
*Commonwealth of Virginia
Office of the Attorney General*



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**ATTORNEY GENERAL HERRING CHANGES VIRGINIA’S LEGAL POSITION IN MARRIAGE EQUALITY CASE**

**RICHMOND** -- Attorney General Mark R. Herring today changed Virginia's legal position in *Bostic v. Rainey*, siding with the plaintiffs in the pending case challenging Virginia's ban on marriage rights for same sex couples. Because he has determined the law to be a violation of the U.S. Constitution, Attorney General Herring will not defend the ban and will instead seek to have it declared unconstitutional.

*Bostic v. Rainey* was filed in July 2013 in federal court in Norfolk.  On December 23, 2013, Judge Arenda Wright Allen scheduled oral argument to take place on January 30th. A second case is pending in federal court in Harrisonburg.  In both cases, same-sex couples sued Janet Rainey, in her official capacity as State Registrar of Vital Records, because the Registrar has primary responsibility for carrying out Virginia’s laws in compliance with Virginia’s constitutional and statutory bans on same-sex marriage.  The lawsuits obligate the Attorney General to appear on Rainey’s behalf, to present the Commonwealth’s legal position, and to make an independent constitutional judgment whether Virginia’s laws conflict with the Constitution of the United States.  The timing in *Bostic,* with oral argument scheduled next week, necessitated deliberate but prompt action.

“I swore an oath to both the United States Constitution and the Virginia Constitution. After thorough legal review, I have now concluded that Virginia’s ban on marriage between same sex couples violates the Fourteenth Amendment of the U.S. Constitution on two grounds: marriage is a fundamental right being denied to some Virginians, and the ban unlawfully discriminates on the basis of both sexual orientation and gender,” said Attorney General Herring.“Virginia has argued on the wrong side of some of our nation’s landmark cases—in school desegregation in 1954, on interracial marriage with the 1967 *Loving* decision, and in 1996 on state-supported single-gender education at VMI.  It’s time for the Commonwealth to be on the right side of history and the right side of the law.”

"The supporters of Virginia’s ban on same-sex marriage have argued in their legal brief that marriage between a man and a woman best promotes responsible procreation and optimal child rearing. This argument not only disrespects Virginia’s same-sex couple families, but it is illogical.  It is simply inconceivable that denying same-sex couples the right to marry will make heterosexual couples more likely to marry and have children,” said Attorney General Herring.  “Virginians should no longer face discrimination and economic hardship based on whom they love and commit their lives to. Writing for the Court in 2003 in the *Lawrence v. Texas* case, Justice Kennedy explained that the Constitution’s framers ‘knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.’ The Registrar and local clerks will continue to enforce the ban until the courts can act, but the Registrar and I will not defend it, and will argue for its being declared unconstitutional.”

While infrequent, there is precedent for the Attorney General’s actions today.  Former Attorney General Ken Cuccinelli declined to defend the Opportunity Educational Institution last year.  Former Attorney General Jerry Kilgore joined with 43 other State attorneys general in 2003 to argue that an attorney general is properly carrying out his constitutional duties when he seeks to invalidate a State law that he believes, in his independent judgment, to be unconstitutional.  In that brief, Kilgore and the other attorneys general call the “independence” of the Attorney General “critical to the preservation of ordered liberty.” That brief goes on to say that when the  Attorney General believes a state law "violates the constitution, he has a paramount obligation to defend the constitution he is sworn to uphold.”

At the federal level, the U.S. Attorney General and the Justice Department have consistently advised that the Executive Branch does not have a duty to defend a statute that the President believes to be unconstitutional. Justice Antonin Scalia has also said that the President’s powers to resist legislative encroachments by Congress include the power “to disregard them when they are unconstitutional.” Indeed, the President and the Justice Department recently declined to defend the constitutionality of section 3 of the Defense of Marriage Act, which the Supreme Court struck down last year because it unconstitutionally refused to recognize valid same-sex marriages on equal terms with valid opposite-sex marriages.  There are other examples as well.  In 1989, then-acting Solicitor General John Roberts filed a friend-of-the-court brief expressing the views of the United States that a federal statute was unconstitutional, while allowing the agency to defend it through its own counsel.  And in the 1976 landmark election-law case *Buckley v. Valeo*, then-Solicitor General Robert Bork filed two briefs, one defending the constitutionality of the election-law rules at issue, and another, on behalf of the Attorney General and the United States, which provided a counterargument to aid the Court in resolving the First Amendment questions presented.

As a state senator, Herring voted eight years ago against extending marriage rights to same-sex couples, but he has discussed at length how his views and position have changed since that vote. For years, he has spoken publicly about the need to end discrimination and worked to make it happen. He campaigned last year for attorney general in support of marriage equality.

To move the *Bostic* case forward to a prompt decision, the Attorney General and Registrar will work responsibly to ensure that the case remains a fair and proper vehicle for conclusively deciding the legal question.  Despite the State’s change in legal position, the Clerks of the Circuit Courts of Norfolk and Prince William County, represented by well-qualified counsel, will continue to forcefully defend the legality of Virginia’s ban.  Circuit court clerks are independent constitutional officers who would have standing to appeal an injunction barring them from refusing to issue marriage licenses to otherwise qualified same-sex couples.  The Court also has the previous briefing by the office of the former attorney general, Ken Cuccinelli, in support of the ban.