3 And it doesn't talk about any kind of moral or any kind
4 of issue. It's talking about states' rights in this.

5 It's a -- it's a recognition that what we're
6 talking about in these kinds of cases is -- renders under
7 Caesar that Caesar -- this is a court where the
8 Constitution of the United States is ultimately there,
9 and the laws of the United States if they're not adverse
10 to the Constitution.

11 Plaintiff's got a problem. The problem with this
12 case is standing I've got to hear where they're going to
13 go with standing in this case. But if I rule for or
14 against them, that's going to go up and there's going to
15 be a Circuit court that's going to hear that and they're
16 going to tell me if I'm right or wrong. And if you get
17 the Fourth Circuit and the Supreme Court to take it
18 they'll tell them whether they're right. Ultimately,
19 somebody has to make the final decision and we have
20 selected a Supreme Court to do that, which saves us a
21 whole lot of trouble.

22 I mean all you have to do is go back to Bush v
23 Gore. If that happened in any other country there would
24 have been a war over that but not here. When the Supreme
25 Court said this is it, there was some complaining to be

1 done on one side and happiness on the other, but we moved
2 on because somebody had to make the last call and we've
3 selected the courts to do that, the Supreme Court. And
4 we do the preliminary stuff for those guys.

5 So stay around because we're going to hear this.
6 I'm anticipating that I'm going to be not giving you --
7 not allowing you to intervene and then -- but I don't
8 know how that's -- where that's going to go.

9 Yes, sir.

10 MR. SCHMID: Your Honor, if I may say something.
11 Your statements there raise one moral concern about our
12 proposed intervenor Bumgarner has which is, yes, we do
13 have a system where at the district court level the
14 decisions are made and they go to circuit court and they
15 go to the Supreme Court. However, our clients and every
16 proposed intervenor would have no such right of recourse.
17 If our position is to be rejected and the constitutional
18 rights that are enshrined in the First Amendment and the
19 Fourteenth Amendment to protect proposed intervenor
20 Bumgarner and the others are rejected, she'll have no
21 resource. She can't go to the circuit court to seek
22 review. Amicus won't allow her to do that. To file an
23 amicus brief gives her nothing to put forth a position.
24 But were those positions to be rejected and the attorney
25 general, who has expressed opposition to the law, doesn't

1 see any need to go forward or doesn't think it's merited
2 or that it's too financially costly to do so, proposed
3 intervenor Bumgarner and the others will have no recourse
4 whatsoever. They're left in the lurch without having a
5 say-so about whether their rights are adjudicated.

6 THE COURT: If the intervenors have constitutional
7 rights on their own they have their own constitutional
8 rights. They have claims they can make. It doesn't just
9 have to be in this particular lawsuit. This is dealing
10 with a particular law that was passed and whether or not
11 this is an establishment by saying that if you have
12 religious -- any kind of well reasoned -- or I can get
13 the specific -- religious objection to this, then you can
14 -- I understand what the legislature is doing. They're
15 just trying to help these folks. These folks took these
16 jobs before the law ever got -- before that was ever
17 overturned and they weren't expecting to have to do this,
18 and I understand what the legislature is doing.

19 It might have been good if you just had any kind
20 of well held belief. But, of course, if you've got the
21 state employee making their own call on everything then
22 you may have a problem on that. You may have a problem
23 getting your stuff done. But I don't know how the -- if
24 religious rights are being constitutionally violated then
25 individuals have a claim to question whether they have a

1 claim in this suit about this law. This is a specific
2 law. This is the state of North Carolina coming in and
3 saying this not coming in against necessarily your
4 client. They're coming in for your client. The question
5 is, is this law unconstitutional? And I don't even know
6 if they have standing.

7 I haven't heard -- the Fourth Circuit's had some
8 talk about, you know, people just not feeling good about
9 something or don't like something. I haven't heard
10 anybody that's not been able to get married yet.
11 Everybody's getting -- I mean -- and nobody's been forced
12 to marry anybody. I mean the one that I had was
13 Christian churches that wanted to perform same sex
14 marriages. And now after all those -- after Bostic and
15 all the cases and my case came down now one Episcopal
16 church in Asheville doesn't and one Episcopal church in
17 Asheville does it, and neither one is being forced to do
18 the other. And there's still people in the other one
19 that think they're wrong in doing it. But everybody is
20 always wanting to be the boss of everyone else. It's
21 that way in politics, it's that way in everything, it's
22 that way in religion. But I understand.

23 And you're -- really and truly, your client has --
24 is the most sympathetic in terms of intervening of
25 everybody here. The legislature, I think, is being well

1 represented by the -- attorney general lawyers do cases,
2 as you guys know. Sometimes we think we've got the worst
3 side of the case and we end up getting a client and we're
4 going, golly, I wish I had the other side of the case.
5 But we still do a good job and sometimes we win and
6 sometimes we lose. But lawyers do that all the time.
7 Lawyers do that all the time.

8 And I understand the political situation is a
9 very, very volatile one. And I don't want to get
10 involved in all the politics of this stuff. I think it's
11 bad when judges do that. I'm always happy to see when it
12 happens that a judge does something that's not expected.
13 Justice Roberts, on the ObamaCare thing and not whether
14 that was the right decision or not, because everybody
15 expected he was going to lean on the conservative side.
16 He's a judge. He's going to make the call the best he's
17 going to be. He may be wrong on that. There are people
18 who think he was wrong headed in making that decision,
19 but he made that decision and it was -- he's being a
20 judge when he makes that decision. Because sometimes we
21 just have to put our personal feelings behind us and rule
22 on the law.

23 So I may be wrong on this. And you guys will have
24 a an opportunity, if you want to to -- if I've been
25 incorrect in not letting you intervene, but there may be

1 several steps ahead before this case ultimately gets
2 decided. What I'm going to do today is I'm going to hear
3 the arguments today from both sides with regard to
4 standing and then the claims themselves, and then I'm
5 going to make some sort of decision on this case and do
6 the best I can in making that. If it turns out that you-
7 all should have been allowed to intervene, we'll have
8 another hearing and more arguments. If we don't, then I
9 will rule.

10 In other words, I'm going to hold back and make
11 sure I'm right on this. And I don't get -- I'm sure I'm
12 right on this now but, you know, sometimes I've been sure
13 and the Court has told me I'm wrong -- the Fourth
14 Circuit's told me I'm wrong, and they have no problem
15 telling me when they think I'm wrong.

16 MR. SCHMID: Thank you, Your Honor.

17 THE COURT: Thank you-all very much. Thank you.

18 All right. Let's jump to the arguments. You
19 filed the motion so let me hear what it's about.

20 MR. MAJMUNDAR: Yes, Your Honor. Thank you. May
21 it please the Court. My name is Amar Majmundar. I'm
22 joined by co-counsel Olga Vysotskaya. It's been
23 established we're from the attorney's general's office.
24 I want to be sure -- Your Honor, you had mentioned
25 standing a couple of times. Do you care the order in

1 which these motions are presented? Do you want to hear
2 standing first?

3 THE COURT: Yeah. Let's hear standing first
4 because, you know, you get past, if you've got several
5 different arguments. But with regard to standing on
6 these things, you know, it's -- it goes all the way
7 through all of these claims. The establishment claim is
8 the one which may be able to survive taxpayer or may not
9 be able to survive taxpayer claims with regard to that.
10 The others, this will be a first if it happens. So go
11 ahead and argue standing.

12 MR. MAJMUNDAR: I appreciate that, Your Honor.

13 THE COURT: You can argue it all the way through
14 if you'd like to, but let's go ahead and hear the
15 standing issue first because that's the door everybody
16 has to get through before anybody rules on the other
17 claims.

18 MR. MAJMUNDAR: Certainly, Your Honor. And
19 Ms. Olga Vysotskaya drew the short straw on that so
20 she'll present the standing argument.

21 THE COURT: Very good.

22 MS. VYSOTSKAYA: Your Honor, my name is Olga
23 Vysotskaya with my colleague Amar Majmundar. I was
24 assigned to represent defendant Warren in this case, and
25 standing issue was my issue so I'll be happy to argue it

1 before Your Honor. I intend to argue it in the similar
2 order the way it was presented in our brief.

3 THE COURT: That's fine.

4 MS. VYSOTSKAYA: I intend to argue the Flast
5 exception, Flast versus Cohen exception, upon which
6 plaintiffs expressly rely in this case to establish their
7 standing that it does not extend to state taxpayers
8 first. Secondly, I intend to argue that even if this
9 type of standing extended to state taxpayers, that
10 plaintiffs failed to satisfy the two-pronged test that
11 was announced in Flast in order to meet that kind of
12 taxpayer standing exception. And to the degree that Your
13 Honor would like to hear our argument to the extent that
14 they don't meet any other type of standing that is common
15 in federal court cases --

16 THE COURT: You go ahead. I've gone through this.
17 I mean I'm listening to you. I'm not an empty slate
18 right now. Go ahead and argue.

19 MS. VYSOTSKAYA: I'll jump right into Flast
20 versus Cohen case. The reason being that this is the
21 type of standing that plaintiff stated specifically in
22 their complaint that they rely on. And later when they
23 responded to our motion to dismiss in their response they
24 also stated that they relied on Flast for establishment
25 clause claim and also for their Fourteenth Amendment

1 claim.

2 As Your Honor noted, if that type of standing were
3 to be granted for the Fourteenth Amendment claim that
4 would be the first time that the court has ever done
5 this. Our Supreme Court in Green case, in Cuno case. In
6 every other case that was decided, has clearly extended
7 taxpayer standing only to the establishment clause type
8 of claims.

9 THE COURT: That's the way I see it.

10 MS. VYSOTSKAYA: Explicitly, in fact, to expand
11 that type of standing to the Dormand commerce claim which
12 was an issue before the court in Cuno case, Daimler
13 Chrysler versus Cuno case, and several others to
14 establish clause came, which is a more interesting one.
15 The general rule still applies. The Supreme Court
16 reiterated it several times in Cuno, in Hein, in Wynn
17 cases. And the general rule is generally taxpayers don't
18 have any standing to sue. However, a very narrow
19 exception was carved out in Flast versus Cohen case. In
20 that case federal taxpayers brought a challenge against a
21 federal specific appropriates problem which appropriated
22 money from the federal Treasury to a program that
23 supported instruction and teaching in religious schools.
24 Around \$1 billion was appropriated under that program,
25 and taxpayers in that case claimed that that violated the

1 freedom of constitution that it violated the
2 establishment clause rights.

3 THE COURT: Why is it different for state?

4 MS. VYSOTSKAYA: It is different in this case for
5 several different reasons. And let me start with the
6 test, Your Honor, that was announced in Flast. In order
7 to meet that test, first of all, plaintiffs have to show
8 that there is a logical link between the taxpayer's
9 status and between the type of legislations that they're
10 attempting to challenge. As the Court specifically held,
11 Flast -- and the Supreme Court in its later decisions
12 held that it has to be a specific legislative outlet out
13 lay of money. In other words, it has to be a specific
14 taxing and spending program that the government is
15 establishing in the legislation that is being challenged.

16 It cannot be just an incidental type of
17 expenditure that goes basically with every regulatory
18 statute that legislature ever passes. There is some kind
19 of expenditure of money involved. But the courts held
20 that unless it's a direct outlay of money in that
21 specific legislation that Flast then was not applied
22 under those circumstances. And this is exactly the
23 situation that we have presented -- are presented with
24 here.

25 Basically what we have in Senate Bill II is a

1 regulatory statute. It's a statute that basically deals
2 with the way -- how the duties of magistrates have been
3 for the better -- a portion in the state. It talks about
4 that the magistrates are allowed to recuse themselves
5 from performing all the marriages. And clearly there is
6 some kind of expense that is involved with this kind of
7 recusal. In the specific case, a type of expense that is
8 involved is the transportation expenses that has to be
9 incurred if all the magistrates within the district
10 recuse themselves and you have to bring a magistrate from
11 a different jurisdiction to perform the duties of the of
12 all the magistrates that have recused themselves. But it
13 is clearly an incidental type of expense. It is clearly
14 not the purpose of that statute on its own. The purpose
15 of that statute is to make sure that there is a religious
16 accommodation that is provided to the magistrates who may
17 have differing religious views on the nature of marriage.

18 It's different than -- in that way, but also --
19 that's one of the issues we raise. The Flast case has
20 never been -- has never been expanded -- let me put it in
21 a different way. The Supreme Court of the United States
22 has never held that the Flast case applies to state
23 taxpayer standing at all. Flast itself in many places,
24 as you read the case, talks only about federal
25 appropriations of money about congressional -- United

1 States' Congress power to do problems within its Article
2 I, Section 8 tax and spending powers. The Supreme Court
3 has never held that it applies to the state.

4 Now there were cases -- and plaintiffs do cite
5 some of the cases in their response where the court
6 basically assumed that the state taxpayer standing, but
7 our justices called such an assumption a nonbinding
8 subsilencio. Nonprecedented, basically. The court did
9 not rely on the assumption of spending in order to make
10 them an assertion that it constitutes any kind of
11 presidential authority.

12 Moving on to the second prong. So we talked about
13 that this is not a direct legislative outlay. It's not a
14 specific taxing and spending program. It's a regulatory
15 statute they would have. That would relate to the first
16 prong of Flast at the scene. Plaintiffs fail to
17 demonstrate that there is a logical link between the
18 taxpayer status and the type of legislations that they're
19 challenging. They also fail to meet the second type, the
20 second prong of Flast versus Cohen test. The second
21 prong is that plaintiffs have to demonstrate that there
22 is a nexus between the taxpayer's status and the type of
23 constitutional infringement that they are alleging in
24 this case.

25 If you were to go by the assertions made by

1 plaintiffs, basically as soon as you mentioned
2 establishment clause that means that you met Flast versus
3 Cohen test. And I would disagree that that's an
4 appropriate way to look at that second prong of the test.
5 I think the Court has to look at what the legislation
6 that is being challenged is actually trying to accomplish
7 and see if it actually amounts to the religious type
8 infringements in order to meet that second test. As I
9 mentioned before, this is a purely regulatory type of
10 statute and there is no need for the Court to elevate
11 form over substance in this case and just take on its
12 face plaintiff's assertion that this is an establishment
13 type of violation.

14 I could discuss the case, Your Honor, or I could
15 just go to talk about why they don't meet the type of
16 standing that is applicable to every other case other
17 than the establishment clause case in federal courts.

18 THE COURT: Yeah, go ahead. I'm going to let you
19 argue what you want to argue today. Anything you think
20 might sway me either way, I'll here.

21 MS. VYSOTSKAYA: Ordinarily, in order to state
22 Article III standing, plaintiffs have to show that they
23 have an injury, that the injury is particularized to them
24 that is an actual or an imminently threatened type of
25 injury, that that injury is traceable to the acts of the

1 defendants, and that that injury could be redressed by
2 the favorable decision.

3 THE COURT: What do you say to the injury they
4 claim?

5 MS. VYSOTSKAYA: I would say the injuries they
6 claim is purely hypothetical and conjecture type of
7 injury. They complain sort of about two different types
8 of harms that they may experience in the future. The
9 first type of harm that they complain about is that at
10 some point they may have to appear in court before a
11 magistrate who does not believe in the type of marriage
12 that they enter, and that's specifically two sets of
13 plaintiffs here Your Honor. The plaintiff same sex
14 marriage couple that has been married and same sex
15 marriage couple that is intending to marry but has not
16 married yet.

17 So they say that because magistrates have certain
18 types of beliefs about the nature of their marriage that
19 they will hold -- that they will apply that type of
20 belief and show that type of belief towards the group of
21 people itself rather than the type of marriage. In other
22 words, what they say is that the judge will be -- cannot
23 be impartial. And I think there is a strong presumption
24 about this type of claim in this court. The judges are
25 presumed to act impartially. And unless plaintiffs --

1 and you could have a situation where plaintiffs encounter
2 this type of scenario, and I think in that case we
3 wouldn't be talking about standing here. I think we
4 wouldn't be raising standing as an issue, but there is no
5 specific --

6 THE COURT: Your best argument on that that the
7 magistrate is going to have a document saying they have
8 recused themselves from same sex marriage and the parties
9 could file a motion to recuse the judge if the judge
10 doesn't have the sense to hear the case in the first
11 place? Couldn't they do that?

12 MS. VYSOTSKAYA: I think they could, but I think
13 also it's a big --

14 THE COURT: It's not like it's being held as a
15 secret. If you're not going to perform same sex
16 marriages, you're going to have to file a document saying
17 you're not doing it and everybody is going to know who
18 you are.

19 MS. VYSOTSKAYA: Well not everybody is going to
20 know. That record is actually a confidential record that
21 is placed in the magistrate's personnel file. But that,
22 again, goes to the fact that this harm is basically
23 conjectural and hypothetical. A person appearing before
24 a magistrate would not even know whether or not that
25 magistrate has recused himself or herself. And in case

1 the judge behaves impartially there are other judicial
2 recourses, as Your Honor knows. There are motions to be
3 filed to recuse a judge if a judge behaves impartially
4 and if plaintiffs in that case would demonstrate that
5 this has occurred.

6 THE COURT: Judges file refusals all the time. In
7 fact, I ended up with a case -- the original case because
8 a judge filed a recusal. And the case that I had here
9 that was before this on the marriage, I didn't have that
10 case. The other judge got out of the case and I got
11 that. The next one in line is me, so I ended up taking
12 it. Now I've gotten this case. So it happens. Judges
13 recuse all the time.

14 MS. VYSOTSKAYA: Or plaintiffs -- if that harm
15 actually existed, if they appeared before judges they
16 believed the judge was impartial because he was
17 discriminating against same sex couples, of course, they
18 could file the appropriate motion. But because there is
19 no factual allegation that states that plaintiffs have
20 encountered that situation, there is not even an
21 allegation stating that they are about to appear before a
22 magistrate on any matter. This just doesn't meet that
23 first prong of the regular standing test. It's not an
24 actual threatened or even type of injury that is alleged
25 here.

1 Of course there is a problem also with tracing the
2 alleged impartiality of a magistrate to the Senate Bill
3 II. Senate bill II does not create an impartiality. All
4 Senate Bill II does is it allows magistrates who believe
5 in marriage differently for religious purposes --

6 THE COURT: Don't you think that ought to be known
7 though? Why hide it? If you're going to be doing -- if
8 this is a religious thing, don't you want to stand up on
9 the top of the roof and shout out that this is a sin and
10 I don't believe in it? Wouldn't you want to do that?
11 Why are you keeping it a secret from everybody? What's
12 the problem with keeping a secret?

13 MS. VYSOTSKAYA: I think the statute makes it
14 confidential because --

15 THE COURT: I understand that. But don't you
16 think that should be something that's known?

17 MS. VYSOTSKAYA: I think that those magistrates
18 who recuse themselves are not prohibited from declaring
19 that to be so.

20 THE COURT: No. I'm sure they're not prohibited
21 from that, but what they're worried about is somebody
22 who's saying I'm going to get those folks when they come
23 in here. I'm going to get those folks when they come in
24 here. And the state magistrates don't have the same
25 legal background and training that lawyers and judges and

1 everybody have to try to talk about being able to handle
2 things that you may not agree with. Some people carry
3 their beliefs on their shoulders.

4 MS. VYSOTSKAYA: I think, Your Honor, that first
5 of all, there is a very strong legal presumption that
6 those people who were appointed -- elected into judicial
7 types of roles won't do so. And if it does happen again,
8 and it is not alleged to have happened in this case,
9 plaintiffs will have a recourse. Plaintiff will have a
10 recourse. They could file a lawsuit at that time. They
11 could file appropriate motions to recuse the judge for
12 reasons that they believe are true. You do not have to
13 have a refusal form or know the name of the magistrate to
14 see you are being treated impartially or --

15 THE COURT: Well move on. Move on.

16 MS. VYSOTSKAYA: Plaintiffs cannot demonstrate --
17 they cannot meet that second prong of the test either.
18 They cannot trace the type of harm that they alleged
19 they're afraid to suffer to the Senate Bill II. They
20 could link it potentially to the magistrate's personal
21 belief but not to Senate Bill II. Senate Bill II does
22 not enshrine anything, does not require anybody to
23 believe in any particular way.

24 And Your Honor, you probably know that there was a
25 case recently decided in Mississippi where the state of

1 Mississippi passed legislation, too, that allowed
2 religious accommodations to its magistrates. But that
3 case was -- it's Bryant versus -- it's a Bryant case. In
4 that legislation question there was clearly in your case
5 I think. And I think most people would agree was
6 enshrining of a specific type of belief. In that case it
7 was specific -- three categories of beliefs that were
8 listed in the legislation itself that clearly treated
9 same sex couples differently from other couples in the
10 marriage of --

11 THE COURT: What if you're an Atheist and you
12 don't want to do same sex marriages because you don't
13 have any religious belief but you just don't like them?
14 Have you got to write down you don't like them, or do you
15 have to say this is a religious belief?

16 MS. VYSOTSKAYA: Your Honor, I think that's an
17 excellent question and I think it would allow a
18 magistrate to use the recusal form. If you do not
19 believe that marriage should be sanctioned, let's say, by
20 the state at all. If you believe it's a purely religious
21 thing I think you could file your recusal form. I think
22 if you are an Atheist you could file your recusal form as
23 well. It's religious objections. You could object, in
24 other words, to religion and still take benefit of Senate
25 Bill II. I think it would allow you too absolutely.

1 And finally, Your Honor, it is difficult also to
2 see that even a favorable decision from this court would
3 redress the type of injury plaintiffs are complaining
4 about. What they're asking the Court to do is to enjoin
5 the spending under Senate Bill II. They do not ask the
6 Court to declare Senate Bill II in its entirety to be
7 unconstitutional because, clearly, establishment clause
8 type of claim would not allow them to seek that type of
9 framing.

10 Establishment clause claim only allows to strike
11 down spending as unconstitutional, not the whole entire
12 problem as unconstitutional. So the situation that they
13 would find themselves in would be that the state won't be
14 able to spend money on magistrate recusal but magistrate
15 refusals would be able to continue. And it doesn't seem
16 like that third prong of the standing requirement is met
17 by the type of relief that plaintiffs are demanding in
18 this case. There is a mismatch.

19 We also ask Your Honor to have this case dismissed
20 from prudential considerations. It's different from
21 constitutional Article III standing, but this is a case
22 where plaintiffs are challenging the state regulatory
23 statute that basically regulates how duties of
24 magistrates are being assigned. It's a type of case that
25 is best decided either within the state courts or decided

1 through a political process through petitioning the
2 government, through voting -- voting in elections, trying
3 to select representatives who support your type of view.
4 It's not a type of case that federal judiciary is usually
5 assigned or asked to decide. So we ask Your Honor to
6 consider our prudential argument that is presented in
7 full in our brief as well, in addition to -- in addition
8 to asking the court to dismiss -- I'm happy to answer any
9 standing questions.

10 THE COURT: Not right now.

11 MS. VYSOTSKAYA: If Your Honor is fine with that,
12 I would like to move on to plaintiff's failure to state a
13 claim on the establishment clause claim and also on their
14 equal protection claim.

15 THE COURT: Briefly. Go ahead.

16 MS. VYSOTSKAYA: Yes, Your Honor, I'll be very
17 brief. Basically, Your Honor, the Supreme Court
18 precedent and our Fourth Circuit precedent, as well,
19 allows for states or federal government to pass religious
20 accommodations for its employees. Civil rights Act --
21 Title VII of the Civil Rights Act actually requires an
22 employer to accommodate employee's religious beliefs. So
23 there is nothing wrong with the fact that the state
24 actually passed a law that contains a religious
25 accommodation clause. In order -- Your Honor, recent

1 argument there presented by plaintiff of whether or not
2 it's a valid type of religious accommodation type of
3 statute or not.

4 Plaintiffs argue that Lemon test should apply.
5 And we submit that you don't have to apply Lemon test.
6 You could look at the substance of Senate Bill II and
7 conclude from the substance without looking at the Lemon
8 test and that it's an appropriate religious
9 accommodation, that it does not create any state
10 sponsored church, that Senate Bill II does not
11 differentiate between the set of beliefs that the state
12 prefers, that it's equal and impartial to all sets of
13 belief. It's neutral in that respect.

14 Your Honor could look to the fact that there were
15 magistrates who would have lost their jobs if Senate Bill
16 II would not have been passed and conclude that the state
17 had rational interest in supporting this type -- had
18 interest -- basically, legitimate interest in supporting
19 these magistrates. The Court could look at the fact that
20 the state is clearly interested in protecting the work
21 force, the experienced work force, of the state
22 employees, including magistrates, and could have passed
23 law for that. Basically, other than making a lot of
24 blanket conclusions, plaintiff has not alleged there is
25 any kind of infringement upon religion or establishment

1 of religion in Senate Bill II.

2 We also would argue, even if Lemon test is
3 applied, that all the requirements of the Lemon versus
4 Kurtzman test met by the language of the Senate Bill II.
5 And Your Honor, I won't repeat it; I'm sure you're
6 familiar with the test. We laid it out in our briefs.
7 We believe that all the arguments I suggested a second
8 ago would support also a finding that facially Senate
9 Bill II meets all the required prongs -- three prongs of
10 the Lemon versus Kurtzman test for equal protection and
11 due process argument, in addition to having problems with
12 standing, given the fact that they're basing their test
13 of Flast test.

14 Plaintiffs have not stated that Senate Bill II --
15 could they state that Senate Bill II contains any kind of
16 classification towards same sex couples, same sex couples
17 are clearly not referenced. There is no any kind of
18 special aim that is being taken at same sex couples in
19 that field so there is no certification stated. The
20 Court does not even have to look at that point whether or
21 not there is any kind of legitimate interest that the
22 state has. There is no classification no need for to
23 apply any other test. However, if the Court were to find
24 there's some kind of assumed or secret classification in
25 Senate Bill II, we would argue that -- for the reasons I

1 submitted earlier -- that state test legitimate interest
2 in passing that legislation.

3 And for the due process claim there is no
4 fundamental right that have been alleged to have been
5 infringed by Senate Bill II. Plaintiff simply can't
6 state the claim. It's based, again, upon the same type
7 of hypothetical and conjectural harms that, Your Honor,
8 you and I discussed at length before.

9 We also ask the Court to dismiss this case based
10 on plaintiff's filing of the case in the wrong venue.
11 Your Honor, would you be interested in hearing that
12 argument? It's laid out in our briefs. The case law is
13 laid out. Basically, defendant -- clearly in this case,
14 defendant Warren is a state official who resides in
15 Raleigh. The venue is appropriate in the Eastern
16 District under the first prong of the federal statute of
17 28, U.S.C., 1391. The second prong is that the
18 substantial -- that you could file it in the venue where
19 the substantial advance that led to the claim have
20 occurred. And since nothing was claimed to have occurred
21 in this case, all is based upon potential harm in the
22 future.

23 THE COURT: Right. I think they talked about
24 McDowell County. I think the magistrates down there had
25 all opted out, at least for a while, and they had to move

1 people in. But so far I think everybody's been able to
2 get married that wants to get married down there,
3 regardless of orientation.

4 MS. VYSOTSKAYA: That's interesting, Your Honor,
5 because Rutherford and McDowell County are actually
6 within the same judicial district. So the obligation for
7 the Director Warren to be involved by spending money to
8 transfer a magistrate from one district to another
9 district is actually not triggered by that factual
10 allegation that plaintiffs make. It's simply magistrates
11 were moving in the same judicial district.

12 THE COURT: Yeah, but they were moved. They were
13 specifically being moved in order to make sure that
14 somebody was at the courthouse in McDowell County to
15 perform a same sex marriage. I mean that's where you --
16 that whole thing was done to make sure that there was not
17 -- that a heterosexual couple which was going to be able
18 to get married on a day when a same sex couple could not
19 get married to give everyone the equal access there. I
20 mean that was why that was done. I mean, you know, it's
21 just the reality of the whole thing. That's why it
22 wasn't done. It wasn't, oh, we're just sending
23 magistrates -- we just like spending money, so we're
24 going to move magistrates from one place to another. It
25 was done to accommodate the magistrates that wished to

1 opt out of performing the marriages.

2 MS. VYSOTSKAYA: It was also done, Your Honor, to
3 accommodate the types of interest that plaintiffs are
4 advocating for to make sure that, despite the fact that
5 all magistrates recused themselves, there is somebody
6 available to marry them as well.

7 THE COURT: I understand. I understand. You're
8 right.

9 MS. VYSOTSKAYA: Your Honor, that kind of wraps
10 up my argument. I'm happy to answer any questions or
11 rebut.

12 THE COURT: No. You may have something to say
13 when they argue. Do you want to argue first or?

14 MR. MAJMUNDAR: At Your Honor's discretion. If
15 you want to keep this issue fresh in your mind while
16 listening to their arguments, I'm glad to defer. It's
17 just one more argument on behalf of defendant.

18 THE COURT: Let me go ahead and hear you and then
19 I'll let them go, and I'll let you respond.

20 MR. MAJMUNDAR: I'll try to be as pithy as
21 possible. As Your Honor knows, because of some Eleventh
22 Amendment immediate concerns, Judge Warren was named in
23 the second iteration of this lawsuit under Ex Parte
24 Young. And as the Court is aware under Ex Parte Young,
25 the name of the official cannot be someone who has the

1 authority to enforce state's laws. It has to be someone
2 that has to be someone who has a special relationship to
3 the challenged action. That official has to be clothed
4 in the enforcement duty of that challenged action. There
5 has to be proximity to or responsibility for the
6 enforcement of the challenged action.

7 And so in that regard -- and kind of move along
8 quickly. But in that regard, the defendant here is
9 appointed by the Chief Justice of the North Carolina
10 Supreme Court. The AOC is established by virtue of the
11 North Carolina Constitution as well as by statute.
12 Statutes specifically delineate what the director of the
13 AOC can and essentially cannot do. It provides an
14 exhaustive list, and it's found at N.C.G.S. 7A-746. And
15 it's a long litany of the responsibilities of the
16 Director of the AOC.

17 Included in that list is entering into defendant
18 contracts and securing IDs for employees, and making sure
19 there's a legion of translators who are certified and
20 qualified to perform their services. a variety, as the
21 name would apply, administrative functions that are
22 designed to facilitate not only litigants' experiences in
23 North Carolina courts but those of the judges as well.
24 And it should be clear that AOC is not synonymous with
25 the judicial department. Rather, it's a cog within the

1 umbrella of the judicial department. It's a small
2 section of the judicial department, and they do a lot of
3 the administrative mechanical facilitating work.

4 And so in that regard they act more as file
5 keepers and bookkeepers and, you know, ordering copy
6 paper when it needs to be ordered. They do all the
7 little things to insure that the judicial system in North
8 Carolina runs as efficiently as possible and hopefully
9 yield better jurisprudence as a consequence. So when you
10 look at that list of duties as assigned to Judge Warren
11 and his predecessor and his eventual successor, it's
12 pretty clear that it's purely administrative, and it's
13 especially true with respect to magistrates.

14 THE COURT: Well who should be sued then? I mean
15 who are we going to have sued in a case like that? I
16 mean is it hidden? Is it sort of a game maybe you'll get
17 it picked right, kind of like Battleship where if you hit
18 them you've got to hit?

19 MR. MAJMUNDAR: Right. I don't suggest any sort
20 of legal whack-a-mole here. What I'm trying to do is
21 delineate what he's responsible to. I will point that
22 7A-146 provides that the chief district judge, subject to
23 the general supervision of the chief justice of the
24 supreme court has administration supervision and
25 authority over the operation of the magistrates in his

1 district. So the chief district court judge is the one
2 who actually hires and fires and reviews performance if
3 there is a grievance asserted.

4 THE COURT: Do you have to sue them all, since
5 this is an effort to affect the law statewide? Have you
6 got to sue every single one of them out there because
7 they might have someone out there helping out in their
8 district?

9 MR. MAJMUNDAR: I think every potential
10 litigation has to be factored in, I think, given the case
11 in this county or that district. The other option as
12 well -- I'm not advocating this happened, but magistrates
13 themselves who refuse to abide by your court's -- by your
14 order of General Synod would also be a likely defendant
15 if their refusal is SB II-related. So, irrespective of
16 who may be the appropriate person, it's pretty clear that
17 defendant is not the appropriate person because, again,
18 he has to have that special relationship with respect to
19 enforcement. And if you review this obligation it's
20 purely administrative.

21 Now plaintiffs have -- and you've pointed out the
22 issue here is really the establishment clause portion of
23 this lawsuit that there is money spent. And according to
24 plaintiffs, Director Warren is the one who spends that
25 money. And in that sense it's true they're the

1 bookkeepers for the judicial department and they cut the
2 checks for the translators and the other vendors and for
3 salaries and for whatever might be travel expenses.

4 But there's a couple of points to be made is that
5 within a district, a judicial district, expenses are
6 always incurred. If a magistrate calls in sick in one
7 county, there's a need for extra magistrates. If there's
8 an emergency of some sort, whatever it is, there's
9 routine movement of magistrates between counties in a
10 district.

11 THE COURT: Right. But this is being done -- I
12 mean, realistically, this is a specific thing that's
13 being done that ultimately authorizes the expenditure to
14 allow these magistrates who want to opt out of performing
15 any marriage because of their opposition to performing
16 same sex marriages to be able to be moved around to make
17 sure there's always cover. And apparently they've done
18 pretty good because I haven't heard any -- nobody's filed
19 a lawsuit that on the day they wanted to get married the
20 county was loaded with opposition.

21 MR. MAJMUNDAR: That's exactly the point, Your
22 Honor. I know plaintiffs have suggested to the Court
23 that SB II and Director Warren have acted in defiance of
24 General Synod. But the reality is is whether you
25 disagree with SB II or you disagree or you're neutral,

1 the objective viewpoint of SB II is that it does in fact
2 insure that any person who goes to a magistrate with the
3 person they love can get married. That they're not going
4 to be turned away at the door because they might be a
5 same sex couple or an interracial couple or a
6 heterosexual couple. SB II, whatever you might think of
7 the motivation behind it one way or another, it does in
8 fact insure that General Synod is complied with if nobody
9 encounters that circumstance where they want to get
10 married but cannot.

11 And the other aspect of moving these magistrates
12 around is that it's at the request of the chief district
13 court judge. In whatever district it might be, if all
14 the magistrates stand up and say we're not going to do
15 this for whatever deeply held -- religious held
16 convictions they have, we don't feel comfortable doing
17 this. And in the event all the magistrates in that
18 district decide we're not going to do this, then and only
19 then can the chief district court judge ask the AOC to
20 bring in a magistrate from another district. And if you
21 look at SB II, the only provision in that law that
22 relates or even refers to AOC is that limited
23 circumstance where all the magistrates stand up and say
24 we're not going to do this in this district. And then
25 and only then can AOC make arrangements and move people

1 around to insure that this court's order in General Synod
2 is complied with.

3 So there is this kind of de minimus expenditure of
4 funds for the purpose of moving magistrates around not
5 just for marriage purposes but for a variety of different
6 purposes within a district. And only in a limited
7 circumstance when all the magistrates stand up and say
8 we're not going to do it can AOC move from another
9 district a magistrate. That's the first part of spending
10 issue.

11 The second part is interesting, Your Honor, in
12 that complains that the state has filled in the
13 retirement funds for these magistrates who resigned. So
14 after your order in General Synod there were a number of
15 magistrates who said, you know what? I'm not comfortable
16 doing this sort of marriage. They have their own
17 personal beliefs whether you agree or disagree with them.
18 They resigned. Senate Bill II came out around eight
19 months after this court's order in General Synod. And
20 what Senate Bill II says is, all you magistrates who
21 resigned we understand you have personal beliefs;
22 everybody has their personal belief. If you want to come
23 back as a magistrate, you may do so. You will not get
24 your salary back, you will not get your sick time back,
25 you will not get your vacation time accrued. However, if

1 you want to come back, you have 90 days from the
2 enactment of this bill to submit your application. And
3 in doing so, if you are approved, then the state will
4 make up the difference in the date of service between the
5 time you resigned some time after October 9th of 2014 and
6 from the enactment of Senate Bill II.

7 There's two points about this, Your Honor, is that
8 expenditure is done. It's been done for many months now.
9 These folks had 90 days to submit their papers to be
10 reinstated and have money put into the retirement account
11 to make up that gap of service. There's no more
12 expenditure in that regard, and this is prospective
13 injunctive relief on their claims on that issue. The
14 money is spent. It's done. It won't be spent again.

15 Secondly, it's hard to square the circle that
16 filling in the retirement gaps are those who really felt
17 compelled to resign. Is it advanced of a religious
18 purpose? And that's what the establishment clause
19 violation suggests is it's an advancement of a religious
20 purpose, rather than insuring that people who work a
21 number of years in state employment had the chance and
22 had their retirement where, when they finally do retire
23 uninterrupted by a gap because it's something they felt
24 strongly about.

25 And you said Your Honor at the very beginning that

1 you know people -- reasonable people have different
2 opinions on same sex marriage and it's okay to have those
3 opinions we have to avoid by the law and that's a hundred
4 percent true. So if these folks come back and say, you
5 know, as the law is with Senate Bill II, I'm absolutely
6 going to abide by it. They shouldn't be punished by
7 their ability to retire in a timely fashion or a receive
8 the full benefits as a state retiree would have. On the
9 expenditure issue. I think that's now been rendered moot
10 by virtue of the lapse of time, if nothing else.

11 So plaintiffs in their complaint have made a
12 number of general legal conclusions and they're couched
13 as facts, but they're legal conclusions -- and I think
14 what plaintiffs do is forget the actual language of
15 Senate Bill II. As I described, there's only a very
16 limited context in which the AOC and the director may be
17 involved in the processes associated with Senate Bill II
18 and that's when all the magistrates stand up in a
19 district and say we're not going to do this. From that
20 language, plaintiff suggested the defendant is willing
21 administrator of that systemic religious based disavowal
22 of the oath to uphold the federal constitution. And I'm
23 not sure exactly how making sure magistrates are
24 available to perform marriages constitutes a willing
25 religious based disavow of the oath of the federal

1 constitution. They're making sure people can get
2 married, they're making sure people aren't denied the
3 right to get married. So to suggest that in doing that
4 they're enforcing this disavow of the constitution, it's
5 different for me to square that sir.

6 Now I guess in the absence of specific facts
7 because, as Ms. Olga talked about, there aren't a lot of
8 facts to suggest there's been a harm that's been
9 incurred. A lot of these things are ephemeral and
10 they're speculative. So in the absence of those facts
11 plaintiffs have pointed out three cases to Your Honor
12 that they believe establish that Director Warren, Judge
13 Warren, is a proper party. Those three cases actually
14 stand for the opposite. I'm not going to go through them
15 in any great detail. They're the South Carolina Wildlife
16 Federation and Lighthouse case.

17 In that case the court went through great detail
18 to determine the South Carolina DOT was not only
19 supervising the DOT and having this road built in an
20 environmentally sensitive area, but he also was deeply
21 involved in getting that work done and getting it
22 advanced and getting that permit. And according to that
23 level of involvement, he was enforcing the laws at issue
24 in that case. That's not the case here.

25 The second case --

1 THE COURT: Let me -- but let me ask you one more
2 time about this. Let's just assume for a minute that
3 there is -- standing to attack the law there's taxpayer
4 standing to attack the law, the law as it is before it
5 goes out, before it's spent. Who gets sued? Who is the
6 proper party to be sued here? If you're good at figuring
7 out who's not supposed to be sued, North Carolina surely
8 knows who is supposed to be sued in this. Who do you say
9 is supposed to be sued so the Court can look at it and go
10 you're right or you're wrong?

11 MR. MAJMUNDAR: I appreciate the Court's
12 question. It's a knotty one. The answer, I think, is
13 always going to be factor.

14 THE COURT: That's not good enough for me. I
15 understand what you're saying. You want the judge in
16 McDowell County to be sued if it happens there. You want
17 to wait until a marriage is denied in Mecklenburg and
18 have that judge sued. Let's suppose if as it is borne --
19 as the statute comes out it is facially unconstitutional
20 under the establishment clause. Who is supposed to be
21 sued under that when it's borne there at the legislature?
22 Does everybody have to wait and individually attack it so
23 that the law just sits there causing issues along the
24 way? Who's the right person to sue? This is all going
25 to get -- it's going to -- no matter what I do this is

1 all going to get salted out -- every one of these issues
2 is going to get cleared up by somebody.

3 MR. MAJMUNDAR: Sure. And I don't think that it
4 would have to be an individual case by case basis. I
5 think if there is a case and there's a declaratory
6 judgment, one sought, in that case that declaratory
7 judgment ruling will encompass any case that invokes the
8 same legal issues.

9 THE COURT: Who would it be against?

10 MR. MAJMUNDAR: If you're asking me, I think the
11 most likely candidate might be a magistrate.

12 THE COURT: You're saying something has to happen
13 -- you're going to continue to argue that something has
14 to happen before anybody can do that. You sort of have
15 to sit there and wait until the law actually goes forth,
16 rather than being able to sue when it comes out of the
17 legislature. You say wait a minute. This is an
18 establishment of religion.

19 MR. MAJMUNDAR: I believe that's true, Your
20 Honor. I think somebody something actually does have to
21 happen. Ms. Olga talked about that. In order for this
22 to be a purposeful endeavor, this litigation, we have to
23 talk about something that actually happened.

24 THE COURT: So I guess when the Church of England
25 was discriminating against the Puritans, they had to be

1 forced and had to leave in order to do that. And when
2 the Puritans got here and said well we're glad we can
3 practice freely our religion, but if you don't do exactly
4 what we want you can go out in the woods and die in
5 America. So there's always going to be something that
6 comes down the line. But don't you know at some point
7 that something is facially wrong if it is facially wrong?
8 I mean if something is facially wrong when it comes out
9 of the legislature, who do you sue? The legislature?
10 The government? The administrator? Who are we going to
11 sue.

12 MR. MAJMUNDAR: Well there are a number of
13 available defendants in the state of North Carolina, Your
14 Honor, but --

15 THE COURT: Okay. Let's move on. Move on to
16 something else.

17 MR. MAJMUNDAR: I will move on. Very quickly,
18 with respect to Bostic, I'd like to distinguish that
19 quickly. Plaintiffs have cited Bostic as another example
20 of where it was determined that the officer named had
21 enforcement authority. In Bostic it was the head of the
22 Office of Registrar there. In that case the defendant
23 conceded that she was responsible for the enforcement of
24 the challenged statute. That does not exist here. And
25 in the McRooney - Cuccinelli, case the court went the

1 THE COURT: Yeah, we can take a recess. Let's go
2 ahead and take a recess of about ten minutes. All right.

3 (Off the record at 10:45 a.m.)

4 (On the record at 11:00 a.m.)

5 THE COURT: All right. I'll hear from the
6 plaintiffs.

7 MR. LARGESS: Thank you, Your Honor. Let me
8 start -- let me focus on the standing question first but
9 start with this. No one has mentioned yet -- and this
10 side of the room doesn't really mention it in any of
11 their pleadings -- what is at issue here, Your Honor.
12 And that is before there was a Bill of Rights, before
13 there was a First Amendment, there was an Article VI of
14 the Constitution that said this constitution is the
15 supreme law of the land and that every judge in every
16 state will swear to be bound to uphold it. And what this
17 statute does is say that there's a religious exemption
18 from that requirement. And we have challenged that law
19 official facially and as applied as unconstitutional.

20 THE COURT: What is your standing for doing that?
21 In other words, let's suppose for a minute that the Court
22 agrees with you that you get past the motion to dismiss
23 if you have standing. I mean there are -- you know, we
24 do have rules. We do have ways that these things get
25 there to avoid everything being done in a willy-nilly

1 manner. And there's a serious, serious issue of standing
2 in this case that needs to be heard regardless of whether
3 that was done.

4 What you're saying -- are you saying that these
5 are people trying to do a good thing that were misguided
6 in what they did? Or do you think this whole thing is a
7 bad thing? Because the Court sees it as trying to let
8 these folks keep their jobs. And I understand you think
9 they ought to be -- you're saying they ought to do the
10 whole job if they're going to be magistrates.

11 MR. LARGESS: They're judges. Under North
12 Carolina law they swear a judicial oath.

13 THE COURT: They do. They do. They do swear to
14 support the federal constitution, yes, they do. Where in
15 there -- let me ask the question. Where in the law is it
16 about the fact that their recusing is secret? I've read
17 through a copy of the statute that I've got. Is that
18 something that's done separately to protect them from
19 protestors or something?

20 MR. LARGESS: I believe so, Your Honor. I
21 believe so. That's -- I'm here to talk about the
22 establishment clause standing issue, and Ms. Burke is
23 going to talk about the Fourteenth Amendment, but they go
24 together in this way. In Flast there was this language
25 about how there may be other constitutional limits on

1 legislative action and those -- and I'm going to take you
2 through the history here. But what's at stake here is
3 the integrity of the magistrate's judicial system in
4 North Carolina because it's a secret that these people
5 who disavow and reject the Fourteenth Amendment ruling of
6 this court and the Supreme Court are going to sit and
7 hear cases of gay and lesbian persons without knowledge
8 of their position that they do not believe they're
9 entitled to full citizenship. That's a fundamental
10 problem, Your Honor, that we think we have a standing to
11 raise under Flast.

12 Let me take you through the history.

13 THE COURT: Take me through the history, but I
14 want you to get on to this standing issue. That's very,
15 very important to the Court because this is what opens
16 the doors to the courthouse.

17 MR. LARGESS: And this case, Your Honor, is the
18 narrow case that actually fits within Flast, and here is
19 why. If you understand, there's these cases from the
20 '20s, Frothingham and Melon, saying that federal
21 taxpayers did not have standing to challenge legislation
22 as taxpayers. Then in 1947, Your Honor, remember Everson
23 versus -- the name of it is Board of Education of the
24 Ewing New Jersey Township. A challenge to using school
25 money to put students on buses to parochial schools was

1 accepted by the Supreme Court because it was state
2 taxpayers, municipal taxpayers, challenging on First
3 Amendment grounds that spending.

4 The court found a secular purpose in the
5 transportation scheme and denied on the merits. About
6 ten years later there's this Doremus case where they try
7 to challenge, on First Amendment grounds, this practice
8 again in the state of New Jersey of having teachers read
9 five verses from the Old Testament every day at the start
10 of school or from the Bible. That's where this language
11 about incidental spending came from. The court said they
12 couldn't even point to any money that was spent on this
13 in any budget so therefore there was no claim.

14 And then that led to Flast in 1968 where you had
15 this federal education spending bill that went to
16 parochial and sectarian schools in part, and this group
17 of taxpayers challenged that. And the Court held that
18 Doremus was not -- I mean -- sorry. That Frothingham and
19 Melon were not bars to this lawsuit, that if someone
20 could show that there was a legislative enactment under
21 the spending clause that had a religious purpose that
22 that would give them standing under the First Amendment.

23 THE COURT: How's this case different than Moss
24 versus Spartanburg?

25 MR. LARGESS: Moss versus Spartanburg?

1 THE COURT: Yeah.

2 MR. LARGESS: I'm not familiar with that one.
3 Can I take you through and --

4 THE COURT: Go ahead.

5 MR. LARGESS: Let me --

6 THE COURT: That was a case where Spartanburg,
7 South Carolina, Spartanburg County School District Seven
8 adopted a policy allowing public school students to
9 receive two academic credits for off-campus religious
10 instruction.

11 MR. LARGESS: Right. And there was a standing
12 issue in that case.

13 THE COURT: There was a standing issue in that
14 case. There was -- one child had standing and one was
15 found not to have standing because they didn't like the
16 law. They thought the law was wrong and they were not
17 found to have standing. One that was directly impacted
18 by it did have standing in that case, and that's why I'm
19 asking how this case might differ from that. Because, in
20 other words, essentially what it seems is there's not
21 been a specific wrong that you can point to other than
22 that this is generally wrong for them to do this.

23 MR. LARGESS: No, Your Honor, there is wrong.
24 There's spending privileges purpose. That's what Flast
25 prohibits.

1 THE COURT: That's what happened in Spartanburg.

2 MR. LARGESS: I would guess on that case two
3 things. That's probably a Doremus case because it's
4 municipal spending. That school district issue was at
5 issue not the state's. So under Doremus if you can show
6 the pocketbook amount, you have standing. And there --
7 I'll look at a case, a Ninth Circuit case, Cammack -- C A
8 M M A C K versus Waihee -- W A I H E E -- a Hawaiian. He
9 was the Hawaiian governor at the time, 922, F 2d, 765.
10 They showed some actual spending in that case for
11 religious purpose in the schools. And under Doremus
12 there was standing because you could point to the
13 pocketbook amount. Even if it was small, you could point
14 to it.

15 So without reading Moss -- but let me take you
16 through -- I think you need to understand the history
17 after Flast. And maybe you do understand this, but I
18 think it's helpful. There are these series of cases in
19 the '70s trying to look at this issue of Flast as to
20 whether you could bring some other kind of challenge
21 besides an establishment clause challenge. You may
22 remember some of these. You had Slessinger versus The
23 Reservist Committee to stop the war, which is where the
24 President allowed members of Congress to join the
25 Reserves, and there was a challenge that that violated

1 the Constitution because they were holding two offices at
2 once. The court said that's not an -- that is not a
3 spending issue under Article I, Section VIII.

4 There was a similar challenge to the -- in this
5 United States versus Richardson, the same day, decided
6 about forcing the CIA to reveal its budget and make it
7 public. And it was not under Article I, Section VII so
8 it was not an issue under Flast.

9 Then in 1982 you have this Valley Forge Christian
10 Church -- Christian College, rather, where H.E.W. gave
11 land to the school in Pennsylvania, and people had in
12 Maryland and other states objected and said there was a
13 violation of the establishment cause for the government
14 to make a gift to a religious institution. No standing
15 -- and this is where you start to get the narrowing. No
16 standing because this was spending by the executive.
17 This was a decision by H.E.W. There was nothing that
18 Congress had done and no enactment by Congress that
19 resulted in this decision. So there was no standing to
20 challenge under Flast.

21 That then led -- the next case under flast is a
22 straightforward one, Boeing v Kendrick, a 1988 case where
23 there was standing to bring a challenge to something
24 called the Adolescent Family Life Act because it was
25 Article I, Section VIII spending and it had a religious

1 -- a potentially religious purpose. The Court ruled on
2 the merits that it was not a violation of the
3 establishment clause.

4 Then you get into the three cases that really
5 shape why we have standing today, Your Honor. The first
6 is this Daimler Chrysler Corp. versus Cuno in 2006.
7 Toledo and the state of Ohio had given tax incentives to
8 Chrysler to try to keep the plant in Toledo, and
9 salespeople challenged those tax credits. Interestingly,
10 if you read the case, Judge, that case was removed from
11 state court and the plaintiff sought a remand because
12 they didn't think they had standing in federal court.
13 And then ultimately when the case went to the Supreme
14 Court they had to make a standing argument. They tried to
15 make one under the commerce clause, and the court said
16 those aren't the same considerations. The issue under
17 Flast, Your Honor, was this Madisonian concern going back
18 to the founding of the country that you cannot spend any
19 amount of money as a legislature, not three pence.

20 THE COURT: Where in the statute itself does it
21 talk about the money being spent? I mean in paragraph
22 three it says if and only all magistrates in a
23 jurisdiction are recused, the chief district court judge
24 shall notify the Administrative Office of the Court. The
25 Administrative Office of the Court shall insure a

1 magistrate's available in that jurisdiction for
2 performance of marriages required under G.S. 7A-(b). It
3 doesn't presuppose that people are going to be paid
4 travel or anything like -- obviously, that's something
5 that you would like to be able to do to keep people from
6 having to do that, but it says they've got to insure
7 somebody is there. Where is the expenditure by the
8 legislature? Where's the money authorized there?

9 MR. LARGESS: There's an authorization here and
10 with the retirement spending to do what is necessary to
11 expend funds, if necessary, to move. It's a logical part
12 of that. And you said here it's logical. What happened
13 if they're going to move them from one county to another?
14 They're going to pay them to do that.

15 THE COURT: Answer one question. Where is the
16 secret part in here? I want to read that.

17 MR. LARGESS: Hang on.

18 THE COURT: Where did they decide? Because I know
19 when I recuse, everybody -- it's filed. I mean there's a
20 list of cases of people that I can't hear cases for.
21 When all the other judges of this district are recused,
22 we're recused. I want to know what the secret --

23 MR. SUSSMAN: Your Honor, I believe the statute
24 itself lays it out but I would, for the record, note that
25 the AOC has issued a form, as it does in many state

1 matters, AOC-A-246. And this is called the Magistrate
2 Recusal From The Solemnization Of Marriages Form.

3 THE COURT: All right.

4 MR. SUSSMAN: On that form it notes in bold:
5 Note to chief district court judge. This form is a
6 confidential personnel record under Chapter 126 of the
7 General Statutes of North Carolina. And there's some
8 additional records there about how the magistrate should
9 save a copy for his or her own personnel files.

10 THE COURT: Yeah. I've read the statute itself,
11 and I did not see it in there specifically saying that
12 they had to be confidential.

13 MR. SUSSMAN: Your Honor, just because -- I'm
14 referencing this form so it makes clear in bold that this
15 is confidential. I would also make just -- the Court had
16 asked this previously when the attorney general's office
17 was arguing. The only way to except out is pursuant to
18 a, quote, "sincerely held religious objection," end
19 quote.

20 THE COURT: That could be -- I mean Atheists -- I
21 could say I don't believe in any religion, therefore
22 that's religious. The Wiccans might say we believe in
23 natural law and we're going to except out or something.
24 I mean there's all sorts of things that could be on
25 there. It doesn't specifically say a religion itself,

1 but you're saying that the -- it's establishing this
2 against the Atheists, is that it, or the Agnostics?

3 MR. SUSSMAN: No. Simply to the point that in
4 order to opt out under the current form you must sign and
5 attest.

6 THE COURT: That you have a sincere religious
7 belief.

8 MR. SUSSMAN: Sincerely held religious belief.

9 THE COURT: Right. Which might be I don't have
10 any religion so I don't believe in it, or I don't have
11 any -- I may be a Wiccan and I believe in the birds and
12 the trees and things like that, and it's just not my
13 thing. I mean, couldn't you do that? Really and truly
14 you could say that you're out?

15 MR. SUSSMAN: I don't believe you could, Your
16 Honor. I think that --

17 THE COURT: All right. Go ahead.

18 MR. SUSSMAN: We can address that later.

19 THE COURT: I mean, is this done -- let me ask
20 this question. Is this done just to try to get these
21 folks out of there? Just to remove people? In other
22 words, there was all this stuff against same sex
23 marriage. Some of it was those that were fighting for
24 that felt it was mean-spirited. Is this, sort of, let's
25 get these folks out of there? Because everybody that's

1 wanted to get married has gotten married. Nobody has
2 been denied a marriage under my order since that order
3 came forward. And is this not just an effort to try to
4 have a win-win by the state?

5 MR. LARGESS: Your Honor, I don't know --

6 THE COURT: It may be misguided. It may be
7 misguided. Maybe if you're right on -- if you're right
8 on your standing and right on your claim. But isn't that
9 really what it is? Or are they just trying to secret
10 people in the courthouse that are going to find cases
11 against same sex couples?

12 MR. LARGESS: Let me say this, Your Honor.
13 That's an issue to be developed in discovery in the case.
14 The motive behind the law -- it's our view it was filled
15 with animus towards the decision of this court and the
16 rights of these people to allow people on their religious
17 grounds to disavow the constitution.

18 THE COURT: I understand that there are those that
19 are opposed, for whatever reason, to same sex marriage,
20 but that doesn't mean that they can't do something that
21 is not a bad thing. I mean just because you think
22 somebody may be bad toward your folks doesn't mean that
23 every action that they do is -- that is a bad act in
24 trying to do that. You know, then are they not just
25 saying --

1 MR. LARGESS: Your Honor, again, I think that
2 goes to the merit of the case and the motive issue.

3 THE COURT: It does. But I am going to ask these
4 questions because you immediately wanted to go to the
5 fact that -- rather than get into the standing issue you
6 wanted to go immediately to the issue of the
7 Constitution, the six articles of the Constitution,
8 before all that came in. And so when we start going into
9 everything and get into the constitution itself and get
10 away from the standing issue, I think that if you can get
11 past the standing issue you might get past dismissal.
12 But the problem is getting past the standing issue.

13 MR. LARGESS: Let me continue then, Your Honor.
14 So in 2006 you had this Daimler Chrysler case saying,
15 again, a challenge under the -- an attempted claim
16 standing under the commerce clause and the court saying
17 there's no comparison to the commerce clause and First
18 Amendment in terms of the interests that are at stake.
19 And it goes through that language about the interest at
20 stake is the right of conscience of every person not to
21 have to give their tax money to any religious purpose
22 that they may disagree with.

23 So then in 2007 you had this case that's
24 challenged -- you remember President George W. Bush had
25 this faith-based initiatives program where he tried to

1 engage the churches in social service network stuff, and
2 there was a legal challenge to using the money as a First
3 Amendment violation, and that went up to the Court in
4 2007. And that's where you got this distinction again
5 this is Hein -- H I E N -- this distinction. Again, this
6 was executive spending. There was nothing in the record
7 showing that Congress gave the money to the President
8 specifically directing him to engage with religious
9 groups, and that's what was required for the Flast
10 standing, some legislative enactment that had something
11 to do with religion. And that was missing here. It was
12 just a blank check, essentially, to the administration to
13 do that, to do what it wished, and it decided to do this
14 program. So it wasn't Flast standing to challenge it.

15 Then you come to 2011 and Arizona has adopted this
16 voucher program, or tuition credit tax credit program,
17 not a voucher program, called STOs where people could
18 donate up to, I think, \$500 a year towards these tuition
19 programs for students to go to private and religious
20 schools. And that was challenged as under the
21 establishment clause. And there's this 5-4 split in the
22 court over whether there was Flast standing to challenge
23 that legislation which was expressly religious. It was
24 to support religious schools but through a tax credit.
25 And the five member majority said that's not spending,

1 that's allowing private individuals to put their money in
2 these programs and therefore it doesn't involve the
3 concern of Flast which is spending by the government in
4 support of religion even if only three pence.

5 The dissent -- the four rip into this and say
6 where before have we made a distinction between an
7 appropriation and a tax credit? And they list these five
8 cases that involve tax credits. And the issue was never
9 challenged, and there's this kind of discourse about
10 who's being intellectually dishonest in this discussion
11 kind of thing. But the result of that case leaves us
12 with our case is valid under Whitt. We are talking about
13 a small amount of spending authorized -- authorized by a
14 bill that's entitled an act to allow a magistrate's
15 assistant, Registrars of Deeds and Deputy Registrars of
16 Deeds to recuse themselves from duties related to
17 marriage due to sincerely held religious beliefs.

18 On its face it has a religious purpose, and there
19 is -- as you said, we brought this case when we learned
20 that the magistrates in McDowell County had recused
21 themselves and when through a FOIA request the television
22 station here in Asheville obtained the evidence that they
23 were being paid to move these people. And we thought
24 maybe we have a Flast standing to challenge this law.
25 The attorney general said the other part of the law that

1 no one disputes is spending -- is this commitment or
2 authorization of spending is this commitment to spend
3 money to retirement -- for bridge retirement credit of
4 magistrates who refuse to perform duties of the
5 magistrate for religious reasons and then when they are
6 allowed to recuse themselves from marriage could apply
7 again because now they have a religious exemption from
8 their obligation to uphold their judicial oath. That's,
9 at least on its face, arguably a colorable First
10 Amendment spending violation.

11 And under *Wynn*, when there's an enactment that
12 authorizes even a small amount of spending in favor of
13 religion, the taxpayers have standing to bring that
14 claim. And I'm going to sit and let Ms. Burke talk to
15 you about the Fourteenth Amendment aspect of that. But,
16 again, it's from this language in *Flast* that says we do
17 not limit this decision to establishment clause cases.
18 And I think she's going to cite to you a free press tax
19 case from Arkansas that found standing outside the
20 establishment clause to challenge the spending bill. So
21 it's not that there's never been anything outside of
22 spending but -- and then we have this unique situation.

23 THE COURT: Where was that one in Arkansas? What
24 circuit was that in?

25 MR. LARGESS: It's a U. S. Supreme Court case,

1 and we'll give you that cite in a second. So there is an
2 open door there that there's that language. And there
3 have been no cases -- the litany I just took you through,
4 Judge, none of it involved the Bill of Rights or some
5 other provision that was potentially violated by the
6 legislative enactment. That's what why we think, under
7 Flast, there is an opportunity for standing to bring a
8 challenge that violates the equal protection and due
9 process clause. And the concern is in part what -- it's
10 not in this face but as applied. If these people are
11 sort of hiding in plain sight who are disavowing the
12 Fourteenth Amendment rights of constituents that appear
13 before them, that really threatens the integrity of the
14 judicial system.

15 THE COURT: Are you okay then if they decide
16 they'll go ahead and let the folks be known? Does that
17 take care of all that problem?

18 MR. LARGESS: I don't know if it takes care of
19 all of it, but it certainly would address the right of
20 people to seek recusal which they have none now. I'll
21 let Ms. Burke address that further.

22 THE COURT: Okay. Yes, ma'am.

23 MS. BURKE: Good morning, Your Honor, Meghann
24 Burke for the plaintiffs. As Mr. Largess has pointed
25 out, I'll be focusing my argument on the Fourteenth

1 Amendment claim, recognizing the Court has some questions
2 and concerns about that. It's not my intention to repeat
3 arguments that have been made.

4 THE COURT: On the standing issue. In other
5 words, if you get past standing you may have -- you may
6 be able to survive dismissal --

7 MS. BURKE: Understood.

8 THE COURT: -- and get further down the road. But
9 standing is the door you've got to get through.

10 MS. BURKE: Understood. And we contend, Your
11 Honor, the Fourteenth Amendment is an additional
12 limitation on the state's power to tax and spend under
13 Flast v Cohen. And our standing to proceed on those
14 claims falls under Flast because it is precisely the
15 expenditure of funds that facilitates the denial of equal
16 protection of the laws and due process, as Mr. Largess
17 pointed out here, determinate of the judicial system.
18 And the state, we contend, cannot under the Fourteenth
19 Amendment deny animus under on the base of religious, not
20 on Senate Bill II. And what makes this case unique is
21 that the judicial oath taken by magistrates who are
22 judicial officials in the state of North Carolina
23 reaffirms what is unique about this set of facts, because
24 it is in the judicial setting where due process comes
25 alive.

1 I would like to direct the Court's attention to
2 this particular language from Flast, and this is where we
3 rest our Fourteenth Amendment claim on. Flast, of
4 course, holds that -- we hold that a taxpayer will have
5 standing consistent with Article III to invoke federal
6 judicial power when he alleges that here legislative
7 action under the taxing and spending clause. It is in
8 derogation of those constitutional provisions which
9 operate to restrict the exercise of the taxing and
10 spending power. We contend, Your Honor, that the
11 Fourteenth Amendment, the equal protection clause,
12 restricts the taxing and spending of the North Carolina
13 legislature to further an unconstitutional purpose which
14 is to express animus against the gay and lesbian
15 community. And we did find this case.

16 THE COURT: Is this displaying animus? In other
17 words, is that -- is it really displaying some kind of --
18 in and of itself anti-LGBT animus?

19 MS. BURKE: I'm happy to go there.

20 THE COURT: And the reason I ask that is, you
21 know, these folks who were there when the law was -- when
22 the law was overturned, passed and they had to start
23 performing those things, they were -- you know, they were
24 trying to be able to get them to be able to stay
25 employed, I guess, is what they were trying to do, trying

1 to help individuals keep their jobs. I mean does that
2 have to have an animus?

3 MS. BURKE: That's a great question and I'd like
4 to address that.

5 THE COURT: By the way, I don't like the secret
6 thing. I didn't realize that was in there, the part in
7 there where nobody knows who's who there. I understand
8 that issue.

9 MS. BURKE: I'd like to address the religious
10 accommodation issue because I think this court is well
11 aware what the facts and circumstances are leading up to
12 General Synod. And prior to this court's ruling the
13 North Carolina General Assembly criminalized the
14 solemnization of marriages by clergy whose faith
15 traditions affirmed the sanctity of marriages of people
16 between the same sex. Now suddenly they claim religious
17 accommodation for government officials whose faith and
18 traditions --

19 THE COURT: Right. But let's suppose for a minute
20 that there was all this animus and everything and that
21 they -- that the laws there were and all those things
22 have been overturned. Does everything they do after that
23 try to -- to try to keep things sort of where they are,
24 does everything just have to be -- is one side or the
25 other always right and one side always wrong on every

1 single issue in the world? I mean that's part of where
2 we have become is to where everybody seems to be --
3 rather than having an open discussion about these things,
4 you're either bad or good, and it's -- the rhetoric has
5 gotten huge.

6 I understand where you're going and that marriage
7 has been opened to everybody now in this country and that
8 battle has been won. But now does everything that they
9 do to try to help folks that may have strongly held
10 beliefs, has that become -- is all the animus of, hey, I
11 understand that that's different from whether it's
12 unconstitutional or not, but it doesn't have to be a bad
13 motive behind something that might be unconstitutional.
14 Good people can make mistakes and bad people can do the
15 right thing, and good people can do the right thing, and
16 bad people can make mistakes. It's not -- everything is
17 not --

18 MS. BURKE: I've appeared in this courtroom for
19 folks -- I would contend the religious accommodation
20 argument can only be taken seriously as the legislature's
21 efforts to accommodate all religious views around the
22 marriage clause and that simply wasn't the court's ruling
23 in General Synod. And I think there are a number of
24 other factors that I think we can understand the context
25 about around animus. But what I would also point out is

1 that what makes this case unique is when these
2 magistrates are recusing themselves they're acting in
3 their official capacities, not as private citizens who
4 certainly have a right to believe and worship however
5 they exist. But when they are acting in their official
6 capacities they are the state, they are the government,
7 and that's where lines get drawn. We would argue that is
8 heightened by the fact they are judicial officials where
9 these folks may have any number of occasions to come into
10 a courtroom and be treated the same as anybody else and
11 have the laws apply to them.

12 I'd like to go back to the standing issue.

13 THE COURT: I do, too, because that's the big --

14 MS. BURKE: I'll come back to this, but I do want
15 to spend a little more time on standing. We did find
16 this case, Your Honor, Arkansas Riders Project v Ragland.
17 It's a 1987 case. The citation there is 481, U.S., 221.
18 And in that case, standing was found on behalf of general
19 interest magazines to perform a free exercise clause
20 claim. They intended there that a tax statute -- a tax
21 that was imposed on them was a discriminatory tax, and
22 the court did not actually see fit -- they didn't have to
23 reach the Fourteenth Amendment claim that was brought
24 because the case was disposed of under the free exercise
25 clause and there was a violation found.

1 So it's not uncommon to find standing on taxpayer
2 basis outside of the establishment clause context.
3 However, what we raise here is -- I would certainly
4 represent to the Court is a unique issue, and we contend
5 these are unique facts. It is a unique case that perhaps
6 brings this Fourteenth Amendment restriction on a state's
7 power to tax and spend in a very unique and
8 particularized way.

9 Of course the Court is well aware that the
10 Fourteenth Amendment states that no state shall deny to
11 any person within its jurisdiction the equal protection
12 of the laws. And under *Romer v Evans*, which *Romer*,
13 *Lawrence*, *Windsor*, these are not cases you will see cited
14 in defendant's brief and for good reason. Because these
15 are cases that clearly state the states cannot express
16 moral disapproval of an entire people through its law
17 making. Of course, *Romer v Evans*, the 1996 case,
18 repealed a law that had passed to restrict rights of the
19 LGBT community in Colorado.

20 Interestingly, similar arguments that are raised
21 here today in this courtroom have been raised in every
22 marriage equality case preceding it. And the *Romer v*
23 *Evans* case that preceded this series of cases, this idea
24 that there is a religious objection that should be an
25 exemption for state officials who are acting within their

1 official capacities, is precisely the force of law that
2 gives operation animus which Romer prohibits.

3 THE COURT: If they left out the word religious
4 and said you don't have to do any marriages upon any
5 sincerely held objection, would you be okay with that
6 one?

7 MS. BURKE: I don't think I would, Your Honor,
8 no.

9 THE COURT: Why is that? That doesn't make it
10 religious.

11 MS. BURKE: It's a government official who's
12 refusing to respect the Constitution. And from the
13 Fourteenth Amendment's perspective whatever the reason
14 being --

15 THE COURT: They're saying they're not going to
16 perform any marriage for whatever -- you don't know
17 exactly what their religious --

18 MS. BURKE: Let's go ahead and get into that,
19 because I do think this is important. There are at least
20 half a dozen or so reasons why we know everyone -- this
21 is a facially neutral statute. Everyone in this
22 courtroom knows that it is targeting gay and lesbian
23 couples and gay and lesbian North Carolinians.

24 THE COURT: Is it targeting, or is it trying to
25 help those that don't believe in same sex marriage? I

1 mean how -- why I'm saying that is, if you had somebody
2 -- if somebody showed up at McDowell County and the
3 magistrates there -- all of them said we're not doing one
4 today, bingo. But they've got it set up so that every
5 single same sex marriage couple is going to get married
6 whether they like it or not, whether the legislature
7 agrees with it or not. They say they're going to -- it
8 will happen. So how does that -- I know where this all
9 started from and I know the inceptions of it and I know
10 where it all came from. You don't have to tell me about
11 it. Everybody here knows that. But in the end -- in the
12 end, is this one targeting anybody other than trying to
13 help these folks?

14 I will say I don't know that they passed this or
15 decided -- maybe the Administrative Office of the Courts
16 came up with this particular standard where they are
17 letting nobody know who's who. I think that's a
18 different thing, but I don't -- I'm not sure that they
19 did that so that they could have people lying in wait for
20 same sex couples coming in and looking for somebody to
21 bump with their car and they go to small claims court and
22 that person is waiting to shaft them. I don't think
23 they're trying to do that.

24 MS. BURKE: Well the first place I would start,
25 Your Honor, is this court's ruling General Synod and

1 Obergerfeld after it requires that marriage licenses be
2 issued --

3 THE COURT: Right.

4 MS. BURKE: Senate Bill II is not necessary.
5 That's a constitutional and legal requirement, and
6 there's a standing court order that makes that clear.

7 THE COURT: Right.

8 MS. BURKE: We can end there. But these are
9 government officials. They've chosen to take an oath to
10 uphold the Constitution, and that's what the Constitution
11 --

12 THE COURT: That argument I can do. But I'm
13 saying it doesn't have to necessarily -- an act which you
14 say is unconstitutional doesn't necessarily have to be
15 aimed at somebody to hurt them. I mean this may -- this
16 act appears to be -- maybe I'm missing something here --
17 appears to be to be helpful to those individuals who have
18 disagreement with same sex marriage to the point they
19 can't perform a civil duty at all with regard to that.
20 They can't separate the render under Caesar the things
21 that are Caesar and God that are God in the daily work.

22 MS. BURKE: And here we bleed into the First
23 Amendment claim, because I would argue to that the state
24 has picked a side in this debate. They never tried to
25 accommodate the clergy who affirmed these marriages.

1 They actually criminalized that behavior as recently as
2 2014.

3 THE COURT: But those days those -- are the
4 thrilling days of yesteryear. They're gone.

5 MS. BURKE: It's important context for
6 understanding there's a two or three year gap here where
7 there is an accommodation for government officials, for
8 judicial officials --

9 THE COURT: Tell me how it hurts same sex couples
10 if you know who they are and you get them to recuse.

11 MS. BURKE: Well I think that's assuming a fact
12 not --

13 THE COURT: I know that's a problem.

14 MS. BURKE: It is a problem.

15 THE COURT: I don't see it in the statute. There
16 may be a statute and maybe I'm wrong about that, but I
17 looked in the statute and don't see it. I've got down
18 the Administrative Office of the Court.

19 MS. BURKE: We do have a threshold problem.

20 THE COURT: They may have overstepped or that may
21 have been something they were allowed today do, but I
22 don't know. That bothers me. I think everybody needs to
23 know who everybody is.

24 MS. BURKE: That is exactly the point here that
25 is the threshold problem that we don't know who those

1 magistrates are, first of all. Secondly, they're not
2 subject to the judicial standards commission, magistrates
3 are not. And thirdly, these individuals, our clients,
4 Diane and Cathy and Kelly and Sonja could potentially be
5 before these magistrates for an eviction proceeding.
6 Certainly not alleging that this next thing is a fact in
7 issue in these folks' lives, but we know that domestic
8 violence is a common problem in our community; no less
9 true for the gay and lesbian community. There could be
10 an attempt to collect a debt, a small claims issue, any
11 number of things where a citizen could appear before a
12 magistrate and these individuals have no way of knowing
13 whether or not this magistrate believes that the laws
14 should apply equally to them whether or not this
15 magistrate believes that this person is afforded and
16 entitled to due process. They've renounced it in some
17 document we can't get our hands on, and that impairs the
18 integrity of the judicial system in very grave, serious
19 ways, and we contend that's where the Fourteenth
20 Amendment imposes this restriction on the legislature's
21 authority to tax and spend.

22 THE COURT: Let's get back to standing.

23 MS. BURKE: Yes, Your Honor. I'd like to revisit
24 that.

25 THE COURT: To make that argument you've got to

1 get past standing.

2 MS. BURKE: I think Mr. Largess has documented
3 the evolution of Flast standing. And it is true that
4 Wynn and Hein and these cases -- Hein, that opinion I'm
5 sure Your Honor has studied and will study documents and
6 cases where the court did not extend standing beyond the
7 First Amendment establishment clause context. So this is
8 a unique set of facts, and for that reason it's a unique
9 claim. We certainly recognize that, and I wish I could
10 point to the Court to say here's the case where the
11 Fourteenth Amendment taxpayer standing under Flast was
12 found. We do not have that here. We have the Arkansas
13 Right of Project case. But we contend, Your Honor, that
14 this unique set of facts does present that issue.

15 Those cases, Wynn and Hein, Mr. Largess pointed
16 out, addressed executive spending, administrative
17 spending, tax credits, expenditures. We contend the
18 Fourteenth Amendment claim threads that meaning. This is
19 an expenditure by the legislature for a constitutionally
20 prohibited purpose. Your Honor is well aware that Flast
21 has two elements to it and I won't go over the
22 relationship or the nexus between the taxpayer standing
23 and Senate Bill II because I believe Mr. Largess has
24 covered that. But I do want to address the nexus between
25 taxpayer status or client's taxpayer status and the

1 precise nature of the constitutional infringement
2 alleged. We've started to get into that a little bit, so
3 it's not my intention to retread that ground.

4 Your Honor these cases, Romer, Lawrence, Windsor
5 General Synod, affirm the dignity of gay and lesbian
6 people as a matter of law, not as a matter of opinion,
7 not as a matter of religious view but as a matter of law.
8 Gay and lesbian North Carolinians are entitled to the
9 same dignity as any other citizen in the state of North
10 Carolina, and the force of law cannot be used to say
11 anything less than that. That's where we contend Senate
12 Bill II runs afoul of constitutional dictas.

13 I'm happy to get into some of the other ways we
14 can show animus here but I think it's important to note
15 there is no secular purpose here. The same arguments
16 that haven't advanced in previous cases are being
17 advanced here. And those arguments about personal
18 religious views were rejected by the Romer court, they
19 were rejected by the Windsor court, and they were
20 rejected by the Obergerfeld court because a force of law
21 is what governs here. I'll note that, as we allege in
22 our complaint, Senator Buck Newton, who is a cosponsor of
23 this bill, if there was any question about what this law
24 was about, said: I will not stand idly by and watch the
25 demands of a few insist that a magistrate perform a

1 wedding that he or she believes to be immoral. And this
2 again puts us squarely within Romer v Evans, that moral
3 disapproval of a person is not a legitimate policymaking
4 motive.

5 I'd also point out that under Windsor, the fact
6 that this law is so unprecedented makes it
7 constitutionally suspect. That was the issue of the
8 Defense of Marriage Act. And Doma, in the Windsor case
9 -- it's often thought of as a Civil Rights case, which is
10 absolutely true, and rightly so, but it's also a tax
11 case. Edie Windsor was forced to pay a tax bill to the
12 tune of 300 and some thousand dollars that she would not
13 have had to pay but for the animus that -- and moral
14 disapproval that was expressed against her via the
15 Defense of Marriage Act. And of course, as this court
16 knows well, the Supreme Court said that cannot stand
17 constitutional muster that law was repealed. And I think
18 the timeline surrounding Senate Bill II is indeed
19 significant.

20 And I'd like to just briefly run through -- I'm
21 sure the Court is well aware of some of these key facts
22 but, of course, this court's ruling on October 10th 2014.
23 Four days later, October 14th, the AOC general's counsel
24 and Professor Cromwell from the School of Government
25 issued an a memo and e-mail, respectively, saying

1 magistrates have to perform these marriages as a matter
2 of law. On that same day, two of our clients were
3 happily married following this court's ruling. They're
4 also plaintiffs in that case. They wanted to get married
5 here in their home state and in their home county. And
6 that's a partly what animates our claims on behalf of
7 Kelly and Sonja and Diane and Cathy.

8 These are plaintiffs who reside in McDowell and
9 Swain Counties, the very counties where these refusals
10 are happening they're a very close nexus between these
11 refusals and the injuries these particular plaintiffs
12 have suffered. In the months following, upon
13 information, we think roughly 32 magistrates resigned.
14 We certainly cannot be certain, but the timing is} a
15 little suspect as to why they may have resigned.
16 November 5th 2014, the former AOC Director Smith
17 responded to Senator Burger making clear that the law
18 required magistrates to perform civil marriage
19 ceremonies. On January 28th, just a couple months after
20 that, Senate Bill II was filed. And, of course, the
21 short title is magistrate's recusal of civil ceremonies.

22 Days later, Magistrate Bumgarner filed a lawsuit,
23 as in the papers in this case, against, interestingly,
24 the former AOC Director Smith. And I do think that's
25 significant to the Court's question about who's the right

1 defendant here. Apparently, Magistrate Bumgarner thought
2 that was the appropriate defendant in her case. On
3 February 25th, Senate Bill II was approved by the senate
4 shortly thereafter. Director Smith announced his
5 retirement just days later. Again, we'd like to get to
6 the phase of discovery in order to figure out and suss
7 out what are these facts? What the particular facts that
8 tend to show or not animus?

9 On May 1st, Director Warren became the new
10 director of the AOC and the House -- shortly thereafter,
11 three or four weeks later, the House approved Senate Bill
12 II. Governor McCrory vetoed it on the same day, but the
13 veto was overridden a week or two let later on June 11th
14 2015. And, critically, just over two weeks later, on
15 June 25th 2015, Obergerfeld was decided which affirmed
16 the dignity of gay and lesbian Americans. Senate bill II
17 had remained unchanged to this day.

18 Your Honor is well aware of the thorough canvass
19 of history of race discrimination that Judge Schroeder
20 did in the voting rights case that was recently decided
21 by the Fourth Circuit. And he did an excellent job
22 documenting critical facts that aided the Fourth Circuit
23 in coming to its conclusion to reverse that.

24 THE COURT: Yeah. They said normally they'd send
25 it back but he had given them such great information.

1 Judge Schroeder is a very thorough judge.

2 MS. BURKE: He indeed was. And in this case, the
3 Fourth Circuit -- and in reversing him they made an
4 important point: In holding the legislature did not
5 enact the challenge provisions with discriminatory
6 intent, the court seems to have missed the forest in
7 carefully surveying the many trees. We contend, Your
8 Honor, there are many trees here.

9 Our due process arguments do overlap with the full
10 protection claim, but I do want to point out these
11 magistrates are judicial officials who take an oath to
12 uphold the U. S. Constitution as it's been interpreted by
13 the U. S. supreme Court in all the cases that I've cited
14 and Senate Bill II violates the right of meaningful
15 access to the courts that our courts have a proud history
16 and tradition of recognizing.

17 I'm happy to answer any questions Your Honor has,
18 but I don't want to repeat arguments that have already
19 been made. I'll just conclude by saying that the
20 purported religious disavow of the Fourteenth Amendment
21 by judicial officials cannot circumvent the equal
22 protection clause and due process clause. We ask this
23 court to deny the motions to dismiss.

24 THE COURT: Thank you.

25 MR. LARGESS: Let me just quickly go through the

1 remaining issues, if I could, Your Honor. I think that
2 -- but say this first. I was looking for the provision
3 that makes it a confidential personnel matter for the
4 recusal decision and was unable to find it. We will look
5 for that and send it to you.

6 THE COURT: I'm interested in that because that's
7 something I'm bothered by. I always think it's better to
8 be open about things so everybody understands where
9 everybody's coming from.

10 MR. LARGESS: I also took a chance to read
11 through Moss -- found that case and looked at it. I
12 realize the reason I had not looked at it before is it's
13 not a taxpayer standing case. It's an actual injury case
14 where a person who was not a Christian got solicited by
15 the school district for the opportunity for this after
16 school religious program, and that was an injury -- a
17 recognized injury. So I think that the cases are
18 distinct --

19 THE COURT: Yeah. Most of the taxpayer standing
20 cases, they've occasionally allowed establishment clause.
21 You can't find anything on Fourteenth Amendment right
22 now, as counsel's pointed out -- and there may be some
23 after this, but this court's not going to move -- where
24 I'm really looking at it right now is the -- is whether
25 there's standing in the establishment clause issue.

1 That's really where I'm looking at it. The Fourth
2 Circuit may -- I don't know what the Fourth Circuit will
3 do one way or another as to whoever appeals this
4 decision. But they will -- I can tell you they're smart
5 people up there. They'll look at it and they'll make a
6 call. And my guess is ultimately it will get to the
7 Supreme Court.

8 MR. LARGESS: Let me explain again, Your Honor,
9 just about Wynn just so you understand, because that's
10 the key to this standing. And that is, the dissent said
11 this is \$50 million a year that affects this Arizona
12 state budget. How can that not be a spending issue? And
13 the response was, it's not spending. And if it's
14 spending, it can only be, again, that three pence
15 argument is all that you need and we have that here. We
16 have the -- it's not that the spending is incidental in
17 amount. It's incidental to the legislation. Here it's
18 the core of the legislation that if magistrates recuse
19 themselves so that we have a county where no one is
20 willing to do the marriages, you, Mr. Warren, are going
21 to bring in someone. You're authorized and directed to
22 follow this law and make sure there's someone there to
23 protect the religious views of those magistrates and not
24 force them.

25 THE COURT: Just get one of those superior court

1 judges to do the marriages.

2 MR. LARGESS: Well there are all different sorts
3 of ways of dealing with it, Your Honor.

4 THE COURT: You don't have to bring anybody in or
5 spend any money. They've got a little bit of time.

6 MR. LARGESS: But for our purposes the fact is
7 that they have spent the money and it was authorized by
8 the legislature for a religious purpose, and that is
9 Flast. That's why we have standing.

10 Now in terms of the other issues of whether we've
11 stated a claim. I mean this is a statute that on its
12 face has a religious purpose. Its effect is religious to
13 protect the religious sensibilities of these magistrates.

14 THE COURT: So if they just took out the word
15 "religious," then we wouldn't have any problem at all.
16 Is that what you're saying? Well if you don't have to do
17 marriages, period, for any -- how is it worded? Let me
18 see how they worded it. "Sincerely held objection" as
19 opposed to "sincerely held religious objection," would it
20 be okay.

21 MR. LARGESS: I don't know if you'd have a First
22 Amendment claim there. I think you'd have to pierce it
23 because the only objection is a religious one, Your
24 Honor, so I think that you what you're getting at.

25 THE COURT: Why would it be a religious one? Some

1 people may just -- I mean people have all kinds of
2 objections to all kinds of things. And whether you or I
3 think something is perfectly fine doesn't mean somebody
4 else doesn't think that. And they're entitled to believe
5 that. And it may not be a religious experience. It may
6 just be I don't like that. I mean somebody may have an
7 idea that they just don't like something. We differ on
8 things all over the place in this world.

9 MR. LARGESS: We do, Your Honor.

10 THE COURT: That's why we're such a wonderful
11 world of different people and different ideas. And, you
12 know, this country's a very, very strong country because
13 of that. So if they left the word religious out would
14 that -- I mean a lot of them would -- a lot of them, I
15 agree with you, would probably be for religious. And
16 most people who are going to say that doesn't bother me.
17 That's one of my duties. If that's the job I've sworn to
18 do, if that's the job I put my hand on the Bible and said
19 I swear to follow the United States Constitution, I'll be
20 able to do that. But there may be people that say North
21 Carolina is saying we want to help some of these folks
22 and still allow the United States Constitution to be
23 followed by North Carolina by making sure somebody is
24 there to perform these marriages that the law now
25 requires.

1 MR. LARGESS: The third prong of Lemon, Your
2 Honor, if I may, in terms of the way the statute reads
3 currently which is the statute we're challenging is there
4 can't be excessive entanglement between the state and
5 religion. Here you have this elaborate process to
6 promote and protect the religious views of people who
7 refuse to accept the Constitution. That's excessive
8 entanglement of religious beliefs with the function of
9 judges. So I think we've stated a claim under Lemon.

10 I think the statute is invalid on its face, Your
11 Honor, but we can get to that later after you deal with
12 whether we have standing. But the other issue is, who is
13 the right defendant? Is there a special relationship
14 here? He is the Director of Administrative Office of the
15 Courts. He wouldn't answer who's the Director of the
16 Judicial Department? Admitted that his bookkeeper would
17 be the one writing the checks to the retirement system.
18 He is the person who has the connection who's
19 implementing this law.

20 THE COURT: Let me ask you about venue while
21 you're standing up. Why is this case being held here
22 instead of being brought in Raleigh? There's good judges
23 down in Raleigh. There's some good ones in Greensboro.
24 Why is this one being brought in Asheville?

25 MR. LARGESS: We discovered the spending in

1 McDowell County. We believe the statute is a challenge
2 to your ruling in this district about Amendment One, so
3 there are issues related.

4 THE COURT: My ruling was for -- my ruling ended
5 up being for the whole state.

6 MR. LARGESS: It did. But it took place here,
7 Your Honor. And what they did in their argument about it
8 is very simple. They cited all these cases before the
9 venue statute was changed. You can have venue in
10 multiple jurisdictions. All of these HB-2 cases are in
11 the Middle District, not in the Eastern. So the issue is
12 we have pointed to substantial activity that took place
13 in this district. Even if so, we could bring it here
14 even if we could also bring it in Raleigh. It's simple.
15 I think Mr. Warren is the proper defendant, and I think
16 we have standing, and we've stated a claim.

17 MS. VYSOTSKAYA: Your Honor, I will try to follow
18 up on several points that I heard recurring throughout
19 this conversation. Number one, Your Honor, you
20 identified the most important issue in this case and it
21 goes back to the federal court's power under Article III
22 of the United States Constitution to hear only cases and
23 controversies. Not to hear things about everything that
24 is wrong with any kind of legislative provisions but to
25 hear only cases and controversies when a party is injured

1 actually injured in fact. And as we argued before, that
2 is absolute here.

3 Plaintiffs argued that establishment --
4 establishment clause is standing. It's incorrect. Every
5 single establishment clause that is cited in plaintiff's
6 briefs or in our briefs only provide a taxpayer spending
7 where legislatures specifically established a tax
8 problem. There was always a large sum of money involved,
9 there was always a program specific programs that took
10 money from a taxpayer and put it into a treasury then
11 took the money from the treasury and put it towards
12 religious or sectarian institutions. Here that is not
13 occurring at all. We don't have a specific taxing and
14 spending program that is being established in Senate Bill
15 II. And we don't have any money going to any sectarian
16 entity. The money is going to a state employee, not for
17 support of any religion. It's just going to state
18 employee under this bill.

19 THE COURT: But it is for, apparently, religious
20 objections. That's -- I mean that's what the law says.
21 The law says based upon any sincerely held religious
22 objection.

23 MS. VYSOTSKAYA: But that does not amount to an
24 establishment of religion. In that case, if you took
25 that position --

1 THE COURT: Establish over non-religion -- over
2 non-religion. I know you can argue I'm Agnostic, I'm
3 Atheist, I don't have any religion. And therefore,
4 because I don't have any religion, you know -- I mean you
5 can go ahead and convolute something to the point.

6 MS. VYSOTSKAYA: It really does not. Magistrates
7 are free to believe or not to believe whatever they --
8 whatever their religious beliefs or nonbeliefs allow them
9 to believe. SB-2 does not change that situation
10 whatsoever. It does not establish religion at all. All
11 it does -- and it has been found to be permissible in the
12 Supreme Court precedence. All it does is it allows
13 accommodations for religious beliefs of the magistrates.

14 If you went by the logic that is suggested by
15 plaintiffs, they would never be ever, ever any kind of
16 religious accommodations that would be proper. Any time
17 the word religion is uttered, as Your Honor asked a very
18 good question. If you took the word religion out of the
19 statute would be that be okay then? So is religion a
20 magical word? I don't think the Supreme Court precedent
21 supports that position at all.

22 THE COURT: All right. Let me ask you another
23 question then. Where is this located for this where you
24 get to secretly keep the fact that you are -- I mean that
25 needs to be -- people need to know what's going on so

1 that if they believe that someone might have an animus
2 against them, if there's some kind of bad mind in terms
3 of how they feel -- and I'm not saying that all -- lots
4 of these folks are really, really good folks who have
5 sincerely held beliefs, but so do the folks who are
6 coming in looking to have their problems redressed.

7 It's not for me to decide who's right and wrong on
8 all of these moral issues. That's for days -- bigger
9 bigger judges at the Supreme Court of the United States
10 to decide that. I can't decide that part. But the good
11 folks coming in -- and there may be some good folks
12 there, but they may be worried about it. Don't they have
13 a right to know that the folks -- that the person who was
14 hearing their case has such a strongly held belief that
15 they have recused themselves from doing a judicial duty
16 of their office? Don't they have a right to know that?
17 And if it's -- and where is it in the law? Or is it just
18 in the Administrative Office of the Courts doing this
19 because somebody called them up and said -- some
20 legislator called them up and said that would be a good
21 idea to do that? I mean tell me about that.

22 MS. VYSOTSKAYA: Yes, Your Honor. I will not be
23 able to answer a question whether certain legislature
24 called --

25 THE COURT: I know you aren't. I'm being -- I

1 always wonder how these weeds get thrown into the garden.
2 But where is that?

3 MS. VYSOTSKAYA: Let me answer the question in
4 several different ways. First of all, I would like to
5 point out that it's not in Senate Bill II, which is the
6 only bill that is being challenged by plaintiffs here.
7 So to the extent they want to challenge the
8 confidentiality provision, a different law would have to
9 be challenged. It would have to be --

10 THE COURT: So after Senate Bill II somebody said
11 we've got to keep this quiet or something.

12 MS. VYSOTSKAYA: Your Honor, I know that on the
13 magistrate recusal form there is a reference to North
14 Carolina Personnel Act. So it could be in Chapter 126.
15 I'm not certain about that having not --

16 THE COURT: You know, people have -- there are
17 things that are protected for personnel, but there are
18 also some things that would be overreaching to try to
19 protect everything about everybody under the idea that
20 everything they do in their job is secret. I mean I
21 don't think we run the country that way. That's why we
22 have the Freedom of Information Act.

23 MS. VYSOTSKAYA: I understand the Court's concern
24 100%.

25 THE COURT: I'm not saying that anybody would do

1 anything, but people ought to know. I mean it ought to
2 be laid out on the table. Look. Yes, I'm going to hear
3 your case on this and I have had a problem with, but I
4 will be able to hear your case fairly. And they may say
5 I would rather somebody else hear it. And that person
6 would probably recuse because they would wouldn't want
7 any decision they made to be questioned if somebody
8 really wanted them to recuse. But they may not. They
9 may think, man, this person is fair. They may disagree
10 with me on this but they can still be fair. Again,
11 there's no reason for everybody to be against everybody.
12 I mean sometimes we can have disagreements on issues and
13 nobody's bad. We can disagree in this country.

14 MS. VYSOTSKAYA: I absolutely understand that
15 concern, and it may be an issue for a different case next
16 time when the situation --

17 THE COURT: I'm thinking about it now. I mean
18 really, you know, this -- it impacts this bill.

19 MS. VYSOTSKAYA: Well that's not in Senate Bill
20 II.

21 THE COURT: No. It impacts it if somebody has
22 decided that is a -- is implicated here, then that's --
23 you know, that impacts how it's used or how it will be
24 used. Again, I know your argument is that nothing has
25 happened yet but, you know, same sex couples are going to

1 go in in front of magistrates for matters all the time.
2 They're correct about that. And that's something -- the
3 fact that somebody may be against that relationship and
4 have a strong feeling against that relationship beyond
5 just I don't like that relationship. I don't like that
6 relationship so bad I'm recusing from doing this thing.
7 They may -- there may be a -- you know, it seems they
8 would be entitled to know that.

9 MS. VYSOTSKAYA: Your Honor, I don't think that
10 they won't be able to find that information out. They
11 would have to apply -- they would have to move and get an
12 order, even if -- even if such provision exists in the
13 Personnel Records Act, they would be -- if they suspect,
14 again, the judge is treating them impartial based on what
15 they observed during the proceedings, and if they suspect
16 that that is being done because of animus towards same
17 sex couples, nothing would prevent them to apply or to
18 get an order and to get that record under the court order
19 and review it. I don't think that would be prohibited.
20 But you have to have an injury. You have to have
21 something. You can't just -- in other words, you have to
22 have something to base that request upon. But I
23 understand Your Honor's concern on that issue.

24 Let me get back into the standing again. As far
25 as all the establishment clause cases they were all based

1 upon a specific taxing and spending clause which is not
2 here. And the last case contains language that says
3 incidental spending is not going to give taxpayers their
4 status. It's in Flast, it's in Wynn, it's in Cuno.

5 THE COURT: What do you say about his claim --
6 plaintiff's claim that this is a straight up
7 constitutional issue? These people have taken an oath to
8 follow the United States Constitution, the United States
9 Constitution, the case that the Supreme Court has ruled
10 that same sex marriage is constitutionally permitted and
11 that these folks are violating their oath in not
12 following the United States Constitution. What do you
13 think about that? The Fourth Circuit is going to talk
14 about that a little bit.

15 MS. VYSOTSKAYA: My answer to that would be that
16 the United States Constitution does not contain the
17 provisions that requires magistrates to marry couples at
18 all. What contains that provision is a state law. And
19 what Senate Bill II is doing is changing the requirement
20 from, you know, having every magistrate having a duty to
21 perform a marriage to a group of magistrates within the
22 district to perform a marriage. I don't think the United
23 States Constitution prohibits that.

24 THE COURT: Okay.

25 MS. VYSOTSKAYA: As far as the Fourteenth

1 Amendment issue, Your Honor. Let me just state that in
2 he Hein case, which is a 2011 case from the United States
3 Supreme Court. The Supreme Court specifically stated
4 that we refused to lower the taxpayer status to any case
5 outside of the establishment clause case. There was one
6 case that was cited, the free press case. I have not
7 read it. But by the description of it, it sounded like
8 plaintiffs there had actual injury that the specific free
9 press rights were prohibited. Therefore, they would have
10 met the standing regardless of the establishment clause.
11 They would have met standing that all of us discussed
12 during the first part of our conversation.

13 And Your Honor, moreover, if that was true, if the
14 standing for the Fourteenth Amendment purposes was
15 taxpayer standing, then why have the requirement that in
16 order to meet the Fourteenth Amendment challenge? A
17 plaintiff has to show that there is a justification, the
18 court has to provide proper scrutiny standard, then that
19 test is not just not needed. If all you produce is to
20 have that taxpayer standing then tall other cases that
21 the Supreme Court and Fourth Circuit and Your Honor's
22 court has decided using your regular classification and
23 level of scrutiny type of test would be a surplussage.

24 Finally, I wanted to -- I wanted to also make a
25 reference to the extent the Court is interested on that

1 extensive entanglement with the religion that plaintiff
2 was discussing. And I think what they're basing it on is
3 the language in Senate Bill II that says "sincerely held
4 religious beliefs," rather than "religious beliefs." So
5 the word "sincerely" is emphasized. That's what I read
6 from their brief. And Your Honor, Senate Bill II does
7 not require magistrates to prove sincerity. All they
8 have to do is to fill out the form and read it as is.

9 Number two, the Supreme Court also talked about
10 this in one -- in one of the cases. It was a case that
11 involved the religious land use. And asking, basically,
12 a magistrate whether you sincerely hold that belief is
13 different than asking a magistrate is that belief central
14 to your case? That would be extensive entanglement.
15 Simply asking, do you truly have that belief? is not
16 extensive entanglement at all. It's not entanglement at
17 all. And, as applied, there are no facts stating, you
18 know, in this case which would show that any magistrate
19 was denied the recusal based on sincerity or insincerity
20 of that person's belief. And moreover would plaintiffs
21 be, really, the right party to even question that
22 sincerity requirement? Or would the proper party be a
23 magistrate whose sincerity was questioned by the state,
24 if that's what the decision is based on.

25 And, Your Honor, on the venue issue. First of

1 all, the cases -- we cited some of them -- were pre-1990s
2 amendments cases. Some were post amendment cases,
3 especially in our transactional venue argument in our
4 brief. And plaintiffs have not addressed all those cases
5 at all. But to emphasize substantial part of events that
6 lead to a claim have to occur in the district where the
7 venue is, you know, being requested.

8 And spending, I don't think that it's a
9 substantial type of event. I mean if you look at the
10 events that are really being challenged in this lawsuit,
11 it's a passage of Senate Bill II which occurred in
12 Raleigh in the Eastern District. It's the debates that
13 surround that passage of the act. And several times the
14 opposing counsel brought up some comments that were made
15 by legislatures that occurred in Raleigh as well. So we
16 would submit to Your Honor that not only the defendant
17 Warren resides in the Middle District, which would
18 support our venue position under the first prong of the
19 federal statute, but also the substantial events occurred
20 in that venue as well. And I'm sure my co-counsel may
21 have a couple of comments.

22 MR. MAJMUNDAR: Just briefly, Your Honor, with
23 respect to the confidentiality provisions. It's going to
24 be in Chapter 126(A). I have been a state employment, to
25 my amazement, for 15 years and I still don't understand

1 it. I do know, however, that my personnel record -- if a
2 member of the public or whoever, a future prospective
3 employer wants information out of my record, my employer
4 is permitted to tell them that I was employed between
5 date X and date Y, my salary, and that I left in good
6 standing or that I am in good standing and that's it,
7 absent a court order, compelling production of that
8 record.

9 THE COURT: Yeah. But this is something where
10 somebody is saying they're not going to perform -- in
11 other words, I think if you were -- if your employer --
12 if you were to say I'm working for the attorney general
13 but I'm not going to court on such and such matters that
14 the people would be entitled to know that. I think
15 that's going to be some kind of secret. That is not a
16 good personnel -- that's not a good law to let people be
17 able to keep information from public view about those
18 kinds of matters.

19 Yes, I've got plenty of things about that they
20 can't say anything about me. But when litigants come in
21 to me they've got to know they're going to get a fair
22 shot, and they need to know. And I've got -- if I'm
23 recused, I'm recused. I'm out of those cases. As I
24 said, it ended up as to how I got this case. And I'm
25 sure if I found there was no venue, the people in the

1 Middle and Eastern District, my fellow judges would never
2 speak to me again. But the -- but I think that's -- you
3 know, that's not something that should be hidden. That's
4 not a personnel matter that ought to be hidden. They
5 just need to say it doesn't have to be -- they're not
6 asking them to tell what their belief is. They're just
7 saying they have one. They don't have to write out a
8 paragraph about this is why and all that kind of
9 information. They just say they have a sincerely held
10 religious belief.

11 MR. MAJMUNDAR: I understand your viewpoint. I'm
12 only trying to describe this source material from where
13 the confidentiality arises.

14 THE COURT: I understand. I think that was a
15 swing and a miss by somebody that put that under the
16 Personnel Act.

17 MR. MAJMUNDAR: It may be. Maybe to my benefit
18 it's in there. Anyway, the second kind of part of this
19 is plaintiffs have stood up and said these people. These
20 people did this. These people did that. I'm not sure
21 they're talking about the current defendant but they're
22 talking about a collection of individuals who, in the
23 course of the last number of years, have acted and
24 pronounced things in a certain way that might reflect
25 insensitivity or animus. Okay? And I understand that.

1 THE COURT: There are some who said nothing and
2 there are some who said some things, yes.

3 MR. MAJMUNDAR: Exactly. And Your Honor, I could
4 appear before a magistrate, any magistrate who has not
5 recused themselves, and they may have an inherent bias
6 against me for whatever reason, and I will never know
7 that unless I perceive their behavior to be untoward for
8 some reason. And in that instance I have the ability to
9 bring a grievance to the chief district court judge. So
10 the existence of bias -- I think everybody has some
11 measure of bias about some issue or another. We don't
12 always know when we're standing up before a magistrate or
13 a judge or whomever, a panel of jurists, as to whether or
14 not they have bias toward us. We have to have faith in
15 their ability to do their job in an unbiased manner.
16 There may be a gay magistrate who doesn't appreciate my
17 lifestyle, the way I live my life, and they may have
18 bias, and it should not matter.

19 THE COURT: I understand. And I have no doubt
20 that some -- maybe all of them can give fair hearings to
21 anyone regardless of how they feel about their particular
22 marital state. But with that said, people ought to know
23 that -- where there might be a possibility. Because this
24 is a strong -- this is going to be a strongly enough held
25 belief that it is a sincere religious objection. It's a

1 strongly held belief.

2 MR. MAJMUNDAR: I agree, Your Honor. Counsel has
3 made impassioned, compelling arguments to the Court
4 today. They were better suited to be presented to the
5 court in General Synod. They're the General Synod
6 arguments. That issue has been decided and it was
7 decided by Your Honor. And what's notable about that
8 order -- it's pithy. But what's notable is at the end
9 you pointed out specifically that this is not a moral
10 issue, this is not a political issue, this is a legal
11 issue, and you emphasized the word "legal."

12 What we're talking about is the modalities of
13 Senate Bill II. We're not talking about animus for
14 people for years, going back generations perhaps. There
15 is a long line of cases -- it's true, they're in Romer
16 and Lawrence and Windsor. There is a long line of cases
17 and they all have established a jurisprudence in this
18 country with respect to the constitutional rights of
19 those who are same sex partners who wish to get married.

20 THE COURT: They have.

21 MR. MAJMUNDAR: There is nothing about SB-II that
22 serves to subvert that right. We're talking about the
23 legalities, not the moralities, and not the political.

24 THE COURT: Thank you. All right.

25 MR. LARGESS: Two things, Your Honor, just

1 quickly.

2 THE COURT: All right.

3 MR. LARGESS: The statute 126.4 is the state law
4 that says a personnel act -- personnel files are
5 confidential, and it lists who can have access to them.
6 So they've just considered it. And on the form, the
7 recusal form, it says this is a personal file. Do not
8 file with the clerk.

9 On this last point that's exactly why it's
10 repudiation of your law, Judge. Senate Bill II is a
11 moral objection to your legal ruling that these people
12 have a moral right based on their religious views to not
13 follow the Constitution, and we're going to spend money
14 to allow them to do that. And even the people who are
15 offended by their beliefs have to contribute to their
16 beliefs, and that's the fundamental problem here.

17 THE COURT: Again, if they left out "religious,"
18 then you really wouldn't have anything religious on
19 there. It would just be a "sincerely held belief"
20 objection. It would still be the same, it would still
21 be, in terms of what you're saying, but you wouldn't have
22 any establishment clause issues.

23 MR. LARGESS: We would not. It would be whether
24 a moral objection to the Constitution is sufficient for a
25 -- for a judge to avoid the duties of office. I don't

1 know how you get standing to bring that case. The
2 problem here, they did limit it to religious beliefs and
3 that's what gives us --

4 THE COURT: I will say this. I appreciate all of
5 the excellent attorneys that have been in this case. The
6 legal documents and writing writings that have been filed
7 are excellent, and the arguments have been well stated
8 today. The Court will talk about this and make a
9 decision. Now, in order of what we're going to do is in
10 terms of taking a de novo look at intervention in this
11 case. The Court is going to enter an order pretty quick
12 on that so that you-all will be able to do whatever you
13 want to do -- react to that before the Court makes a move
14 on what it's going to do in this. And then if the -- if
15 there's going to be any -- if you-all are going to be
16 allowed to intervene, then we will -- we'll have another
17 hearing if you're allowed. If not, then I'll be ready to
18 go. Yes, sir.

19 MR. BOYLE: Your Honor, could I just make one
20 comment?

21 THE COURT: Yes, sir.

22 MR. BOYLE: In listening to the arguments -- I
23 think that it becomes clearer, after listening to these
24 arguments, that the magistrates that are my clients would
25 benefit from representing themselves and talking about

1 the oath of their office and the constitutionality of it
2 and talking about the positions that the attorney general
3 has taken in this case that are, again, adverse to the
4 positions that my clients are taking in other cases. I
5 just wanted to say that after this argument I think it
6 makes it even more clear to my clients' position.

7 THE COURT: I understand your position and you-all
8 are well representing your clients. I just disagree in
9 terms of this venue. This hearing, with this particular
10 issue, I think, is best handled by the state. And I
11 think you-all certainly may have some claims and may --
12 depending on how everything shakes out may have some
13 lawsuits to bring with regard to that sort of thing, but
14 I do not think this is the proper forum for your
15 positions in this particular case as well stated as you
16 can make them. I mean you-all have done a good job doing
17 that. So let me come down and see everybody and then
18 we'll be moving on.

19 (Off the record at 12:15 p.m.)
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
DOCKET NO. 1:16-cv-00054-MOC-DLH

KAY DIANE ANSLEY, et al.,)

Plaintiffs,)

Vs.)

MARION WARREN, in his Official Capacity as)
Director of the North Carolina Administrative Office)
of the Courts,)

Defendant.)

ORDER

THIS MATTER is before the court on the Motion to Dismiss (#38) by Defendant, which has been fully briefed and is ripe for review. The court heard oral arguments on the Motion on August 8, 2016. Defendant argues that this matter should be dismissed for lack of jurisdiction, improper venue, and Plaintiffs' failure to state a claim upon which relief can be granted. Having considered the Motion, the arguments of counsel, and the applicable law, the court enters the following findings, conclusions, and Order.

FINDINGS AND CONCLUSIONS

I. INTRODUCTION

The facts as alleged in this case are as follows. See Complaint (#1) at ¶¶ 18-85. In September 2011, the North Carolina legislature voted to hold a statewide ballot initiative, commonly called Amendment One, to amend the North Carolina Constitution to limit marriage to opposite-sex couples and prohibit the recognition of marriages between same-sex couples. The Amendment One referendum passed on May 10, 2012, amending the state constitution. On Friday, October 10, 2014, after the Supreme Court denied certiorari in Bostic v. Schaefer, 760 F.3d 352

(4th Cir. 2014), this court declared Amendment One, and its corollary provisions in Chapter 51 of the General Statutes, unconstitutional. This court found that the ban on marriage between same-sex couples violated the Fourteenth Amendment under the Fourth Circuit's decision in Bostic. See Gen. Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014).

Following this Court's ruling in General Synod, thousands of marriage licenses were issued to same-sex couples in North Carolina, and those couples were subsequently married, some through ceremonies performed by magistrates. On Monday, October 13, 2014, Defendant Warren's predecessor as director of the Administrative Office of the Courts, Judge John W. Smith, issued a directive instructing state magistrates to immediately conduct marriages of all couples presenting a marriage license issued by the Register of Deeds. On Tuesday, October 14, 2014, General Counsel for the North Carolina Administrative Office of the Courts ("NCAOC") issued a legal memorandum stating that magistrates would violate their judicial oath to uphold the United States Constitution if they refused to marry same-sex couples. Also on October 14, 2014, the District Court for the Middle District of North Carolina issued an Order and Judgment also striking down Amendment One and corollary marriage laws prohibiting marriage equality. See Fisher-Borne v. Smith, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014). On October 24, 2014, various members of the North Carolina General Assembly, including Phil Berger, President Pro Tempore of the Senate, sent a letter to the Director of the NCAOC, voicing their criticisms of NCAOC's directives concerning the October 14 memorandum. The objecting members of the General Assembly "encourage[d] [the NCAOC] to revise the memorandum to include a comprehensive and correct statement of federal and state law on the doctrine of reasonable accommodation and management flexibility." Plaintiffs have alleged that some magistrates, including magistrates from counties

within this judicial district, resigned in the face of this court's Order in General Synod and the directive from the NCAOC rather than uphold their oath of office and perform marriages for same-sex couples.¹

On January 28, 2015, the President Pro Tempore of the Senate filed the second bill of the new legislative session, Sess. Law 2015-75, Senate Bill 2, "An Act To Allow Magistrates And Registers Of Deeds To Recuse Themselves From Performing Duties Related To Marriage Ceremonies Due To Sincerely Held Religious Objection") (hereinafter "Senate Bill 2" or S.B. 2). Section 1 of the proposed bill created a new statute, N.C.Gen.Stat. § 51-5.5, that would grant magistrates the right to recuse themselves from conducting any marriages, and separately would grant assistant and deputy registers of deeds the right to recuse themselves from issuing marriage licenses, for six-month intervals, based upon "any sincerely held religious belief." See N.C.Gen.Stat. § 51-5.5. Plaintiffs have alleged that, given the timing of the law's enactment, the legislature acted in direct response to this court's ruling in General Synod to exempt magistrates who oppose same-sex marriages from fulfilling their mandatory judicial oath to support and uphold the United States Constitution. Section 2 of S.B. 2 amended N.C.Gen.Stat. § 14-230, which provides, inter alia, that any magistrate who should "willfully omit, neglect or refuse to discharge any of the duties of his office... shall be guilty of a Class 1 misdemeanor." S.B. 2 added subsection

¹ Under subchapters IV and VI of Chapter 7A of North Carolina's General Statutes, magistrates are judicial officials who preside over certain matters in North Carolina's State District Courts. Those matters include solemnizing marriages and signing marriage licenses and submitting them for registration in accordance with North Carolina law. See N.C.GEN.STAT. § 7A-292(b)(9); § 51-1; § 51-7. Under N.C.GEN.STAT. § 7A-170, magistrates are required to take the judicial oath of office, consisting of the oath of all public officials set out in N.C.GEN.STAT. § 11-7, and the specific oath for judges found in N.C.GEN.STAT. § 11-11. Under N.C.GEN.STAT. § 14-230, any magistrate who violates the oath of office or willfully refuses to discharge a duty of office is subject to removal from office on a misdemeanor charge.

(b) to N.C.Gen.Stat. § 14-230, providing that “[n]o magistrate recusing in accordance with G.S. 51-5.5 may be charged under this section for recusal to perform marriages in accordance with Chapter 51 of the General Statutes.” Senate Bill 2 thus expressly excludes a magistrate’s refusal to perform marriage ceremonies as an act that “violated his oath of office” or that constituted a form of “misbehavior in office” or otherwise provided cause for removal from office on a Class 1 misdemeanor. Section 3 of S.B. 2 amended N.C.Gen.Stat. § 161-27, which provides penalties for a register of deeds who fails to perform his legal duties, to add a subsection (b), which expressly protects assistant and deputy registers of deeds from being charged with a Class 1 misdemeanor for “recusal to issue marriage licenses in accordance with Chapter 51 of the General Statutes.” Section 4 of S.B. 2 added the following provision to N.C.Gen.Stat. § 7A-292, which lists the “additional powers of magistrates”: “The authority granted to magistrates under G.S. 51-1 and subdivision (a)(9) of this section is a responsibility given collectively to the magistrates in a county and is not a duty imposed upon each individual magistrate. The chief district court judge shall ensure that marriages before a magistrate are available to be performed at least a total of 10 hours per week, over at least three business days per week.” Under Section 5 of S.B. 2, “Any magistrate who resigned, or was terminated from, his or her office between October 6, 2014, and the effective date of this act may apply to fill any vacant position of magistrate.” Such magistrates were not allowed to receive a salary or earn leave during that time, but would be “considered to have been serving as a magistrate during that period for purposes of determining continuous service, length of aggregate service, anniversary date, longevity pay rate, and the accrual of vacation and sick leave.” Additionally, Section 5 of S.B. 2 provides that the “Judicial Department shall pay and submit both the employee and employer contributions to the Retirement Systems Division on

behalf of the magistrate as though that magistrate had been in active service during the period in question.”

Plaintiffs have alleged that S.B. 2 also authorizes the expenditure of public funds to accomplish the goal of exempting magistrates from their oath of office on religious grounds in two ways. First, language in N.C.Gen.Stat. § 51-5.5 provides that if all of the magistrates in a given county recuse themselves due to a “sincerely held religious objection” from performing marriages, the NCAOC will arrange to bring a willing magistrate from another county to perform marriages. Second, under Section 5 of S.B. 2, any magistrate who had resigned his or her position, and then applied and was reappointed to that position within 90 days of the effective date of S.B. 2, would receive full credit towards retirement for that gap in service. To accomplish that end, Section 5 of S.B. 2 requires the “Judicial Department” to pay into the state retirement system on behalf of each reappointed magistrate both the employee’s and employer’s share of retirement contributions to cover that gap in service.

The House approved S.B. 2 on May 28, 2015. Governor McCrory vetoed it that same day, issuing a formal statement explaining the reason for his veto. That statement provided:

I recognize that for many North Carolinians, including myself, opinions on same-sex marriage come from sincerely held religious beliefs that marriage is between a man and a woman. However, we are a nation and a state of laws. Whether it is the president, governor, mayor, a law enforcement officer, or magistrate, no public official who voluntarily swears to support and defend the Constitution and to discharge all duties of their office should be exempt from upholding that oath; therefore, I veto Senate Bill 2.

See “Governor’s Objections and Veto Message.”² The legislature overrode the Governor’s veto on June 11, 2015. On June 26, 2015, the U.S. Supreme Court ruled in Obergefell v. Hodges, 576

² Available at: <http://www.ncleg.net/Sessions/2015/S2Veto/S2Veto.html>.

U.S. ___, 135 S. Ct. 2584 (2015), that state bans on marriage between same-sex couples violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment. The North Carolina legislature did not seek to modify S.B. 2 in the wake of the Supreme Court's decision in Obergefell.

Plaintiffs have alleged that since S.B. 2 became law, at least 32 magistrates across North Carolina who had previously performed marriages for opposite-sex couples invoked religious beliefs to recuse themselves from performing marriages because of their opposition to performing marriages for same-sex couples. They have also alleged that all of the magistrates in McDowell County recused themselves from performing marriages under S.B. 2 because of their opposition to marriage equality for same-sex couples. They have further alleged that Defendant Warren, in his Official Capacity as Director of the NCAOC, has expended public funds monthly under N.C.Gen.Stat. § 51-5.5(c) to further this religious exemption from the oath of office for all of McDowell County's magistrates by paying from public funds the costs necessary to transport magistrates from Rutherford County to perform marriages in McDowell County, and to transport magistrates from McDowell County to Rutherford County to perform other judicial duties during that time.

The court finds it noteworthy that recusing magistrates are not required to publicly state whether they have recused themselves from performing marriages. Plaintiffs allege that Defendant Warren knows that gay and lesbian citizens of McDowell County may need to appear before oath-renewing magistrates in other civil or criminal matters, and that every magistrate in McDowell County believes that gay and lesbian citizens should not be entitled to full Equal Protection and Due Process of law under the Fourteenth Amendment, which is now the law of this country under

Obergefell. While a citizen appearing before a magistrate in McDowell County will know of a magistrate's recusal status by virtue of the fact that they have all recused themselves, the secrecy of recusal presents an issue in other counties where some magistrates have recused and some have not.

The plaintiffs in this case are three couples. Plaintiffs Kay Diane Ansley and Catherine "Cathy" McGaughey are citizens and residents of McDowell County, North Carolina, who were married on October 14, 2014, after this court's ruling in General Synod. Plaintiffs Carol Ann Person and Thomas Roger Person are citizens and residents of Moore County, North Carolina. They are an interracial couple who attempted to get married in 1976, and two magistrates in Forsyth County refused to marry them because of religious objections to interracial marriage. In 1978, a federal district court found that the two magistrates had violated the Fourteenth Amendment rights of Carol Ann and Thomas, ordered that their marriage be performed and ordered the magistrates to pay the Persons' legal fees. Plaintiffs Kelley Penn and Sonja Goodman are citizens and residents of Swain County, North Carolina, who are engaged to be married. Defendant Marion Warren is Director of the NCAOC, which manages and oversees the administrative services provided to the Judicial Branch of North Carolina's more than 6,000 employees and hundreds of courthouses and facilities in every county of the state.

Plaintiffs brought this action under 42 U.S.C. § 1983 challenging the constitutionality of S.B. 2 on three grounds—under the Establishment Clause of the First Amendment, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. Plaintiffs seek a declaratory judgment providing: 1) that Defendant Warren's spending in furtherance of the goals of S.B. 2 violates Article VI of the U.S. Constitution (the Supremacy Clause) as well as the First

Amendment, as applied to North Carolina under the Fourteenth Amendment; 2) that Defendant Warren cannot support and protect magistrates who disavow their judicial oath and duties on religious grounds; 3) that Defendant Warren's use of public funds to advance a specific religious view of marriage equality is unconstitutional; and 4) that Defendant Warren's actions in furtherance of S.B. 2 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs also seek an Order enjoining Defendant Warren from taking further action to implement S.B. 2, including the expenditure of public funds and the provision of administrative support to magistrates who have recused themselves from performing marriages. See Complaint (#1) at pp. 23-24. Within ten days of the filing of the lawsuit, a number of individuals moved to intervene in this case pursuant to Rule 24 of the Federal Rules of Civil Procedure. Those Motions were ultimately denied on August 12, 2016. See (#61).

II. MOTION TO DISMISS

Defendant has moved to dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), (3), and (6). Defendant argues that this matter should be dismissed for lack of personal and subject matter jurisdiction, improper venue, and Plaintiffs' failure to state a claim upon which relief can be granted. The court will address each argument in turn.

A. Personal Jurisdiction

In support of the motion to dismiss, Defendant Warren first argues that this court lacks personal jurisdiction over him, acting in his official capacity, because Plaintiffs have failed to allege that he has actually taken, or threatened to take, any action to deny them of their asserted rights as taxpayers, or as same-sex couples who wish to be married by a magistrate. Defendant Warren argues that, absent allegations that he enforced the subject statutes as amended by S.B. 2,

Plaintiffs' claims under 42 U.S.C. § 1983 should be dismissed pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure.

“When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff ultimately bears the burden of proving to the district court judge the existence of jurisdiction over the defendant by a preponderance of the evidence.” Combs v. Bakker, 886 F.2d 673, 676 (4th Cir.1989). “[W]hen, as here, the court addresses the question [of personal jurisdiction] on the basis only of motion papers, supporting legal memoranda and the relevant allegations of a complaint, the burden on the plaintiff is simply to make a prima facie showing of a sufficient jurisdictional basis to survive the jurisdictional challenge.” New Wellington Fin. Corp. v. Flagship Resort Dev. Corp., 416 F.3d 290, 294 (4th Cir. 2005).

Here, Plaintiff has filed suit pursuant to 42 U.S.C. § 1983 challenging Defendant Warren's actions, acting under the color of state law, as in violation of the First and Fourteenth Amendments. The parties dispute the applicability of the Ex parte Young doctrine to Defendant in this case. The Eleventh Amendment prohibits federal courts from exercising jurisdiction over suits asserted against a state by its own citizens or by citizens of another state. U.S. Const. amend. XI; Hans v. Louisiana, 134 U.S. 1, 18 (1890). The Eleventh Amendment also prohibits states from being sued in state court without their consent. Alden v. Maine, 527 U.S. 706, 712 (1999). “The ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court.” Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). However, under the doctrine articulated in Ex parte Young, 209 U.S. 123 (1908), an exception to Eleventh Amendment immunity exists wherein a federal court may “issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that such

a suit is not a suit against the state for purposes of the Eleventh Amendment.” McBurney v. Cuccinelli, 616 F.3d 393, 399 (4th Cir. 2010) (citing Ex parte Young, 209 U.S. at 159–60).

The Supreme Court has explained the Ex parte Young doctrine as follows:

To ensure the enforcement of federal law...the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. This standard allows courts to order prospective relief, as well as measures ancillary to appropriate prospective relief[.] Federal courts may not award retrospective relief, for instance, money damages or its equivalent, if the State invokes its immunity.

Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004) (citations omitted). As the Fourth Circuit has explained, “Ex parte Young requires a ‘special relation’ between the state officer sued and the challenged statute to avoid the Eleventh Amendment's bar. General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.” Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001) (citations omitted) (finding that although the named governor “is under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state's executive branch, he lacks a specific duty to enforce the challenged statutes....The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute.”).

Here, Plaintiffs allege that Defendant Warren, in his official capacity, is sued for “conduct taken under color of state law that violates the First and Fourteenth Amendments,” see Complaint at ¶ 4, in that he has undertaken “unconstitutional spending” in defiance of this Court’s Order in General Synod. Defendant argues that Plaintiffs have made no factual allegation that Defendant has taken, or threatened, any action to enforce S.B. 2 or to defy this Court’s Order in General Synod. Defendant therefore argues that he lacks the required “special relation” to the alleged

violation of federal law. See Ex parte Young, 209 U.S. at 157; Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d at 331. The Fourth Circuit has explained the “special relation” test as follows:

Where a state law is challenged as unconstitutional, a defendant must have “some connection with the enforcement of the act” in order to properly be a party to the suit. This “special relation” requirement ensures that the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials. Primarily, the requirement has been a bar to injunctive actions where the relationship between the state official sought to be enjoined and the enforcement of the state statute is significantly attenuated. Such cases have been dismissed on the ground that “[g]eneral authority to enforce the laws of the state” is an insufficient ground for abrogating Eleventh Amendment immunity. Thus, the [state actor defendant’s] connection to the [alleged unlawful activity] need not be qualitatively special; rather, “special relation” under Ex parte Young has served as a measure of proximity to and responsibility for the challenged state action. This requirement ensures that a federal injunction will be effective with respect to the underlying claim.

S. Carolina Wildlife Fed’n v. Limehouse, 549 F.3d 324, 332–33 (4th Cir. 2008) (emphasis in original). The “special-relation requirement protects a state’s Eleventh Amendment immunity while, at the same time, ensuring that, in the event a plaintiff sues a state official in his individual capacity to enjoin unconstitutional action, [any] federal injunction will be effective with respect to the underlying claim.” McBurney v. Cuccinelli, 616 F.3d 393, 399 (4th Cir. 2010) (citation and internal quotation marks omitted). The parties agree that in considering whether a defendant has sufficient enforcement powers to fall under the Ex parte Young exception, the Fourth Circuit will look at the duties enumerated by statute. See id. at 400 (parsing the statutory duties of the attorney general and finding he lacked authority to enjoin violations of the Virginia Freedom of Information Act).

Defendant argues that by virtue of North Carolina’s General Statutes and the State’s Constitution, he is not empowered to enforce S.B. 2. N.C.Gen.Stat. § 7A-340 establishes “a State office to be known as the Administrative Office of the Courts. It shall be supervised by a Director,

assisted by an assistant director.” In turn, N.C.Gen.Stat. § 7A-341 provides that the “Director shall be appointed by the Chief Justice of the Supreme Court, to serve at the pleasure of the Chief Justice.” The Director’s duties are set out with N.C.Gen.Stat. § 7A-343, which include administrative duties such as compiling data associated with financial operations; prescribing efficient business methods; performing audits and making recommendations to ensure the efficiency and efficacy of the Judicial Branch; making arrangements for the physical facilities and equipment of the Judicial Branch; analyzing and entering into vendor contracts; making arrangements for the payment of interpreters and experts; issuing photographic identification cards to appropriate Judicial personnel; and, establishing appropriate per-mile reimbursement for transportation by privately owned vehicles in accordance with rates set out by the Internal Revenue Service. Those duties also include: “ensur[ing] overall compliance with federal and State laws”; determining the number of “magistrates required for the efficient administration of justice”; overseeing an Internal Audit Division that “evaluates and discloses potential weaknesses in the effectiveness of internal controls in the court system for the purpose of safeguarding public funds and assets and minimizing incidences of fraud, waste, and abuse”; “inspect[ing] and review[ing] the effectiveness and efficiency of processes and proceedings conducted by judicial officers;” and “prepar[ing] and submit[ting] budget estimates of State appropriations necessary for the maintenance and operation of the Judicial Department, and authoriz[ing] expenditures from funds appropriated for these purposes.” N.C.Gen.Stat. § 7A-343.

Defendant contends that none of the duties delegated by N.C.Gen.Stat. § 7A-146 provide the Director the responsibility or authority to enforce any law, much less S.B. 2, but only authorizes him to engage in those specific administrative activities designed to facilitate the administration

of justice. Plaintiffs argue that Defendant Warren is an appropriate defendant in this case because S.B. 2 directs him, “as Director of the NCAOC ... to use public funds for a religious purpose,” see Complaint at ¶ 4, and that “Defendant Warren oversees and manages the administration of the judicial system and is well aware that magistrates are judicial officials subject to these provisions of law as well as the judicial oath of office.” Id. at ¶ 28.

Plaintiffs argue that Defendant Warren is an appropriate defendant under Limehouse. In that case, the Fourth Circuit found that a state transportation agency director, who had supervisory authority over South Carolina’s drafting of an environmental impact statement for a federally funded bridge project, satisfied the proximity and responsibility requirements. The director argued that the “special relation” condition was not met because he was not “charged with any duty under a federal statute or ... with enforcement of a state statute.” The Fourth Circuit rejected this argument, finding:

As the administrative head of the agency with responsibility for carrying out its policies and representing the agency in its dealings with the federal government, the Director possesses a sufficient connection to the alleged violation of federal law.

Limehouse, 549 F.3d at 333. Plaintiffs here argue, similarly, that Defendant Warren is responsible for the expenditure of taxpayer funds to operate the court system, and is the administrative head of the agency responsible for administering and implementing S.B. 2, which directs the NCAOC director to spend public funds as part of his statutory duties under N.C.Gen.Stat. § 51-5.5. Plaintiffs contend that Defendant Warren’s spending has enabled all of the McDowell County magistrates to recuse themselves from their marriage duties under S.B. 2. See Complaint at ¶¶ 63-65. Plaintiffs thus contend that the proximity and responsibility prongs under Limehouse are both met.

Plaintiffs also note that the Fourth Circuit applied Ex parte Young to find jurisdiction over a similar defendant in Bostic v. Schaefer, the case that established the binding precedent for this court's ruling in General Synod. 760 F.3d 352, 371 (4th Cir. 2014), cert. denied, 135 S. Ct. 308 (2014), cert. denied sub nom. McQuigg v. Bostic, 135 S. Ct. 314 (2014). The Circuit found in Bostic that Defendant Rainey—the Registrar of Vital Records for Virginia—whose administrative duties included developing Virginia's marriage license application form and distributing it to the circuit court clerk, played a sufficient role in the marriage process to make her an appropriate defendant. Bostic, 760 F.3d at 371. The Fourth Circuit also found that the Clerk of Circuit Court for the City of Norfolk, who was responsible for issuing individual marriage licenses and filing records of marriage in the localities in which they serve, was a proper defendant. Id. at 371 n.3 (“Schaefer bears the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses”). One of this court's colleagues within the Fourth Circuit reached the same conclusion in Harris v. McDonnell, 988 F. Supp. 2d 603, 609 (W.D. Va. 2013) regarding the Registrar of Vital Records, whose job requirements as delineated by statute included the duty to file records of marriage and “furnish forms for the marriage license, marriage certificate, and application for marriage license used in the Commonwealth.” See id. (“The Virginia Governor has insufficient proximity to and responsibility for Virginia's marriage laws, and plaintiffs have not shown any involvement by the Governor in the enforcement of these laws. In contrast, Rainey, the State Registrar of Vital Records, has such proximity and responsibility and is a proper party defendant in this case.”).³

³ Defendant notes that the parties in Harris had agreed that Rainey was a proper defendant, which is not the case here. However, the court still finds the court's analysis instructive. The Harris court noted that the State Defendants recognize Rainey's statutory authority as the State

Having considered the matter, the court concludes that Defendant Warren is a proper Defendant because his duties are sufficiently connected to the alleged violation of federal law to constitute the requisite “special relation” under the Ex Parte Young doctrine. As in Limehouse, Defendant has “supervisory control” over the action challenged here—the preparation of budget estimates for the required state funds to operate the judicial department and authorization of expenditures of those funds. Also as in Limehouse, Defendant Warren is “the administrative head of the agency with responsibility for carrying out its policies.” The fact that Defendant Warren, in his official capacity, is the official tasked with financial responsibilities relating to the operation of the Judicial Department makes him an appropriate official for suit. The court therefore finds that Defendant’s argument as to lack of personal jurisdiction is without merit.

B. Venue

Defendant next argues that venue is improper in the Western District of North Carolina and that this matter should be dismissed pursuant to Fed. R. Civ. P. 12(b)(3). Ordinarily, proper venue for actions filed in federal district courts is governed by 28 U.S.C. § 1391, which provides that:

A civil action may be brought in—

- (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
- (2) a judicial district in which a substantial part of the events or omissions

Registrant of Vital Records regarding Virginia marriage law and policy. See id. (citing Va. Code Ann. § 32.1–267(A), (E) (duty to file record of marriage and “furnish forms for the marriage license, marriage certificate, and application for marriage license used in the Commonwealth”); id. § 32.1–252 (outlining generally the duties of the State Registrar); id. § 32.1–268, –268.1, –271, –275 (regarding the reporting of data by the State Registrar on marriage, divorce, and annulment rates); id. § 32.1–272 (State Registrar’s authority to issue certified and other copies of vital records)).

giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). When venue is improper under § 1391, the district court must dismiss the action or, “if it be in the interest of justice,” transfer the action “to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a). “When an objection to venue has been raised under Rule 12(b)(3), the burden lies with the plaintiff to establish that venue is proper in the judicial district in which the plaintiff has brought the action.” Turfworthy, LLC v. Dr. Karl Wetekam & Co. KG, 26 F. Supp. 3d 496, 502 (M.D.N.C. 2014) (citations omitted). “Courts decide questions of venue largely on the basis of the pleadings.... The Court is not obliged, however, to treat all allegations as true, no matter how speculative, conclusory, or lacking of necessary supporting factual allegations. Instead... a complaint must allege a factual basis for its legal claims.” Bartko v. Wheeler, No. 1:13CV1006, 2014 WL 29441, at *8 (M.D.N.C. Jan. 3, 2014) (citation omitted). In considering a motion to dismiss under Rule 12(b)(3) for improper venue, “the court is permitted to consider evidence outside the pleadings. A plaintiff is obliged, however, to make only a prima facie showing of proper venue in order to survive a motion to dismiss. In assessing whether there has been a prima facie venue showing, we view the facts in the light most favorable to the plaintiff.” Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 365–66 (4th Cir. 2012). As an alternative to dismissal, Defendant has moved to transfer this case to the Eastern District of North Carolina pursuant to 28 U.S.C. § 1404, though he makes no argument under the requisite factors for transfer.⁴

⁴ 28 U.S.C. § 1404(a) provides: “For the convenience of parties and witnesses, in the interest of

Under the plain language of 28 U.S.C. § 1391, venue may be proper in two or more judicial districts. See Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004). “[I]n determining whether events or omissions are sufficiently substantial to support venue under the amended statute, a court should not focus only on those matters that are in dispute or that directly led to the filing of the action. Rather, it should review “the entire sequence of events underlying the claim.” Id. While venue might be proper in more than one district, courts still must consider the word “substantial.” Bartko, 2014 WL 29441, at *8 (citing Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 356–57 (2d Cir.

justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” Id. Upon a motion to transfer, the moving party carries a heavy burden. Duke Energy Florida, Inc. v. Westinghouse Elec. Co., No. 3:14-CV-00141-MOC, 2014 WL 2572960, at *5 (W.D.N.C. June 9, 2014). A court’s decision to grant a motion to transfer venue under 28 U.S.C. § 1404(a) is largely discretionary. 3A Composites USA, Inc. v. United Indus., Inc., No. 5:13CV83-RLV, 2014 WL 1471075, at *1 (W.D.N.C. Apr. 15, 2014). In exercising such discretion, the court applies a balancing test and considers various factors in deciding whether transfer is appropriate. Jim Crockett Promotions, Inc. v. Action Media Grp., Inc., 751 F.Supp. 93 (W.D.N.C. 1990). The factors to be considered include:

1. The plaintiff’s initial choice of forum;
2. The residence of the parties;
3. The relative ease of access of proof;
4. The availability of compulsory process for attendance of witnesses and the costs of obtaining attendance of willing witnesses;
5. The possibility of a view by the jury;
6. The enforceability of a judgment, if obtained;
7. The relative advantages and obstacles to a fair trial;
8. Other practical problems that make a trial easy, expeditious, and inexpensive;
9. The administrative difficulties of court congestion;
10. The interest in having localized controversies settled at home and the appropriateness in having the trial of a diversity case in a forum that is at home with state law that must govern the action; and
11. The avoidance of unnecessary problems with conflict of laws.

Id. A motion should not be granted if transfer “would merely shift the inconvenience from the defendant to the plaintiff, or if the equities lean but slightly in favor of the movant after all factors are considered.” Id. at 95.

2005); Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1371 (11th Cir. 2003); Cottman v. Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994)). “That means for venue to be proper, significant events or omissions material to the plaintiff’s claim must have occurred in the district in question, even if other material events occurred elsewhere. It would be error, for instance, to treat the venue statute’s ‘substantial part’ test as mirroring the minimum contacts test employed in personal jurisdiction inquiries.” Id. (citations omitted).

Defendant argues that venue is improper in the Western District of North Carolina because the appropriate venue for this case is the Eastern District, which is where Defendant resides in his official capacity and where he contends the substantial events (debates and enactment of the challenged law) occurred. Plaintiffs do not contest that venue would be proper in the Eastern District given Defendant’s “official residence” there. See, e.g., Crenshaw v. Syed, 686 F. Supp. 2d 234, 237 (W.D.N.Y. 2010) (“For the purposes of venue, state officers ‘reside’ in the district where they perform their official duties”) (citations omitted); Stanton-Negley Drug Co. v. Pennsylvania Dep’t of Pub. Welfare, No. CIV.A. 07-1309, 2008 WL 1881894, at *4 (W.D. Pa. Apr. 24, 2008) (“It is well established that, ‘for purposes of venue a state official’s residence is located at the state capitol, even where branch offices of the state official’s department are maintained in other parts of the state.’”) (citing Leroy v. Great W. United Corp., 443 U.S. 173 (1979)). Nonetheless, Plaintiffs argue that a substantial part of the events triggering this lawsuit occurred in this district. Plaintiffs argue that the Complaint lays out that S.B. 2 was passed in response to this court’s ruling in General Synod, and that the alleged First Amendment and Fourteenth Amendment violations have uniquely played out in McDowell County. All of the magistrates in that county have recused themselves from performing marriages and Defendant is carrying out the provisions of S.B. 2 in

response to those actions. Further, Plaintiffs note that the Complaint alleges that magistrates located within the Western District resigned in the face of this court's Order in General Synod, were then allowed to be reappointed under S.B. 2, and Defendant directed payment of tax funds into their retirement system accounts to bridge the gap in service.

Several courts apply the principle that "where plaintiffs challenge state-wide policies, and not merely the actions of state officials in a single county, venue is proper pursuant to Section 1391(b)(2) in the district where those policies are developed." Chester v. Beard, No. CIV.A. 07-4742, 2008 WL 2310946, at *8 (E.D. Pa. June 2, 2008). Other courts apply the venue statute more broadly. See, e.g., Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon, No. CV-F-04-6663 REC, 2005 WL 2709508, at *6 (E.D. Cal. Oct. 20, 2005) ("In cases involving state officials, a substantial connection to the claim occurs not only where the 'triggering event' takes place, but also where the effects of the decision are felt.") (citing McClure v. Manchin, 301 F.Supp.2d 564, 569 (N.D. W. Va. 2003) (rejecting secretary of state's claim that a state election law challenge must be brought in the district where the state government sits); Emison v. Catalano, 951 F. Supp. 714, 721 (E.D. Pa. 1996) (suits challenging official acts may be brought in the district where the effects of the challenged statute are brought despite being enacted elsewhere)). See also Bay Cnty. Democratic Party v. Land, 340 F. Supp. 2d 802, 806 (E.D. Mich. 2004) (finding that because the effects of the challenged election ballot procedure were felt statewide, venue was appropriate outside the district where state government was seated).

Here, while a substantial part of the events giving rise to this lawsuit occurred in Raleigh, the court finds that venue is indeed proper in this district based on the specific allegations in the Complaint made as to the magistrates in McDowell County and based on Plaintiffs' residency

here. The court also recognizes that some deference is due to Plaintiff's choice of forum where venue is appropriate there. See Brody v. N. Carolina State Bd. of Elections, No. 3:10CV383, 2011 WL 1843199, at *5 (W.D.N.C. May 16, 2011), aff'd on other grounds, 458 F. App'x 231 (4th Cir. 2011) ("although Defendants do not seek a discretionary transfer of venue under 28 U.S.C. § 1404(a), Plaintiffs' choice of forum is due some deference since venue is, in fact, proper in the selected forum."); comScore, Inc. v. Integral Ad Sci., Inc., 924 F. Supp. 2d 677, 682 (E.D. Va. 2013) ("The plaintiff's choice of forum is typically entitled to substantial weight, especially where the chosen forum is the plaintiff's home or bears a substantial relation to the cause of action.") (citation and internal quotation marks omitted). As such, the court will not dismiss this case on the basis of venue.

C. Standing

Defendant next argues that Plaintiffs lack standing and that this court therefore lacks subject matter jurisdiction over their claims. "There exist two strands of standing: Article III standing, which ensures that a suit presents a case or controversy as required by the Constitution, and prudential standing, which encompasses judicially self-imposed limits on the exercise of federal jurisdiction." Doe v. Virginia Dep't of State Police, 713 F.3d 745, 753 (4th Cir. 2013) (internal citations and quotation marks omitted).

Article III of the Constitution constrains federal courts to resolve only actual cases and controversies. U.S. Const. art. III, § 2, cl. 1. Because of this constitutional limitation, Plaintiffs must demonstrate they have standing to adjudicate their claim in federal courts. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). "A court does not have subject matter jurisdiction over an individual who does not have standing." AtlantiGas Corp. v. Columbia Gas

Transmission Corp., 210 Fed. Appx. 244, 247 (4th Cir. 2006). Rule 12(b)(1) provides for dismissal of claims against all defendants where the court lacks jurisdiction over the subject matter of the lawsuit. Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884). The Federal Rules of Civil Procedure provide that “[i] the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3) (emphasis added). A plaintiff must demonstrate standing for each claim asserted. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006).

Standing has three essential elements: injury, causation, and redressability. Marshall v. Meadows, 105 F.3d 904, 906 (4th Cir. 1997). To satisfy the constitutional standing requirement, a plaintiff must provide sufficient evidence to show that: (1) the plaintiff suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision of the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations and internal quotation marks omitted). These requirements help prevent federal courts from issuing opinions on abstract or hypothetical questions, or from giving advisory opinions. See Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998). Similarly, the requirements of standing maintain “the tripartite allocation of power set forth in the Constitution,” Cuno, 547 U.S. at 341, and ensures that the judicial branch's authority to review—and overturn—the decisions of the executive and the legislative branches is employed only “in the last resort, and as a necessity.” Allen v. Wright, 468 U.S. 737, 752 (1984).

“At the pleading stage, general factual allegations of injury resulting from the defendant's

conduct may suffice [to satisfy these elements], for on a motion to dismiss [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.” Lujan, 504 U.S. at 561 (citations and internal quotation marks omitted). “In determining whether a party has standing to bring suit, the party invoking the jurisdiction of the court bears the burden of establishing standing.” Bishop v. Bartlett, 575 F.3d 419, 424 (4th Cir. 2009).

1. Standing as to the First Amendment Claim

As noted above, “a federal lawsuit must seek to prevent or redress an actual or imminently threatened injury to the plaintiff. Plaintiffs may not establish their standing to bring suit merely because they disagree with a government policy, or because they share the generalized interest of all citizens in constitutional governance[.]” Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599, 604–05 (4th Cir. 2012) (internal citations and quotation marks omitted) (emphasis added). To satisfy the “injury in fact” requirement, plaintiffs must allege they “have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” Winn, 131 S.Ct. at 1442 (quotations omitted). While determining the existence of an injury is not typically a particularly difficult task for a federal court, “[i]t has been repeatedly noted that ‘the concept of injury for standing purposes is particularly elusive in Establishment Clause cases.’” Suhre v. Haywood Cnty., 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting Murray v. City of Austin, 947 F.2d 147, 151 (5th Cir. 1991)). “[T]he Establishment Clause plaintiff is not likely to suffer physical injury or pecuniary loss. Rather the spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion. Accordingly, rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.” Suhre, 131 F.3d at 1086

(internal citations and quotation marks omitted). The Fourth Circuit has explained that while “standing principles must be tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer...[the courts] must guard against efforts to use this principle to derive standing from the bare fact of disagreement with a government policy, even passionate disagreement premised on Establishment Clause principles. Such disagreement, taken alone, is not sufficient to prove spiritual injury.” Moss, 683 F.3d at 605–06 (internal citations and quotation marks omitted) (emphasis added). See also Awad v. Ziriax, 670 F.3d 1111, 1122 (10th Cir. 2012) (“it is not enough for litigants to claim a constitutional violation. They must also ‘identify a[] personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.’”) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982)) (emphasis in original). Nonetheless, “[t]he party who invokes the [court’s] power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.” Doremus v. Bd. of Ed. of Borough of Hawthorne, 342 U.S. 429, 434 (1952).

The Supreme Court has noted that standing based on an Establishment Clause claim can be premised on several theories. “Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom.” Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129–30 (2011) (internal citations omitted). “Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits

can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation.” Id. Such challenges are brought under the rule set forth in Flast v. Cohen, 392 U.S. 83 (1968), which is what Plaintiffs seek to do in this case. See also Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 72 (2d Cir. 2001) (“standing to assert an Establishment Clause claim may rest either on the plaintiff’s direct exposure to the challenged activity...[e.g.] students attending a public school, and their parents, have standing to challenge a program of Bible reading in the school because they are directly affected by the laws and practices against which their complaints are directed[], or, in certain situations, on the plaintiff’s status as a taxpayer.”) (citing 392 U.S. at 103–04; Doremus, 342 U.S. at 433–35)) (internal quotation marks and alterations omitted). Here, Plaintiffs allege that the justiciable injury providing them standing is “the very ‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion alleged by a plaintiff.” (Pl. Mem. Opp. Mot. Dismiss (#46) (citing Winn, 563 U.S. at 140)). See also Pl. Complaint at ¶ 6 (“Plaintiffs have standing as state taxpayers under Flast v. Cohen, 392 U.S. 83 (1968) and its progeny, as they challenge the spending of tax funds by Defendant Warren as approved by the state legislature for the express and primary religious purpose in violation of the First Amendment.”).

a. Taxpayer Standing

Plaintiffs alleged in their Complaint and reiterated at oral argument that they base standing in this suit solely on their status as taxpayers under Flast v. Cohen, 392 U.S. 83 (1968), and not any other “actual or imminently threatened injury” that they seek to redress. Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009). Plaintiffs have alleged an Establishment Clause violation as to the expenditure of government funds in order to facilitate the recusal of magistrates from

marriage ceremonies. Their argument that their tax dollars are not being used in a constitutional manner is simply not enough to confer standing. It may be that, in Establishment Clause cases such as this, an allegation that state funds are being spent to further a religious belief should be sufficient to confer standing. However, a finding of standing in such a case is not supported by current precedent.

Generally, the payment of taxes is not enough to establish standing to challenge the legality of an action taken by the government. See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007) (“if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.”). “Such suits are typically foreclosed because the harm is too widely shared, the financial injury to any given taxpayer is too slight, and the possibility of redress is too speculative to support standing under traditional principles.” Freedom From Religion Found., Inc. v. Lew, 773 F.3d 815, 820 (7th Cir. 2014) (citing Winn, 563 U.S. at 133).

The Supreme Court in Flast recognized a narrow exception to the general rule against federal taxpayer standing, holding that “a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause.” Hein, 551 U.S. at 593. The Court has reiterated time and again that “Flast's holding provides a ‘narrow exception’ to ‘the general rule against taxpayer standing.’” Winn, 563 U.S. at 138 (quoting Bowen v. Kendrick, 487 U.S. 589, 618 (1988)).

In Flast, the plaintiff asserted an Establishment Clause claim to the disbursement of funds to religious schools, and cited taxpayer status as the sole basis for standing. Flast, 392 U.S. at 85-86. As the Supreme Court later noted in Hein, “[t]he expenditures at issue in Flast were made

pursuant to an express congressional mandate and a specific congressional appropriation. The plaintiff in that case challenged disbursements made under the Elementary and Secondary Education Act of 1965, 79 Stat. 27 [, which] expressly appropriated the sum of \$100 million for fiscal year 1966, and authorized the disbursement of those funds to local educational agencies for the education of low-income students.” Hein, 551 U.S. at 603 (citing Flast, 392 U.S. at 86). The expenditures challenged in Flast were “funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate.” Id. (citing Flast, 392 U.S. at 90).

In Flast, the Supreme Court held that taxpayers have standing when two conditions are met. First, “the taxpayer must establish a logical link between that status and the type of legislative enactment attacked.” Flast, 392 U.S. at 102, ibid. (“[t]hus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, s 8, of the Constitution.”). Significant to the factual circumstances of this case, “[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.” Id. Second, “the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.” Id.

The Court found that the plaintiffs in Flast satisfied the first condition by challenging a congressional spending statute adopted pursuant to Article I, § 8, of the United States Constitution,

and satisfied the second condition by alleging that the disbursements violated the Establishment Clause, which “operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, [§] 8.” Id. at 103-04.

In Flast, the Court discussed the roots of the Establishment Clause, noting that “[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.” Id. at 103. They explained that “James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that ‘the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.’” Id. at 103–04 (quoting 2 Writings of James Madison 183, 186 (Hunt ed. 1901)). “The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.” Id. at 104.

In Winn, the Supreme Court summarized, “[Flast] explain[ed] that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of ‘the taxing and spending power,’ their property is transferred through the Government's Treasury to a sectarian entity.” Winn, 563 U.S. at 139–40 (2011). “As Flast put it: ‘The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.’” Id. (quoting Flast,

392 U.S. at 106). “Flast thus understood the injury alleged in Establishment Clause challenges to federal spending to be the very extract[ion] and spen[ding] of tax money in aid of religion alleged by a plaintiff.” Id. (citing Cuno, 547 U.S. at 348; Flast, 392 U.S. at 106 (quotation marks omitted)).

Supreme Court jurisprudence since Flast has found limitations to the Flast exception based on various types of government expenditures, albeit not without generating some confusion as to the doctrine’s precise applicability. See Am. Civil Liberties Union of Mass. v. Sebelius, 697 F. Supp. 2d 200, 205 (D. Mass. 2010) (judgment vacated on other grounds) (“Supreme Court cases since Flast discussing taxpayer standing are admittedly confusing.”). Nonetheless, since Flast, several clarifications have guided lower court decisions to a certain extent. In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), the Court held that taxpayers did not have standing to challenge the free transfer of surplus federal property to a nonprofit religious school on Establishment Clause grounds. See id. at 479. In refusing standing to the plaintiff taxpayers, the Court noted that “the source of their complaint is not a congressional action, but a decision by [the Secretary of Health, Education, and Welfare] to transfer a parcel of federal property.” Id. Because the transfer did not involve an exercise of the congressional spending power under Article I, § 8, but rather one of executive authority under the Property Clause of Article IV, the Court held that it did not fall within the Flast exception. Id. at 480. Thus, the Court has “limited taxpayer standing to challenges directed ‘only [at] exercises of congressional power’” under the Taxing and Spending Clause. Hein, 551 U.S. at 604 (citing Valley Forge, 454 U.S. at 479).

In Hein, the taxpayer-plaintiffs asserted an Establishment Clause challenge to executive orders establishing the White House Office of Faith–Based and Community Initiatives within the

Executive Office of the President, as well as similar offices in other federal agencies. Id. at 593–94 (Alito, J., plurality opinion). The Court in Hein focused on the distinction between explicit congressional appropriations and discretionary executive expenditures. In Hein, Congress had not authorized the creation of the offices by legislation; rather, the offices were created by executive orders and funded by “general Executive Branch appropriations.” Id. at 595. The Court found that the taxpayer-plaintiffs lacked standing to challenge the executive orders because they had not alleged an “Establishment Clause violation ... funded by a specific congressional appropriation and ... undertaken pursuant to an express congressional mandate.” Id. at 604. The challenged “appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain”; rather, “[t]hose expenditures resulted from executive discretion, not congressional action.” Id. at 604. Because the taxpayer-plaintiffs challenged a disbursement not “funded by a specific congressional appropriation” and not “undertaken pursuant to an express congressional mandate,” the Court concluded the taxpayer-plaintiffs lacked standing. Id. See also Murray v. U.S. Dep’t of Treasury, 681 F.3d 744, 750 (6th Cir. 2012) (“the Hein Court indicated that a taxpayer-plaintiff had standing to raise an Establishment Clause challenge to an executive branch disbursement only where the statute ‘expressly contemplate[s] that some of those moneys might go to projects involving religious groups.’”) (quoting Hein, 551 U.S. at 607). Thus, Hein clarifies that taxpayer standing does not extend to a taxpayer challenge to a statute generally providing funding to the executive branch.

Several years later, in Arizona Christian School Tuition Organization v. Winn, the Supreme Court held that taxpayer standing only applies to taxpayer challenges involving specific government appropriations, not tax credits or other “tax expenditures.” 563 U.S. at 141. While

Hein and Winn limited the applicability of taxpayer standing, it did not otherwise overturn the basic principles articulated in Flast.

As noted above, Plaintiffs' sole basis for standing is "as state taxpayers under Flast v. Cohen, 392 U.S. 83 (1968) and its progeny." See Complaint at ¶ 6. However, despite citing the two-pronged Flast test in their brief, Plaintiffs fail to make any argument as to how they make the required showing under that test. Plaintiffs explain that they challenge the two provisions of S.B. 2 that direct Defendant to spend tax dollars to support magistrates who claim personal religious objections to marriages between citizens (taxpayers) of the same sex. First, to expend funds to bring in a "willing" magistrate to perform marriages in McDowell County. Second, to pay into the retirement system to bridge the gap in service for those magistrates who resigned after this court's ruling in General Synod, but then were reappointed after S.B. 2 became law. Plaintiffs claim that this spending, ordered by S.B. 2 and administered by Defendant, uses public funds to further a religious belief in violation of the First Amendment. Plaintiffs argue that this lawsuit fits squarely within Flast and Winn to provide standing for their challenge to the state's "extraction and spending of tax money in aid of religion" as authorized and required by S.B. 2 in order to carry out the law's legislative purpose. Plaintiffs contend that even contributing "three pence" of taxpayer dollars to an expressly and exclusively religious purpose affords them standing. See Winn, 563 U.S. at 141.

However, while Plaintiffs' policy arguments are indeed in conformance with the roots of the taxpayer standing doctrine, Winn did not overturn the fundamental, two-part test articulated in Flast, nor has any other case. Having carefully considered the parties' arguments regarding Plaintiffs' standing to bring an Establishment Clause claim in light of the governing law, the court

finds that Plaintiffs have failed to make the required showing that they fall within the Flast exception to taxpayer standing.⁵

As Defendant notes, Plaintiffs are not challenging a government appropriation, but rather the spending of taxpayer funds necessary to achieve the goals of the state law. As with all regulatory statutes, some sort of expense can be expected to accompany the goals of the statute. As noted above, “the taxpayer must establish a logical link between that status and the type of legislative enactment attacked” and then “must establish a nexus between that status and the precise nature of the constitutional infringement alleged.” Flast, 392 U.S. at 102. As the Seventh Circuit has articulately summarized in assessing taxpayer standing jurisprudence, “[t]he plurality of the Court made clear in Hein that only ‘expenditures made pursuant to an express congressional mandate and a specific congressional appropriation’ met the first nexus requirement; the plurality rejected the plaintiffs’ claim that any ‘expenditure of government funds in violation of the Establishment Clause’ would meet this requirement.” Hinrichs v. Speaker of House of Representatives of In. Gen. Assembly, 506 F.3d 584, 598 (7th Cir. 2007) (quoting Hein, 127 S.Ct. at 2565). Here, Plaintiffs have not pointed to the establishment of any specific appropriation of funds by the legislature to implement the allegedly unconstitutional purpose of S.B. 2. The funding provisions that Plaintiffs challenge here—travel expenses for magistrates and retirement contributions—are not “expenditures made pursuant to an express [legislative] mandate and a specific [legislative] appropriation,” Hein, 127 S.Ct. at 2565, but are “incidental expenditure[s] of

⁵ The court also notes that, despite Plaintiffs’ assertion that they have standing under Flast and its progeny, their brief largely cites cases where taxpayer standing has not been found. See Pl. Brief (#46) at pp. 13-15. While the court does not fault Plaintiffs for failing to provide case law that does not exist, the dearth of authority cited in support of their argument underscores the lack of legal precedent that would enable this court to find taxpayer standing.

tax funds in the administration of an essentially regulatory statute,” which is not sufficient for the purposes of standing. Flast, 392 U.S. at 102. Plaintiffs have not alleged, as in Flast, that they challenge legislative action taken “under the taxing and spending clause,” or offered any other rationale as to how “a logical link between [their] status and the type of ... enactment attacked” is present here. Id. at 102-03. Cf. Arizona Christian Sch. Tuition Org., 563 U.S. at 150 (Kagan, J., dissenting) (noting that the taxpayer plaintiffs “attack[ed] a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause”).

Moreover, the law passed here implicitly authorizes uses of funds by the North Carolina judicial branch, not the legislature. Under Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., taxpayer standing does not extend to such expenditures. In Valley Forge, the Court noted that the taxpayer plaintiffs “[did] not challenge the constitutionality of the [Act] itself, but rather a particular Executive Branch action arguably authorized by the Act.” 454 U.S. at 479 n.15. Because “the source of their complaint [was] not a congressional action, but a decision by [the executive branch],” Flast [was] inapplicable as it “limited taxpayer standing to challenges directed ‘only [at] exercises of congressional power.’” Id. (quoting Flast at 102) (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (denying standing because the taxpayer plaintiffs “did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch”). The court finds no distinction between the holding in Valley Forge denying standing to an expenditure of the executive branch implicitly authorized by legislation and the court’s decision here denying standing to an expenditure authorized by an administrative agency of the judicial branch.

In sum, the court fails to see a “logical link between [Plaintiffs’ taxpayer] status and

the...legislative enactment attacked.” Flast, 392 U.S. at 102. The expenditures authorized by S.B. 2 to enable the NCAOC to administer the recusal process are incidental at best. Senate Bill 2 “did not expressly authorize, direct, or even mention the expenditures,” Hein, 127 S.Ct. at 2566, necessary to carry out the program. See N.C.Gen.Stat. § 51-5.5. Plaintiffs allege only an “expenditure of government funds in violation of the Establishment Clause,” which cannot provide a sufficient basis for standing. Hein, 127 S.Ct. at 2566.⁶

⁶ To the extent Defendant argues that Plaintiffs may not assert taxpayer standing to challenge a state law, as opposed to a federal one, the court finds such argument to apparently be in error, and moreover, unnecessary to resolution of the issue before it. The Supreme Court has addressed challenges to state laws by state taxpayers without any noted issues for decades. See Doremus, 342 U.S. at 434–35 (“[W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed...”) (emphasis added); DaimlerChrysler Corp., 547 U.S. at 345 (“[t]he... rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers.”) (citing Doremus). See also Hinrichs, 506 F.3d at 598 (“state taxpayers are held to the same standing requirements as federal taxpayers. They must establish the requisite nexus between their status and the challenged enactment in order to meet the test articulated in Flast.”); Smith v. Jefferson Cty. Bd. of Sch. Comm’rs, 641 F.3d 197, 213 (6th Cir. 2011) (citing Hein v. Freedom From Religion Found., Inc., 551 U.S. at 600, and noting that it described Doremus as a case involving “a state taxpayer’s claim”). See also ASARCO Inc. v. Kadish, 490 U.S. 605, 613–14 (1989) (opinion of Kennedy, J.) (“[W]e have likened state taxpayers to federal taxpayers” for purposes of taxpayer standing[.]”).

Here, Defendant “agrees that there have indeed been cases where courts arguably assume State taxpayer standing,” but notes that “in none of those cases did the Court analyze State taxpayer standing under Frothingham, [Doremus], or Flast and its progeny.” See Def. Reply (#49) at p. 16. See also Am. Civil Liberties Union of Mass., 697 F. Supp. 2d at 205 (judgment vacated on other grounds) (“It is worth noting that in applying the Flast exception, the Court has never permitted standing where the Spending Clause of Article I was not directly implicated.”). Defendant argues that Plaintiffs’ request for the court to do so in this case is misplaced and that there is no general rule allowing for litigation to all Establishment Clause challenges by all taxpayers, only sub silentio holdings on the issue. Because the court finds that Plaintiffs lack standing for the other reasons stated herein, which it has done assuming that the Flast analysis applies to the challenged state law here, it will not undertake an analysis of whether dismissal of Plaintiffs’ claim merely on the basis that it is made as to a state, not federal, law would also be appropriate in this instance.

The court also finds that Plaintiffs lack standing by virtue of the fact that their claims are merely generalized grievances with a state law with which they disagree, which cannot confer standing. See Moss v. Spartanburg Cnty. Sch. Dist. Seven, 683 F.3d 599, 604–05 (4th Cir. 2012). See also Freedom From Religion Found., Inc. v. Lew, 773 F.3d at 819 (“a plaintiff cannot establish standing based solely on being offended by the government's alleged violation of the Establishment Clause.”) (citing Valley Forge Christian Coll., 454 U.S. at 485–86). In Hein, the Supreme Court rejected the taxpayer-plaintiffs claims that “having paid lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution.” Hein, 551 U.S. at 599. The Court noted that it has “consistently held that this type of interest is too generalized and attenuated to support Article III standing.” Id. Moreover, if the court were to find that Plaintiffs have standing in this case, there would apparently be no limit to the applicability of taxpayer standing in Establishment Clause cases. The Supreme Court has squarely rejected the proposition that any “expenditure of government funds in violation of the Establishment Clause” falls within the Flast exception. Id. at 603.

b. Lack of Alternative Basis for Standing

Plaintiffs have not alleged, let alone submitted affidavits or other evidence, showing any injury in the form of direct harm that might allow the court to find standing on grounds other than taxpayer status. See Hinrichs, 506 F.3d at 600 (noting that in addition to taxpayer standing, “[i]n the context of an alleged Establishment Clause violation...allegations of direct and unwelcome exposure to a religious message are sufficient to show the injury-in-fact necessary to support standing.”). See also Barber v. Bryant, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647, at *14

(S.D. Miss. June 30, 2016) (citing affidavits of individual plaintiffs in the record and finding standing as to plaintiffs who alleged injury in the form of psychological consequences caused by state law); Moss, 683 F.3d at 607 (citing statements made in affidavits submitted by plaintiffs who attested that a public school district program offering academic credit for off-campus religious instruction made them “feel like outsiders” in their own community, and that they changed their conduct in adverse ways as a result of that perceived outsider status). Courts have recognized that “[m]any of the harms that Establishment Clause plaintiffs suffer are spiritual and value-laden, rather than tangible and economic. Consequently, plaintiffs have been found to possess standing when they are spiritually affronted as a result of direct and unwelcome contact with an alleged religious establishment within their community.” Moss, 683 F.3d at 605 (citations, quotation marks, and alterations omitted).

However, recognizing the absence of such allegation or evidence in the record, the court is compelled to note that there exists the potential that a citizen could suffer real or emotional harm as a result of S.B. 2. Because a magistrate’s “sincerely held religious objection” is secret, a person appearing before a state magistrate on a matter in said magistrate’s jurisdiction will not be aware of a potential bias against them. A law that allows a state official to opt out of performing some of the duties of the office for sincerely held religious beliefs, while keeping it a secret that the official opted out, is fraught with potential for harm that could be of constitutional magnitude. The fact that a judicial officer has a strongly held religious belief that is so strong that it has caused them to decline to perform a lawful duty of their office, coupled with the inability of a litigant to discover that fact and request recusal, could provide the necessary injury. But such matters must be dealt with as they arise. Because Plaintiffs do not have standing as taxpayers to challenge S.B.

2, and because they assert no other basis for standing, the court lacks subject matter jurisdiction over their Establishment Clause claim.

2. Standing as to Fourteenth Amendment Claims

To the extent that Plaintiffs attempt to assert standing for their Fourteenth Amendment claims based on Flast and taxpayer standing, such arguments cannot succeed. The Supreme Court has made clear that Flast does not extend to actions other than those arising under the Establishment Clause: “[w]e have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause.” Hein, 551 U.S. at 609 (citing Tilton v. Richardson, 403 U.S. 672 (1971) (no taxpayer standing to sue under Free Exercise Clause of First Amendment). See also DaimlerChrysler Corp., 547 U.S. at 333–34 (no taxpayer standing to sue under Commerce Clause) (“Although Flast held out the possibility that ‘specific [constitutional] limitations’ other than the Establishment Clause might support federal taxpayer standing, only the Establishment Clause has been held to do so since”) (citing Flast, 392 U.S. at 105); United States v. Richardson, 418 U.S. 166, 175 (1974) (no taxpayer standing to sue under Statement and Account Clause of Article I); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under Incompatibility Clause of Article I). Plaintiffs acknowledge that no court has ever allowed taxpayer standing to form the basis of a Fourteenth Amendment claim. This court will not be the first to do so absent any authority indicating that doing so would be in accordance with law and the general principles of stare decisis. See, e.g., Goudy-Bachman v. U.S. Dep’t of Health & Human Servs., 811 F. Supp. 2d 1086, 1106–07 (M.D. Pa. 2011) (“This court is bound by the principles of stare decisis and must reasonably interpret, not create, law.”) (emphasis in original). While Plaintiffs present an

interesting argument that S.B. 2 runs afoul of recent Due Process and Equal Protection jurisprudence, see Obergefell, 135 S. Ct. at 2604–05 (“the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”), the court ultimately finds that taxpayer standing is simply not an appropriate means for Plaintiffs to bring their Due Process and Equal Protection claims before the court.

As Plaintiffs have made no allegations of an “injury in fact” that might otherwise allow them to assert standing in this case, Plaintiffs have failed to meet their burden of showing they have standing to bring Due Process and Equal Protection claims. Accordingly, because Plaintiffs lack standing to bring their Fourteenth Amendment challenges, the court lacks subject matter jurisdiction over them and this action must be dismissed.⁷

III. CONCLUSION

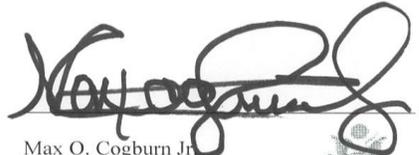
For the reasons stated herein, the court finds that while Defendant is a proper party to this lawsuit and venue is proper in this district, this court lacks subject matter jurisdiction over this action because Plaintiffs lack standing to bring the claims asserted. The court will therefore dismiss this action. See Fed.R.Civ.P. 12(b)(1); 12(h)(3).

ORDER

⁷ Regarding the parties’ arguments on prudential standing, the court finds no need to analyze them here given that Plaintiffs have failed to show Article III standing. See Doe v. Virginia Dep’t of State Police, 713 F.3d 745, 753 (4th Cir. 2013) (“Because we conclude that Doe is unable to meet the requirements for Article III standing for the bulk of her claims, we need not engage in prudential standing analysis.”); Freedom From Religion Found., Inc. v. Lew, 773 F.3d at 822 (“Because we hold that the plaintiffs in this case do not meet the constitutional standing requirements, we need not reach the question of prudential standing.”).

IT IS THEREFORE ORDERED, that Defendant's Motion to Dismiss (#38) is **GRANTED**, and this action is **DISMISSED** for lack of subject matter jurisdiction.

Signed: September 20, 2016



Max O. Cogburn Jr.
United States District Judge

**United States District Court
Western District of North Carolina
Asheville Division**

KAY DIANE ANSLEY, et al.,

Plaintiffs,

vs.

MARION WARREN, in his Official
Capacity as Director of the North Carolina
Administrative Office of the Courts,

Defendant.

JUDGMENT IN CASE

1:16-cv-00054-MOC-DLH

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's September 20, 2016 Order.

September 20, 2016


Frank G. Johns, Clerk
United States District Court



**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
Case No.: 1:16-cv-54**

**Kay Diane Ansley, Catherine “Cathy”
McGaughey, Carol Ann Person, Thomas Roger
Person, Kelley Penn, and Sonja Goodman,**

Plaintiffs,

v.

**Marion Warren, in his Official Capacity as
Director of the North Carolina Administrative
Office of the Courts,**

Defendant.

PLAINTIFFS’ NOTICE OF APPEAL

Plaintiffs, through undersigned counsel, pursuant to Rule 4 of the Federal Rules of Civil Procedure, notice their appeal of the district court’s Order [Doc. 67] and Judgment [Doc. 68] entered on September 20, 2016.

Date: September 21, 2016

Respectfully submitted,

/s/ S. Luke Largess

N.C. Bar 17486
llargess@tinfulton.com

/s/ Jacob H. Sussman

N.C. Bar No. 31821
jsussman@tinfulton.com

/s/ John W. Gresham

N.C. Bar No. 6647
jgresham@tinfulton.com

/s/ Cheyenne N. Chambers

N.C. Bar No. 48699
cchambers@tinfulton.com

TIN FULTON WALKER & OWEN, PLLC
301 East Park Avenue
Charlotte, NC 28203
Tel: 704-338-1220
Fax: 704-338-1312

/s/ Meghann Burke

N.C. Bar No. 42209
meghann@brazilburkelaw.com

BRAZIL & BURKE, P.A.
77 Central Avenue, Suite E
Asheville, NC 28801
Tel: 828-350-3812
Fax: 828-258-8972

/s/ Crystal M. Richardson

N.C. Bar No. 45510
crystal@equalitync.org

LAW OFFICE OF CRYSTAL M. RICHARDSON
2437 Reid Oaks Drive
Charlotte NC 28208
Tel: 980-220-2523

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Date: September 21, 2016

/s/ Jacob H. Sussman