No. 14A196

IN THE
Supreme Court of the United States

MICHÈLE B. MCQUIGG, in her official capacity as Prince William County Clerk of Court,

Applicant

v.

TIMOTHY B. BOSTIC, ET AL.,

Respondents.

RESPONSE OF THE HARRIS CLASS RESPONDENTS TO APPLICATION TO STAY MANDATE PENDING APPEAL

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Joanne Harris, Christy Berghoff, Jessica Duff, and Victoria Kidd, as representatives of the class of all same-sex couples in Virginia except for the four plaintiffs in *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff'd*, No. 14-1167, __ F.3d __, 2014 WL 3702493 (4th Cir. July 28, 2014), *petition for cert. filed* (U.S. Aug. 8, 2014) (No. 14-153) ("the Harris Class Respondents)[1] hereby oppose Applicant Michèle McQuigg's Motion to Stay the Mandate. A stay is not justified because there is only a small likelihood that the Court would ultimately reverse the judgment below and because granting a stay would impose severe and irreparable harm on Virginia same-sex couples and their children. If, however, the Court grants a stay, we urge the Court to take steps to resolve this matter expeditiously by treating McQuigg's stay application as a petition for a writ of certiorari – in which the Harris Class Respondents acquiesce – and granting it in order to minimize the harm imposed on same-sex couples in the Commonwealth while a stay is in effect.

Under the traditional factors analyzed by this Court when considering such requests, applicant McQuigg has offered no persuasive argument for granting a stay. First, there is only a small likelihood that this Court will ultimately reverse

[1] The Harris Class Respondents are the four named plaintiffs in *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.), filed on August 1, 2013, who represent a certified class. After the district court in *Bostic* ruled that the Virginia marriage ban is unconstitutional, the Fourth Circuit allowed the Harris Class Respondents to intervene in the *Bostic* appeal and made them parties to this proceeding.

the judgment below. Since this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), twenty-five federal court decisions in a row have granted judgments or interim injunctive relief, under the Fourteenth Amendment, barring states from denying same-sex couples the right to marry and the right to have their out-of-state marriages legally recognized. The Fourth Circuit's decision, addressing Virginia's marriage ban for same-sex couples, is simply one of many in this unbroken line of rulings. This unanimity not only undercuts the argument for a grant of review, but also indicates that the likely outcome, if the Court does grant certiorari, will be affirmance of the Fourth Circuit decision, which is fully consistent with this Court's equal protection and due process jurisprudence and follows faithfully the rulings in *Windsor* and in *Lawrence v. Texas,* 539 U.S. 558 (2003).

Moreover, the balance of the equities in this case tips decidedly against issuing a stay. There are approximately 14,000 Virginia same-sex couples that make up the class represented by the Harris Class Respondents. All will suffer from the continued deprivation of their constitutional rights. And that harm is not abstract or speculative: many will suffer in ways that are particularly acute. While this case remains pending, children will be born, life partners will die, and loved ones will fall unexpectedly ill – leaving members of the class to face those important life events, and personal crises, without the critical legal protections that marriage would provide, such as the ability to make medical decisions for a partner or child, rights to intestate inheritance or to sue for wrongful death, presumptions of

parentage, and access to step-parent adoption. Time is of the essence for these couples, who have waited long enough to have their constitutional rights, twice affirmed by the federal courts, finally recognized by the government of the state in which they live.

Conversely, any interim burden on Applicant McQuigg would be *de minimis*, if not altogether nonexistent, and the supposed inconvenience to others from recognizing the rights of same-sex married couples during the interim – again, if any – is substantially outweighed by the irreparable harm to the class from the ongoing denial of vital legal rights and protections. Indeed, the inability of defenders of prohibitions on marriage for same-sex couples to make a persuasive showing that such prohibitions serve *any* purpose – or protect against *any* real harm – is both the reason that a stay should not issue and the reason that the federal courts have consistently found such prohibitions unconstitutional since this Court's decision in *Windsor*.

The application for a stay thus should be denied. However, given the urgency of the issue for thousands of Virginians in committed same-sex relationships and the harms they would suffer from continued delay, if the Court grants the stay, the Harris Class Respondents request that the Court treat McQuigg's application as a petition for a writ of certiorari (in which the Harris Class respondents acquiesce), and grant it, so that the issue can be presented to the Court as promptly as possible.

STATEMENT

Virginia has enacted a series of laws withholding the freedom to marry from same-sex couples. These culminated in a 2006 state constitutional amendment, approved by popular vote, that (1) bars celebration or recognition of any marriage not involving one man and one woman, and (2) also bars creation or recognition of any other legal status for unmarried couples intended to provide the "design, qualities, significance, or effects of marriage" or to provide any of the "rights, benefits, obligations, qualities, or effects of marriage." Va. Const. art. I, § 15-A. As a result, lesbians and gay men in the Commonwealth who are in long-term committed relationships not only cannot marry but also are unable to obtain any other legal status that will be respected if a court later determines that that status was designed to simulate marriage or if it provides any of marriage's protections.

The Harris respondents are two same-sex couples in committed, loving relationships who reside in Virginia. Each couple is raising a child. Joanne Harris and Jessica Duff are unmarried but wish to marry in their home state. Christy Berghoff and Victoria Kidd were married in the District of Columbia but their marriage is not recognized in their home state. They filed a challenge to the Virginia marriage ban in the U.S. District Court for the Western District of Virginia on August 1, 2013, two weeks after the Bostic respondents filed suit in the Eastern District of Virginia. The *Harris* case was the first to include a claim for recognition of out-of-state marriages. It also sought certification of a plaintiff class. On January 31, 2014, the *Harris* district court certified, under Federal Rule of Civil

Procedure 23(b)(2), a class of all same-sex couples in the Commonwealth except the four *Bostic* respondents, who had requested exclusion. After the *Bostic* district court granted summary judgment for the plaintiffs in that case, the Harris respondents moved to intervene in the resulting appeal and their motion was granted by the Fourth Circuit.

The *Bostic* district court ruled in favor of the plaintiffs on their claims that the Virginia marriage ban violates the due process and equal protection clauses of the Fourteenth Amendment. *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014). Turning first to due process, the court held that the ban burdened the fundamental right to marry and thus had to satisfy strict scrutiny, citing numerous decisions of this Court including *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Loving v. Virginia*, 388 U.S. 1 (1967). 970 F. Supp. 2d at 470-73.

The court then rejected each of the proffered rationales for the ban as insufficient to satisfy strict scrutiny. 970 F. Supp. 2d at 473-80. It recognized that an argument based on "tradition" was essentially a restatement of the argument that the Commonwealth could discriminate against gay and lesbian couples based on judgments about their moral worth. *Id.* at 473-75. Such an argument, the court held, cannot prevail in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003). The court similarly rejected petitioners' invocation of federalism, noting that states must adhere to the Constitution even when exercising their core functions like establishing domestic relations laws. 970 F. Supp. 2d at 475-77. Finally, the court

rejected the argument that excluding same-sex couples from marriage serves to enhance the well-being of children. It found this justification illogical because the marriage ban needlessly harms and stigmatizes the children being raised by same-sex couples while not bearing any rational relationship to the interests of children being raised by different-sex couples. *Id.* at 477-80.

Turning next to equal protection, the district court held there was no need to determine the level of scrutiny applicable to laws discriminating based on sexual orientation, because the marriage ban fails even rational-basis scrutiny. *Id.* at 480-82. Taking into account the strong evidence that Virginia's public policy toward lesbian and gay couples is based primarily on moral disapproval and prejudice, the court determined that the proffered justifications just discussed fail to supply a legitimate and rational basis supporting the discrimination at issue. *Id.* at 481.

The Fourth Circuit affirmed. *See* App. B to the Stay Application. The majority agreed with the district court that the Virginia marriage ban interferes with the exercise of the fundamental right of marriage. *Id.* at 24a. In so doing, it rejected the notion that this fundamental right only protects different-sex couples. *Id.* The court of appeals accordingly held that Virginia's discriminatory law must satisfy strict constitutional scrutiny.

Applying that scrutiny, the court had little trouble rejecting the proffered justifications of (1) federalism, (2) history and tradition, (3) safeguarding the institution of marriage, (4) "responsible procreation," and (5) optimal childrearing. With regard to the procreation issue, the court found unpersuasive the argument

that the Commonwealth could rightfully limit marriage to couples capable of unplanned pregnancies. *Id.* at 50a-66a. It noted that the exclusion of same-sex couples left far more infertile couples still able to marry — those different-sex couples who cannot conceive accidentally due to age or medical conditions. *Id.* at 58a-60a. It cited *City of Cleburne v. Cleburne Living Center*, 473, U.S. 432, 450 (1985), for the proposition that such under-inclusiveness supports the view that a law was actually motivated by prejudice. *Id.* at 59a-60a.

The court of appeals went on to observe that the marriage ban simply cannot be defended as promoting an interest in responsible procreation. After all, "[p]rohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births." *Id.* at 60a. To the contrary, since many same-sex couples do raise children, the ban actually "increase[s] the number of children raised by unmarried parents." *Id.* at 61a.

Finally, turning to the issue of "optimal childrearing," the Fourth Circuit rejected the argument that marriage may be banned for same-sex couples on the theory that children do better when raised by a mother and a father. *Id.* at 63a-66a. The court expressed great skepticism about this assertion as a factual matter, citing the consensus of mental health professionals that children of same-sex parents do as well as children of different-sex parents, all other factors being equal, and that barring equal marriage rights *harms* children of same-sex couples by stigmatizing them and their families. *Id.* at 64a. It then said it need not rely on these scientific

insights because the marriage ban simply does not increase the number of children being raised by different-sex parents. It neither deters same-sex couples from having children nor increases the number of children born to different-sex couples. *Id.* at 65a-66a. Accordingly this final purported state interest also was insufficient to satisfy strict scrutiny.

On August 1, Applicant McQuigg applied for a stay of the Fourth Circuit's mandate. In opposing the stay, the Harris Class Respondents argued, *inter alia*, that the claimed government interests in preventing same-sex couples from marrying – and, accordingly, the supposed harms that would befall the Commonwealth in the absence of a stay – were the very interests that the Fourth Circuit had considered, and rejected, in finding Virginia's marriage prohibition for same-sex couples to be unconstitutional. On August 13, 2014, the Fourth Circuit denied the request for a stay. *See* App. C to the Stay Application. Applicant McQuigg filed this application on August 14, 2014. *See id.* at 104a-108a.

ARGUMENT

I. The Court Should Deny the Requested Stay.

McQuigg's ability to satisfy even the basic requirements for a stay is questionable, and the balance of the equities cuts sharply against issuing one. Three conditions must be met before the Court issues a stay pursuant to 28 U.S.C. § 2101: a "reasonable probability that certiorari will be granted," a "significant possibility that the judgment below will be reversed," and a "likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins.*

Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) (citing *Times–Picayune Publ'g Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers)). However, the three conditions "*necessary* for issuance of a stay are not necessarily *sufficient.*" *Id.* at 1304 (emphasis in original). The Court also must "balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large," an inquiry that requires consideration of not only "the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also [of] the relative likelihood that the merits disposition one way or the other is correct." *Id.* at 1305 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308, (1980) (Brennan, J., in chambers)). "The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Id.*

In applying these standards, the Court should take account of the fact that since *United States v. Windsor*, every federal court to consider the issue has held that states are constitutionally barred from denying same-sex couples the freedom to marry or denying recognition to marriages entered by same-sex couples in other jurisdictions. *See* http://www.lambdalegal.org/post-windsor-rulings (listing cases). Thus, contrary to Petitioner's assertion that the nation needs "the Court's guidance on this widely litigated issue," Stay App. at 10, the federal courts have had little

difficulty resolving litigation on the question presented without the need for further direction.[2]

In seeking a stay, McQuigg relies primarily on this Court's grant of the stay in early January of this year in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), at a time when only two federal district courts had struck down laws prohibiting marriage by same-sex couples, and the overall course of such litigation in the federal courts across the country remained less certain than it is today. Now, over seven months later, 17 district court rulings have reached the identical conclusion as the district court in *Kitchen*, and the question has reached the Circuit courts, with three decisions from the Fourth and Tenth Circuits now reaching the same conclusion as well. *See Bostic v. Schaefer*, No. 14-1167, __ F.3d __, 2014 WL 3702493 (4th Cir. July 28, 2014), *petition for cert. filed* (U.S. Aug. 8, 2014) (No. 14-153); *Bishop v. Smith*, No. 14-5003, __ F.3d __, 2014 WL 3537847 (10th Cir. July 18, 2014), *petition for cert. filed* (U.S. Aug. 6, 2014) (No. 14-136); *Kitchen v. Herbert*, No. 13-4178, __ F.3d __, 2014 WL 2868044 (10th Cir. June 25, 2014), *petition for cert. filed* (U.S. Aug. 5, 2014) (No. 14-124). Accordingly, the need for this Court's intervention has declined substantially since the stay was issued in *Kitchen*, and, should other courts of appeal continue to follow the current consensus, may yet prove unnecessary altogether.

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[2] Applicant's attempt to create the appearance of a circuit split by citing to the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006), *see* Stay App. at 11, neglects that *Bruning* preceded *Windsor* by several years, as do each of the state appellate decisions cited by McQuigg. *See* App. at 11-12.

This Court's stays in *Kitchen* and *Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014), are also distinguishable because they stayed district court judgments that had not yet been reviewed by the court of appeals. In contrast, the district court decision in this case has now been thoroughly reviewed on the merits by the Fourth Circuit, with the benefit of oral argument and voluminous briefing from the parties and supporting *amici.* Granting Applicant McQuigg's motion for a stay would mark the first time this Court has stayed a judgment since *Windsor* in a case in which both the district court and the court of appeals thoroughly considered the issue and concluded that a state's ban on allowing same-sex couples to marry or recognizing their marriages from other jurisdictions violates the Fourteenth Amendment.

Moreover, denying a stay would impose no harm on Applicant McQuigg or anyone else. Applicant McQuigg points to the situation in Utah, and argues that harm would result if same-sex couples were to marry in the absence of a stay and those marriages ultimately had to be unwound if this Court reverses the Fourth Circuit. But the situation in this case is not analogous to the one in Utah, and the Court's decisions to grant stays in *Herbert v. Kitchen* and *Herbert v. Evans* should not dictate the grant of a stay here. The "legal limbo" in Utah has been caused by the Utah Governor and Attorney General's assertion that they can place these valid marriages "on hold" – an assertion that has been rejected by the lower courts under both Utah state law and the federal Constitution. *Evans v. Utah*, No. 14CV55, __ F. Supp. 2d __, 2014 WL 2048343 (D. Utah May 19, 2014). The spectacle of a state

government seeking to effectively "unmarry" its citizens or to deny legal recognition to the rights and protections of married persons, which was the cause of the "confusion" in Utah, is not one that there is any reason to believe would recur here.[3]

Moreover, even if such harm were theoretically possible, it could only occur in the unlikely event that this Court ultimately reversed the Fourth Circuit's ruling. As noted above, in assessing irreparable harm, this Court must consider not only "the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also . . . the relative likelihood that the merits disposition one way or the other is correct." *Barnes*, 501 U.S. at 1305. The avalanche of decisions ruling for the plaintiffs in marriage equality cases also strongly suggests that, if the Court were to grant review, it too would rule that the Court's due process and equal protection precedents require a holding that such marriage bans are unconstitutional. The Harris Class Respondents will reserve extended merits discussion for later submissions relating to the Fourth Circuit's decision – including their response to the pending petition for certiorari from the same decision filed by Petitioner Janet Rainey, the Virginia State Registrar of Vital Records. *See Rainey v. Bostic*, No. 14-153 (petition for certiorari filed Aug 8, 2014). However, defenders of statutes such as the ones in Virginia that prohibit marriage by same-sex couples have been consistently unable to articulate or demonstrate how those laws serve

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[3] To the contrary, the experience in California in 2008 – where approximately 18,000 couples obtained marriage licenses prior to the enactment of California's Proposition 8 (which prevented the issuance of further such licenses) – demonstrates that, even were Petitioner to prevail, married same-sex couples can coexist in an orderly fashion with a legal regime in which a state is not issuing marriage licenses to same-sex couples.

any compelling – or even rational – governmental purpose. The district court's and Fourth Circuit's careful consideration – and rejection – of these increasingly implausible arguments follows the consensus of every federal court that has examined them over the past year.

Applicant McQuigg has no job duties that relate to the recognition of marriages that have already taken place; her job duties relate solely to the issuance of new marriage licenses. Absent a stay, she would need to do no more than issue a limited number of marriage licenses to same-sex couples during the interim period until the Court resolves the case. And even expanded to the interests of the Commonwealth of Virginia more generally, McQuigg can do no more than point to the generic interest – present in *every* case where *any* law is challenged – of seeing the state's laws enforced. *See* Stay App. at 18. Indeed, McQuigg's inability to point to any real and specific harm that would befall the Commonwealth from allowing same-sex couples to obtain marriage licenses, or affording legal recognition to the marriages of couples married in other states, simply reinforces the unconstitutionality of Virginia's prohibition on such legal recognition in the first instance. No interests are served, and no harms to Virginia or its citizens are prevented, by such laws; the experience of the many states in which same-sex couples are afforded an equal right to marry and have their marriages recognized demonstrates vividly the complete absence of any such irreparable harm to others arising from such recognition.

At the same time that Applicant McQuigg would suffer little, if any, harm without a stay, granting a stay would be guaranteed to impose severe irreparable harm on same-sex couples in the Commonwealth and on their children. "The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Barnes*, 501 U.S. at 1305. The certified class represented by the Harris Respondents consists of approximately 14,000 same-sex couples, who will suffer irreparable harm if the mandate is stayed. While this case remains pending in this Court, children will be born, people will die, and loved ones will fall unexpectedly ill. The substantive legal protections afforded by marriage can be critical, if not life-changing, during such major life events and personal crises. Applicant McQuigg cavalierly dismisses the urgent need for such legal protections as a mere desire to overcome a "modest delay in obtaining the Commonwealth's official sanction of [respondents'] relationships." Stay App. at 21. But that "modest delay" will cause serious harm to many class members.[4]

More generally, as the Fourth Circuit recognized, "[t]he Virginia Marriage Laws erect . . . a barrier, which prevents same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage," App. B to the Stay Application, at 35a-36a, and "prohibit[] them from

[4] Indeed, within hours after McQuigg's motion to stay filed with the Fourth Circuit was mentioned in the media, counsel received a communication from a member of the Harris Class who is struggling with cancer and who needs the court's ruling to go into effect in order to benefit from the health insurance of her wife, a state employee.

participating fully in our society," *id.* at 67a. These irreparable harms are visited not only upon the plaintiff couples, but upon their children as well. "[B]y preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters." *Id.* at 64a.

In sum, under the traditional factors considered by this Court, Applicant McQuigg's request for a stay should be denied.

II. If the Court Grants the Stay, it Should Treat the Stay Application as a Petition for a Writ of Certiorari and Grant it.

While the Harris Class Respondents believe that a stay is not warranted, they acknowledge that the question presented is one of substantial importance, that the Court may believe its intervention to be warranted, and that it may conclude a stay is appropriate during consideration of the case on the merits. If such a stay is granted, given the ongoing harms to same-sex couples in Virginia and elsewhere, we respectfully request that the Court move quickly to address the merits. The best way to do so would be to treat the stay application as a petition for a writ of certiorari. *Cf. Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting application for stay, treating application as a petition for a writ of certiorari, and granting the writ).[5] In that event, the Harris Class respondents would urge the Court to grant

[5] Applicant McQuigg has already announced that she "intends to file a petition for a writ of certiorari with the Supreme Court." *See* Motion of Appellant McQuigg for a Stay of Mandate Pending Filing of Petition for a Writ of Certiorari, at 1, *Bostic v. Schaefer*, No. 14-1167 (4th Cir. Aug. 1, 2014), ECF No. 238. She curiously has not yet done so, although her counsel already filed a petition for a writ of certiorari on

the petition so that the Court can set the matter for merits briefing at the earliest practical opportunity.

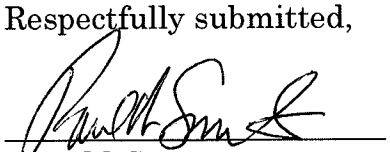
CONCLUSION

The application for a stay should be denied. If it is granted, the application should be treated as a petition for a writ of certiorari and review should be granted.

August 6, 2014 raising the same issues as those presented in this case in *Smith v. Bishop*, No. 14-136. Moreover, her counsel did so a mere nineteen days after the Tenth Circuit's decision in *Bishop v. Smith*, No. 14-5003, __ F.3d __, 2014 WL 3537847 (10th Cir. July 18, 2014). If a stay is granted, having the stay application treated as a petition for a writ of certiorari will cause Applicant McQuigg no prejudice, especially if all parties acquiesce to the granting of certiorari. To the contrary, it will obviate the need for Applicant McQuigg to prepare and file a separate petition for a writ of certiorari, which she already has stated that she intends to file. Treating the stay petition as a petition for a writ of certiorari also will facilitate this Court's considering together, at the Court's next conference, *all* petitions for writs for certiorari filed regarding all cases in which federal courts of appeal have issued decisions concerning the constitutionality of laws barring same-sex couples from marriage.

August 18, 2014

Respectfully submitted,



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TIMOTHY B. BOSTIC, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I, Paul M. Smith, hereby certify that I am a member of the Bar of this Court, and that I have this 18th day of August, 2014, caused a copy of the Response of the Harris Class Respondents To Application To Stay Mandate Pending Appeal to be served via overnight mail and an electronic version of the document to be transmitted via electronic mail to:

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