Nos. 14-225, 14-251

In The Supreme Court of the United States

GEORGE E. SCHAEFER, III, in his Official Capacity as the Clerk of the Court for Norfolk Circuit Court,

Petitioner,

v.

TIMOTHY B. BOSTIC, et al.,

Respondents.

MICHÈLE B. McQUIGG, in her Official Capacity as Prince William County Clerk of Circuit Court,

Petitioner,

v.

TIMOTHY B. BOSTIC, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE BRIEF OF JANET M. RAINEY

MARK R. HERRING
Attorney General of Virginia

TREVOR S. COX
Deputy Solicitor General

STUART A. RAPHAEL
Solicitor General
Counsel of Record

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240
sraphael@oag.state.va.us

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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v.

TIMOTHY B. BOSTIC, ET AL., RESPONDENTS.

MICHÈLE B. MCQUIGG, IN HER OFFICIAL CAPACITY AS PRINCE WILLIAM COUNTY CLERK OF CIRCUIT COURT, PETITIONER,

v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE BRIEF OF JANET M. RAINEY

On behalf of Janet M. Rainey, in her official capacity as State Registrar of Vital Records, the Attorney General of Virginia filed a petition for writ of certiorari (No. 14-153) to review the judgment of the court of appeals in *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014). Petitions for writs of certiorari have now been filed by both of

the circuit court clerks who, like Rainey, were enjoined by the district court from enforcing Virginia's ban on same-sex marriage: George E. Schaefer, III, the clerk of the Norfolk Circuit Court (No. 14-225); and Michèle McQuigg, the clerk of the Prince William County Circuit Court (No. 14-251). The Court should now grant all three Virginia petitions and consolidate them for briefing and argument.

STATEMENT OF THE CASE

There are a few developments to add to the Statement of the Case set forth in Rainey's petition for writ of certiorari, filed August 8, 2014 (No. 14-153). On August 20, 2014, this Court stayed the mandate of the United States Court of Appeals for the Fourth Circuit, pending the timely filing and disposition of a petition for writ of certiorari. *McQuigg v. Bostic*, No. 14A196 (U.S. Aug. 20, 2014). Clerk Schaefer filed his petition on August 22, 2014 (No. 14-225). Clerk McQuigg filed her petition on August 29, 2014 (No. 14-251). All three petitions raise the same legal question concerning the validity of Virginia's same-sex-marriage ban and of Virginia's refusal to recognize same-sex marriages lawfully performed elsewhere.

REASONS FOR GRANTING ALL THREE VIRGINIA PETITIONS

I. Granting and consolidating all three certworthy petitions provides the best vehicle for deciding the exceptionally important question presented.

In light of the stay and the urgent need to resolve the question presented, the plaintiffs below—the Bostic and Schall couples—have asked the Court to grant all three petitions for certiorari and to resolve this case as expeditiously as possible. The *Harris*-class intervenors agree. So does Rainey.

Clerk McQuigg argues that her petition provides the best appellate vehicle, although she notes that the Court "should consider" granting Rainey's petition to ensure its ability to review the marital-recognition claim, given that circuit court clerks in Virginia have no role in enforcing Virginia's refusal to recognize out-of-state marriages. (McQuigg Pet. Cert. 24.) Clerk Schaefer argues that his petition is the best vehicle, although he too notes that Rainey is necessary for appellate standing as to the marital-recognition claim. (Schaefer Pet. Cert. 16 n.12.)

The most sensible course of action is not to pick and choose but to grant all three Virginia petitions and consolidate them for briefing and argument. This case exemplifies why parties appealing from the same decision sometimes file "multiple petitions." Stephen M. Shapiro et al., *Supreme Court Practice* ch. 6.22, at 442 (10th ed. 2013). There are "institutional reasons

(e.g., a state attorney general not wishing to file together with a private party) . . . ." *Id.* There are also "substantive reasons." *Id.* Here, Rainey argues that Virginia's same-sex-marriage ban is unconstitutional but she is continuing to enforce it until this Court can render a definitive ruling; Clerks Schaefer and McQuigg contend that the ban is constitutional but focus on different grounds for defending it. Rainey, Schaefer and McQuigg followed the same pattern in the court of appeals. Each noted a separate appeal from the district court's decision; the Fourth Circuit consolidated the appeals and accepted the parties' proposed realignment and briefing schedule.

In procedurally analogous cases, this Court has similarly granted multiple petitions for certiorari and consolidated the petitions for briefing and argument. Shapiro, *supra*, at 442 (citing *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2012) (consolidating Nos. 11-338, 11-347)). For example, in *AT&T Corp. v. Iowa Utilities Board*, the Court consolidated *eight* separate petitions and cross-petitions for certiorari. 525 U.S. 366, 366 n.* (1999). And in *INS v. Chadha*, the Court consolidated three separate petitions—filed by the INS, the Senate, and the House of Representatives—to review the same decision from the Ninth Circuit. 462 U.S. 919, 928 (1983). *See also Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("We consolidated Texaco's and Shell Oil's separate petitions and granted certiorari to determine the extent to which the *per se* rule against price-fixing applies to an important and increasingly popular form of business organization,

the joint venture."); *Natl. Credit Union Admin. v. First Nat'l Bank & Trust*, 519 U.S. 1148 (1997) (Nos. 96-843, 96-847) ("The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument."); *Agostini v. Felton*, 519 U.S. 1086 (1997) (same, consolidating Nos. 96-552 & 96-553).

No logistical reason militates against granting all three Virginia petitions. Whether the Court grants one, two, or three, the parties will have to be realigned—as in *United States v. Windsor*, 133 S. Ct. 815 (2012) (accepting parties' proposed realignment and briefing schedule)—and "[a]ll parties" to the judgment below are "deemed parties entitled to file documents in this Court." Sup. Ct. R. 12.6.

What is more, each of the petitioners brings something of value to making the Virginia case an ideal vehicle for deciding whether States may ban same-sex marriage or refuse to recognize same-sex marriages performed elsewhere. Clerk McQuigg, ably represented by the Alliance Defending Freedom,[1] defends Virginia's same-sex-marriage ban by emphasizing "traditional" marriage, "responsible procreation," and "optimal child rearing." Clerk McQuigg has appellate standing, both because she appeals the injunction that prohibits her from refusing a marriage

[1] The ADF also serves as counsel for Clerk Smith in the Oklahoma same-sex-marriage case, *Smith v. Bishop*, No. 14-136 (U.S. filed Aug. 6, 2014).

license to any same-sex couple, and because the *Harris*-class intervenors include *all* Virginia same-sex couples who seek a marriage license, including those seeking marriage licenses from Clerk McQuigg's office in Prince William County.

Clerk Schaefer correctly points out that he was the original clerk whose office refused a marriage license to plaintiffs Bostic and London, and that he has clear standing to appeal. (Schaefer Pet. Cert. 17.) Schaefer places his greatest emphasis on the federalism interests supporting the legislature's and the voters' asserted right to adopt laws prohibiting same-sex marriage. (*Id.* 20-26.)

In deciding this case, the Court must address both sets of arguments, and the Clerks' vigorous advocacy of their respective positions satisfies both Article III and prudential considerations. Moreover, because circuit court clerks in Virginia are independent constitutional officers not represented by the Attorney General, *see* Va. Code Ann. § 2.2-507 (Supp. 2014); 1974-75 Op. Va. Att'y Gen. 68, they are proper advocates for their respective positions here.

Rainey is also a proper and necessary petitioner on both the in-state licensure and the marital-recognition claims. Although the Virginia Attorney General agrees with the *Bostic* plaintiffs and the *Harris*-class intervenors that Virginia's same-sex-marriage ban is unconstitutional, he has also made clear from the outset that, because the outcome is not certain, Rainey will continue to enforce Virginia's

marriage ban until this Court can render a definitive ruling. (Rainey Pet. Cert. 37 & App. 204, 210.) Rainey is also the proper State-level defendant to ensure that the Court can order appropriate relief that binds the necessary parties.

Although Clerk Schaefer finds it "harder to grasp" why the Attorney General has filed an independent petition on behalf of Rainey (Schaefer Pet. Cert. 18), the Attorney General's position is procedurally unassailable. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), former U.S. solicitors general agreed, without regard to political party affiliation of the administrations in which they served, that in an appropriate case, the Executive Branch may enforce but not defend an act of Congress in order to ensure that its constitutionality is conclusively adjudicated.[2] They called that practice "an act of considered fidelity to our constitutional structure."[3] They further agreed that the President and the Attorney General may properly conclude "that professionally responsible, non-frivolous arguments are nonetheless *not sufficiently 'reasonable'* to be raised in defense of a statute."[4] The Virginia Attorney General reached that

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[2] Former Senior Justice Department Officials and Former Counsels to the President on Jurisdiction Amicus Br. at 4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (emphasis added), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/Amicus-Brief-of-Former-Senior-Justice-Department-Officials-on-Jurisdiction-for-Windsor.pdf.

[3] *Id*.

[4] *Id.* at 11 n.8 (emphasis added).

same conclusion here about the constitutional arguments that had been offered to justify Virginia's marriage ban. Moreover, in the court of appeals, leading constitutional law scholars in Virginia filed an amicus brief that likewise concluded that, under the Virginia Constitution, "the right of an attorney general to argue against the constitutionality of a statute—especially while continuing to enforce it pending final judicial interpretation—is not open to question."[5]

Notably, no Justice in *Windsor* questioned the propriety of the enforce-but-not-defend position taken by the Government in that case. And the majority in *Windsor* squarely held that the Government had Article III standing to appeal the decision striking down § 3 of the Defense of Marriage Act, 1 U.S.C. § 7, despite agreeing with Edith Windsor that DOMA was unconstitutional. 133 S. Ct. at 2686-87. *Camreta v. Greene*, 131 S. Ct. 2020 (2011), on which Schaefer

[5] Virginia Constitutional Law Professors Amicus Br. at 8, *Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. July 28, 2014) (No. 14-1167), ECF No. 145-1. *See also id.* at 12 ("An Attorney General is not an automaton who must blindly support Virginia law, especially when he concludes that it conflicts with the Constitution as the Supreme Law. Virginia's citizens elect an Attorney General on the expectation that he will exercise his legal judgment in their interest. Attorney General Herring has the authority and the duty to do so here."). It bears adding that Article I, § 7 of the Virginia Constitution prohibits the Executive Branch from suspending a Virginia law without approval of the people's representatives (*see* Rainey Pet. Cert. App. 209-210), a provision not found in the Federal Constitution.

relies (Schaefer Pet. Cert. 18), is consistent with *Windsor*. In allowing a defendant who prevailed on qualified immunity to question the lower court's underlying constitutional ruling, the Court found "no special Article III bar on review of appeals brought by parties who obtained a judgment in their favor below." *Camreta*, 131 S. Ct. at 2029 n.3.

Rainey's petition presents a stronger jurisdictional vehicle than *Windsor*, given that Rainey and the Clerks all have Article III standing to contest the injunctions against them. By contrast, the Court in *Windsor* chose not to decide whether BLAG (the Bipartisan Legal Advisory Group of the House of Representatives) alone would have had Article III standing to appeal, once the Court concluded that the Government had standing. 133 S. Ct. at 2688. As for prudential standing, the majority found that BLAG's vigorous defense of DOMA provided sufficient adverseness to satisfy prudential concerns, even assuming BLAG lacked Article III standing. *Id.* at 2687-88. In this case, by comparison, the Clerks' participation unequivocally satisfies *both* Article III *and* prudential considerations, even before considering the views of amici, who can be expected to file scores of briefs on both sides of the question presented.

Clerk McQuigg is mistaken to question "whether the Bostic couple has standing to assert their in-state license claim against Rainey and, consequently, whether Rainey has standing to appeal that claim." (McQuigg Pet. Cert. 20 n.6.) For in Virginia, the State Registrar alone has legal authority to prescribe the

form of the marriage license and application. Va. Code Ann. § 32.1-267(E) (2011). Thus, only Rainey can change the form to permit same-sex couples to apply for and receive a valid marriage license. And clerks who "knowingly issue a marriage license contrary to law" may be jailed for up to one year and fined up to $500. Va. Code Ann. § 20-33 (2008). Accordingly, Rainey is the *essential* State-level defendant to ensure proper enforcement of any decision striking down Virginia's same-sex-marriage ban. McQuigg offers no valid reason to question the Fourth Circuit's conclusion that "Rainey's promulgation of a marriage license application form that does not allow same-sex couples to obtain marriage licenses resulted in Schaefer's denial of Bostic and London's marriage license request." (Rainey Pet. Cert. App. 43.)

As for the marital-recognition claim, Clerks McQuigg and Schaefer concede that they are not the correct defendants and that Rainey's participation is appropriate to ensure appellate standing on that issue. (McQuigg Pet. Cert. 24; Schaefer Pet. Cert. 16 n.12.)

In short, the most prudent course is to grant Rainey's petition, along with both of the Clerks' petitions.

II. The arguments based on federalism and *Glucksberg* are without merit.

Although Rainey agrees with Clerks Schaefer and McQuigg that the arguments based on federalism

and *Washington v. Glucksberg*, 521 U.S. 702 (1997), warrant close consideration by this Court, those arguments are ultimately meritless.

Marriage-ban proponents who rely on the federalism discussion in Part III of *Windsor*, 133 S. Ct. at 2689, ignore the fundamental difference between DOMA and State bans on same-sex marriage. In *Windsor*, the argument that § 3 of DOMA flouted federalism principles pointed to the same conclusion as the argument that DOMA violated the due process rights of lawfully married same-sex couples; the two arguments worked in parallel together. By defining marriage to be between a man and a woman, Congress invaded an area that, by "history and tradition . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689-90. That mark of invalidity then dovetailed with the Court's conclusion, in Part IV, that "DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government." *Id.* at 2693.

In this case, by contrast, the two arguments conflict. The federalism argument that Virginia should be free to ban same-sex marriage is diametrically opposed to the equal protection and due process claims of same-sex couples who seek the same marriage rights enjoyed by opposite-sex couples. When the argument from federalism conflicts with the Fourteenth Amendment, can there be any doubt about which prevails? Of course not.

No appeal to federalism can justify an unconstitutional practice. A central purpose of the Fourteenth Amendment was to prevent States from depriving their citizens of fundamental rights protected by the Federal Constitution. *See City of Rome v. United States*, 446 U.S. 156, 179 (1980) ("[T]he Civil War Amendments . . . were specifically designed as an expansion of federal power and an intrusion on state sovereignty.").

The federalism discussion in *Windsor* makes all of this clear. Writing for the majority, Justice Kennedy explained that "State laws defining and regulating marriage, *of course*, *must respect the constitutional rights of persons*." 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)) (emphasis added). The district court below correctly viewed the majority's citation of *Loving* as a "disclaimer of enormous proportion." (Rainey Pet. Cert. App. 165 (quoting *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1279 (N.D. Okla. 2014)).) A few paragraphs later, the Court reminded readers again that "the long-established precept" that marriage laws may vary from one State to another is "subject to constitutional guarantees." 133 S. Ct. at 2692. In other words, if the Court determines that the Fourteenth Amendment prevents States from withholding the rights of marriage from same-sex couples, principles of federalism cannot save these marriage bans from invalidation.

Because a constitutional violation trumps federalism, the Clerks' reliance on recent dictum about deferring to public "debate on sensitive issues," *Schuette v. Coalition to Defend Affirmative Action*,

134 S. Ct. 1623, 1638 (2014), is utterly misplaced. (McQuigg Pet. Cert. 13-14; Schaefer Pet. Cert. 25-26.) *Schuette* upheld Michigan's constitutional amendment that the State "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." 134 S. Ct. at 1629. The Court made clear that Michigan's constitution is not a license to engage in discrimination that the Federal Constitution abhors: "when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, *the Constitution requires redress by the courts. . . .*" *Id.* at 1637 (emphasis added). Because the Michigan constitution simply "*prohibits* discrimination" and does not "*require*" it, *Schuette* did not suggest that same-sex-marriage bans are somehow "immune from constitutional review." *Wolf v. Walker*, 986 F. Supp. 2d 982, 996 (W.D. Wis. 2014).

Schuette would be analogous to this case if Virginia banned *both* discrimination against gay people *and* governmental preferences that favored them. But if that were the case, a gay couple could get married and jointly adopt children in Virginia, and we would not be here imploring the Court to protect gay people and their children from laws that treat them as second-class citizens.

Clerks McQuigg and Schaefer also take up Judge Niemeyer's dissenting argument below that *Glucksberg* requires the fundamental right in question to be

defined "in its narrowest terms" (Rainey Pet. Cert. App. 84), which means—the Clerks insist—that there is no fundamental "right to same-sex marriage." (Schaefer Pet. Cert. 26-31; McQuigg Pet. Cert. 9-10, 25.) But Rainey's petition debunked that argument. It showed that the narrowest-historical-context theory on which the Clerks' argument is premised, articulated by Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.), was unequivocally rejected in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992). (*See* Rainey Pet. Cert. 22-25.) Established fundamental rights—like the right to marry—are not subject to *Glucksberg*'s narrow-articulation approach.[6] Neither Clerk has answered that point.

III. The arguments used to deny marriage rights to same-sex couples are the same arguments rejected in *Brown* and *Loving*.

The constitutional arguments by opponents of marriage equality are the same arguments that were once used to justify segregated schools and anti-miscegenation laws. Those arguments are no stronger this time around.

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[6] In the first post-*Windsor* case to uphold a State's same-sex-marriage ban, the district court made the same mistake. *Robicheaux v. Caldwell*, No. 13-5090, Order & Reasons at 20-21 (E.D. La. Sept. 3, 2014), ECF No. 131.

In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court unanimously held that segregated public schools violate the Fourteenth Amendment. *Id.* at 494-95. The decision overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), decided a half-century before, which permitted States to require segregated public facilities based on the "separate but equal" doctrine. 347 U.S. at 494-95.

In one of the four cases consolidated in *Brown*, Virginia's Attorney General argued that Prince Edward County's segregated schools did not violate the Equal Protection Clause because:

- the Congress and the vast majority of States that ratified the Fourteenth Amendment also enacted laws requiring segregated public schools, thereby showing that the "legislatures that ratified the Fourteenth Amendment neither contemplated nor understood that it would abolish segregation in the public schools";[7]
- there was no tradition supporting integrated public schools, and "customs and traditions, like long continued administrative interpretation of a statute, have a bearing on [the Framers'] intention,

[7] Initial Brief of Appellee-Respondent, No. 3, *Davis v. Cnty. Sch. Bd. of Prince Edward Cnty*., 1953 U.S. S. Ct. Briefs LEXIS 5, at *57 (U.S. Nov. 30, 1953).

construction and the test of reasonableness";[8] and

- the principle of "judicial restraint" required treating the question of desegregation as a matter of "social experiments" for the States.[9]

In *Loving*, Virginia's Attorney General defended the Commonwealth's ban on interracial marriage by arguing:

- that a judicial decision overriding Virginia's laws "would be judicial legislation in the rawest sense of that term";[10]
- that judicial caution was warranted because "of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view";[11] and
- that "it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a

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[8] *Id.* at *104.

[9] *Id.* at *135-36.

[10] Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, No. 395, 1967 WL 93641, at *41 (U.S. Mar. 20, 1967) (quoting *Loving v. Virginia*, 147 S.E.2d 78, 82 (Va. 1966)).

[11] *Id*.

> policy of permitting or preventing such alliances."[12]

At oral argument, Virginia's assistant attorney general added that the Commonwealth's interracial-marriage ban stood "on the same footing as the prohibition of polygamous marriage, or incestuous marriage," summoning up a familiar, slippery-slope bogeyman.[13] And had the case not been overruled in *Brown*, Virginia's counsel could have added a citation to *Plessy*, which observed that bans on interracial marriage had "been universally recognized as within the police power of the State." 163 U.S. at 545.

Opponents of marriage equality invoke the same arguments here—tradition; Framers' intent; federalism; judicial restraint; and the slippery-slope towards polygamy and incest. Replace "same-sex marriage" for earlier references to segregated schools and interracial marriage, and voilà, Virginia's briefs and oral argument in *Brown* and *Loving* can be recycled by marriage-ban defenders in this case. It is no answer to say that *Brown* and *Loving* involved racial discrimination and this case does not. "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all*

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[12] *Id.* at *50.

[13] Oral Argument at 81:10, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), http://www.oyez.org/cases/1960-1969/1966/1966_395.

individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added). All means all. There is no "unless you are gay" exception.

Courts have cited these obvious parallels, particularly with *Loving*. In striking down Florida's same-sex-marriage ban, Judge Hinkle correctly recognized that, although some may view judicial invalidation of such laws as controversial, later generations will wonder what took us so long, just as we ask why it took until 1967 to strike down interracial-marriage bans:

> Now, nearly 50 years later, the arguments supporting the ban on interracial marriage seem an obvious pretext for racism; it must be hard for those who were not then of age to understand just how sincerely those views were held. When observers look back 50 years from now, the arguments supporting Florida's ban on same-sex marriage, though just as sincerely held, will again seem an obvious pretext for discrimination. Observers who are not now of age will wonder just how those views could have been held.[14]

In the meantime, this Court should recognize unconstitutional excuses when it sees them. They shine like a warning beacon here.

[14] *Brenner v. Scott*, No. 4:14cv107, 2014 U.S. Dist. LEXIS 116684, at *4 (N.D. Fla. Aug. 21, 2014).

CONCLUSION

The Court should grant the petitions for writs of certiorari in Nos. 14-153, 14-225, and 14-251 and consolidate them for briefing and argument.

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia

STUART A. RAPHAEL
Solicitor General
Counsel of Record

TREVOR S. COX
Deputy Solicitor General

OFFICE OF THE VIRGINIA
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240
sraphael@oag.state.va.us

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