No. 14A196

IN THE

Supreme Court of the United States

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

v.

TIMOTHY B. BOSTIC, ET AL.,
Respondents.

RESPONSE OF TIMOTHY B. BOSTIC ET AL. TO APPLICATION TO STAY THE MANDATE PENDING APPEAL

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
CHANTALE FIEBIG
ASHLEY S. BOIZELLE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

THEODORE J. BOUTROUS, JR.
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

DAVID BOIES
BOIES, SCHILLER & FLEXNER LLP
333 Main St.
Armonk, NY 10504
(914) 749-8200

ROBERT B. SILVER
JOSHUA I. SCHILLER
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

Counsel for Respondents Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley

[Additional counsel listed on signature page]

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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:

Plaintiffs Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley respectfully submit this opposition to the Application to Stay the Mandate Pending Appeal of Prince William County Clerk of Circuit Court Michèle B. McQuigg.

Clerk McQuigg seeks to stay the mandate of the Fourth Circuit's decision holding that Virginia's prohibition on marriage between individuals of the same sex and the recognition of such marriages performed in other States violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Fourth Circuit's decision directly implicates the rights of tens of thousands of gay and lesbian Virginians whose fundamental right to marry has been denied by the Commonwealth of Virginia. A stay of the mandate would prolong the unconstitutional deprivation of this right to enter into the "most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted), despite a clear consensus among federal courts since this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), that state prohibitions on marriage for gay men and lesbians are unconstitutional.

Because Clerk McQuigg has not established a fair prospect of success on the merits even if this Court grants a petition for certiorari, has failed to identify any irreparable harm associated with the issuance of the mandate, and cannot establish that the balance of equities weighs in favor of staying the Fourth Circuit's decision, the application for a stay should be denied. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). In the alternative, if a stay is granted, then this Court should treat the stay application as a petition for a writ of

certiorari and grant the petition in order to expedite resolution of the surpassingly important constitutional questions presented in this case.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs are gay and lesbian Virginians who have been prohibited from marrying their partners or from having a marriage performed out of State recognized by the Commonwealth of Virginia on the sole basis that their partner is an individual of the same sex. *See* Va. Const. art. I, § 15-A; *see also* Va. Code §§ 20-45.2, 20-45.3 (collectively, "Virginia's Marriage Prohibition") (limiting marriage in Virginia to opposite-sex couples). Plaintiffs challenged Virginia's Marriage Prohibition on the ground that it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs named as Defendants Virginia's State Registrar of Vital Records, Janet Rainey, and the Clerk of Court for the Norfolk Circuit Court, George E. Schaefer, III, who is charged with issuing marriage licenses.

The Commonwealth initially defended the constitutionality of its Marriage Prohibition. After the filing of cross-motions for summary judgment, however, voters in Virginia elected a new Attorney General who soon changed the Commonwealth's position and refused to continue defending the Marriage Prohibition on behalf of Registrar Rainey. *See* Notice of Change in Legal Position by Def. Janet M. Rainey, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. Jan. 23, 2014), ECF No. 96. At that time, Clerk McQuigg intervened in the proceedings in defense of Virginia's Marriage Prohibition and adopted Registrar Rainey's original summary judgment briefing as her own. *See* Mem. of Law in Support of Mot. to Intervene, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. Dec. 20, 2013), ECF No. 73.

Following oral argument, the U.S. District Court for the Eastern District of Virginia held that Virginia's Marriage Prohibition violated gay men and lesbians' fundamental right to marry and was therefore invalid under the Due Process and Equal Protection Clauses of the Fourteenth

Amendment. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014). The district court enjoined the enforcement of Virginia's Marriage Prohibition, but stayed its ruling pending the outcome of an appeal to the Fourth Circuit. *Id.* at 484.

The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision, holding that Virginia's Marriage Prohibition violates the fundamental right of gay and lesbian individuals to marry the partner of their choosing. *See Bostic v. Schaefer*, No. 14-1167(L), 2014 WL 3702493, at *17 (4th Cir. July 28, 2014). In reaching this conclusion, the Fourth Circuit emphasized the profound importance of marriage to individuals and society generally, reasoning that "[c]ivil marriage is one of the cornerstones of our way of life," which "allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships." *Id.* The Fourth Circuit emphasized that this fundamental right "is not [and cannot be] circumscribed based on the characteristics of the individuals seeking to exercise that right." *Id.* at *9.

Clerk McQuigg moved the Fourth Circuit for a stay of its mandate on August 1, 2014. *See* Mot. for Stay of Mandate, *Bostic v. Schaefer*, No. 14-1167(L) (4th Cir. Aug. 1, 2014), ECF No. 238. A week later, the Virginia Attorney General filed a petition for a writ of certiorari, which asks this Court to review and affirm the Fourth Circuit's decision. *See* Pet. for Writ of Cert., *Rainey v. Bostic*, No. 14-153. On August 13, 2014, the Fourth Circuit denied the motion to stay the mandate and thereafter announced that its mandate is scheduled to issue on August 21, 2014. *See* Order Denying Mot. for Stay of Mandate, *Bostic v. Schaefer*, No. 14-1167(L) (4th Cir. Aug. 13, 2014), ECF No. 247.

II. REASONS FOR DENYING THE STAY

It is well established that "[d]enial of . . . in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., in chambers). To obtain a stay pending the filing and disposition of a petition for a

writ of certiorari, "the applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Id.* at 1861–62 (internal quotation marks omitted; alteration in original). In close cases, the Court may deem it "appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* On balance, these factors weigh heavily against a stay of the mandate in this case.

A. There Is No Reasonable Probability That This Court Would Reverse The Court Of Appeals' Decision.

Even assuming that Clerk McQuigg can satisfy the first prong of the stay standard by establishing that four Justices are likely to grant the petition for certiorari, a stay is not warranted because Clerk McQuigg has failed to establish a fair prospect that a majority of the Court will conclude that the decision below was erroneous. On the contrary, the Fourth Circuit's determination that Virginia's Marriage Prohibition violates the fundamental right of gay men and lesbians to marry is grounded in (and consistent with) this Court's own jurisprudence.

First, this Court has repeatedly characterized the right to marry as integral to the liberty and personal dignity of all persons. Indeed, this Court has described marriage as the "most important relation in life," *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted), "central to personal dignity and autonomy," *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (internal quotation marks omitted), "intimate to the degree of being sacred," *Griswold v. Connecticut*, 391 U.S. 479, 486 (1965), and as "one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Fourth Circuit's recognition of "[c]ivil marriage [as] one of the cornerstones of our way of life" for both same-sex

and heterosexual couples, *Bostic*, 2014 WL 3702493, at *17, is consistent with this Court's ruling that marriage is of "fundamental importance for *all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added).

Second, contrary to Clerk McQuigg's argument that the Fourth Circuit misapplied the fundamental-rights analysis of *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (Application at 14), the Fourth Circuit's analysis and decision are wholly consistent with this Court's recognition of marriage as a fundamental right and its persistent refusal to adopt a narrow and exclusionary definition of marriage based on the particular characteristics of the couple or individual whose rights are at stake.

In *Turner v. Safley*, 482 U.S. 78, 95 (1987), for example, this Court held that incarcerated prisoners have a constitutional right to marry, reasoning that "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." *Id.* at 95–96.

This Court's decision in *Loving v. Virginia*—which invalidated Virginia's prohibition on marriage between individuals of different races, 388 U.S. at 12—likewise reflects an understanding of marriage as a broad fundamental right that does not depend on the characteristics of the individual exercising the right. Indeed, despite the Commonwealth's contention in that case that the plaintiffs' challenge implicated only the narrow right to *interracial* marriage, the Court held that "[t]he freedom to marry has long been recognized as one of the vital *personal* rights essential to the orderly pursuit of happiness" that "resides with

the individual" regardless of the individual's race or that of his or her would-be spouse. *Id.* at 12 (emphasis added).

The Fourth Circuit was therefore correct to reject Clerk McQuigg's argument that the right at issue should be narrowly defined as the right to *same-sex* marriage. To hold otherwise would have "disclose[d] the [Fourth Circuit's] own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.

Third, in *Windsor*, this Court recognized that the federal Defense of Marriage Act's definition of marriage as limited to heterosexual unions lacked any rational basis and imposed "a disadvantage, a separate status, and so a stigma" on same-sex couples, 133 S. Ct. at 2693, in addition to "disparag[ing] . . . [their] personhood and dignity," *id.* at 2696. Like this Court, the Fourth Circuit conducted a careful analysis of the proffered rationales for Virginia's Marriage Prohibition and determined that they were insufficient to justify denying gay men and lesbians their fundamental right to marry. *See Bostic*, 2014 WL 3702493, at *10–17. Indeed, the Commonwealth has conceded the absence of any legitimate state interest in this case, including any purported fear of the "long-term effects of redefining marriage," Application at 16, by declining to defend Virginia's Marriage Prohibition. *See* Not. of Change in Legal Position by Def. Janet M. Rainey, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. Jan. 23, 2014), ECF No. 96 (Virginia's Attorney General "concluded that Virginia's laws denying the right to marry to same-sex couples violate the Fourteenth Amendment to the United States Constitution.").[1]

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[1] That the Court in *Windsor* also acknowledged that States have "essential authority to define the marriage relation," 133 S. Ct. at 2692, does not render that decision inconsistent with the Fourth Circuit's conclusion in this case. Federalism cannot justify the deprivation of fundamental rights, particularly where, as here, the Commonwealth of Virginia has conceded

[Footnote continued on next page]

Finally, in addition to being consistent with this Court's jurisprudence, the Fourth Circuit's decision is consistent with the decisions of no fewer than 20 federal courts—including *every* federal court to consider a state ban on same-sex marriage since this Court's decision in *Windsor*. *See, e.g.*, *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014); *Love v. Beshear*, No. 3:13-cv-750-H, 2014 WL 2957671 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 2014 WL 2884868 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264 (D. Or. May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. Mar. 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bourke v. Beshear*, No. 3:13-CV-750, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

Clerk McQuigg asserts that the Fourth Circuit's decision conflicts with this Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), as well as several state

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[Footnote continued from previous page]

that it lacks any compelling interest in maintaining Virginia's Marriage Prohibition. *See* Mem. in Sup. of Change in Legal Position by Def. Rainey at 16, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. Jan. 23, 2014), ECF No. 96-1 (the asserted rationales "cannot justify denying same-sex couples the incalculable benefits of marriage simply because a man loves a man or a woman loves a woman").

court cases. Application at 11–12. But each case relied on by Clerk McQuigg predates *Windsor*, where this Court confirmed that laws that single out gay men and lesbians for disfavored treatment are unconstitutional. 133 S. Ct. at 2695–96. *Baker* itself has lost any precedential force in light of the doctrinal developments in this Court's jurisprudence—including *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*—that culminated in *Windsor*. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). And the lower-court decisions predating *Windsor*—including the Eighth Circuit's decision in *Bruning*—provide no basis for concluding that this Court is likely to reverse the Fourth Circuit's decision in this case.

Because the Fourth Circuit's decision is fully consistent with this Court's jurisprudence and with the decisive weight of lower-court authority, Clerk McQuigg cannot establish a fair prospect of success on the merits.

B. Clerk McQuigg Will Not Be Irreparably Harmed In The Absence Of A Stay, And The Balance Of Equities Weighs In Favor Of Denying A Stay.

In addition to her failure to establish any fair prospect of success on the merits, Clerk McQuigg has failed to demonstrate that she or the public would be irreparably harmed in the absence of a stay or that the balance of equities favors the issuance of a stay of the mandate.

Tellingly, Clerk McQuigg devotes only a paragraph of her application to an explanation of irreparable harm (Application at 17–18), and the only theory that she offers is the claim that she will be irreparably harmed if she is not permitted to enforce "Virginia's man-woman marriage laws." *Id.* at 18. But none of the cases cited by Clerk McQuigg stands for the proposition that a stay must issue where the only theory of irreparable harm is that public officials will be unable to enforce democratically enacted laws that have been adjudged to be

unconstitutional.[2] Indeed, when weighing the right of voters and public officials to the enforcement of democratically enacted laws against the right of individuals not to be deprived of fundamental rights, the balance must tilt (as the Fourth Circuit recognized) decidedly in favor of the protection of fundamental rights. *See Bostic*, 2014 WL 3702493, at *12 (emphasizing that "the people's will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry," and "neither Virginia's federalism-based interest in defining marriage nor [a] respect for the democratic process that codified that definition can excuse the Virginia Marriage Laws' infringement of the right to marry"). Likewise, in the unlikely event of reversal by this Court, any purported uncertainty about the validity of same-sex marriages performed before that decision could be addressed on remand. In any event, that risk of uncertainty falls on those same-sex couples who choose to marry before this Court has ruled, rather than on Clerk McQuigg or the Commonwealth.

Moreover, the balance of equities and the public interest strongly favor denial of a stay. Because the right to marry is fundamental, denying that right to gay men and lesbians, even if only for an interim period, cannot plausibly be characterized as "a modest delay in obtaining the Commonwealth's official sanction of their relationships." Application at 21. To the contrary,

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[2] *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (staying a judgment enjoining enforcement of the California Automobile Franchise Act because the district court erred in holding that an automobile manufacturer had a constitutionally-protected liberty interest in locating its dealerships wherever it pleased); *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) (staying judgment enjoining enforcement of a provision of the Controlled Substances Act despite possible infringement of free exercise rights where the injunction would have required the federal government to violate an international treaty); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (denying motion for a stay of the Ninth Circuit's mandate where the court of appeals found that the district court's injunction against enforcement of a state constitutional amendment was predicated on a legal error).

the denial of that right irreparably harms Plaintiffs and all other gay men and lesbians in Virginia, whether it is denied during the pendency of this Court's review or for an indefinite period. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). As the Fourth Circuit recognized, "[d]enying same-sex couples [the right to marry] prohibits them from participating fully in our society" and "is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 2014 WL 3702493, at *17. Such a prohibition should not be permitted to stand, even during the pendency of an appeal, because each day Plaintiffs' right to marry is denied is a day that can never be returned to them—a wrong that can never be remedied. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("substantial loss or impairment" of a constitutional right is an "irreparable injury").

C. This Court's Stay In *Herbert v. Kitchen* Does Not Require A Stay Of The Fourth Circuit's Mandate.

This Court's issuance of a stay in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), does not compel the issuance of a stay in this case. *See* Application at 18. It is well established that whether or not to stay the mandate falls within this Court's discretion and turns on the particular circumstances of each case. *See Nken v. Holder*, 556 U.S. 418, 433 (2009).

Since the Court issued its stay in *Herbert* on January 6, 2014, it has become even more clear that Clerk McQuigg and other litigants defending prohibitions on marriage by same-sex couples have little likelihood of success on the merits: two federal courts of appeals and eleven federal district courts have invalidated state bans on marriage by gay men and lesbians after that stay ruling, without a single federal decision to the contrary. *See, e.g.*, *Bishop*, 2014 WL 3537847; *Kitchen*, 2014 WL 2868044; *Love*, 2014 WL 295767; *Baskin*, 2014 WL 2884868; *Wolf*, 986 F. Supp. 2d at 982; *Whitewood*, 2014 WL 2058105; *Geiger*, 2014 WL 2054264; *Latta*,

2014 WL 1909999; *Henry*, 2014 WL 1418395; *DeBoer*, 973 F. Supp. 2d at 757; *Tanco*, 2014 U.S. Dist. LEXIS 33463; *De Leon*, 975 F. Supp. 2d at 632; *Bourke*, 2014 U.S. Dist. LEXIS 17457.

Moreover, unlike in *Kitchen*, where the State of Utah continues to defend the constitutionality of its prohibition on marriage between individuals of the same sex, the Commonwealth has conceded in this case that Virginia's Marriage Prohibition is unconstitutional, which conclusively demonstrates that the Commonwealth has no legitimate interest in leaving these discriminatory measures in place pending further appeal. The Commonwealth's concession—together with the unbroken line of authority invalidating state marriage bans since the Court's stay ruling—makes the stay analysis in this case materially different from the one in *Kitchen*.

Here, the circumstances call for issuance of the mandate and the immediate enforcement of the district court's injunction prohibiting Virginia from continuing to deny its gay and lesbian residents their fundamental right to marry.

III. IN THE ALTERNATIVE, THE COURT SHOULD TREAT THE APPLICATION FOR STAY AS A PETITION FOR A WRIT OF CERTIORARI AND GRANT REVIEW

Plaintiffs' fundamental constitutional rights are being violated each day that Virginia's Marriage Prohibition continues to prohibit them from marrying the partner of their choice. *See Dombrowski*, 380 U.S. at 486. Plaintiffs therefore have an overriding interest in the expeditious resolution of this case and the prompt termination of any stay issued by this Court. Accordingly, if this Court does grant a stay of the Fourth Circuit's mandate—thereby leaving in place Virginia's Marriage Prohibition pending the resolution of the case by this Court—it should treat the Application as a petition for a writ of certiorari, grant the petition, and set the case for full

briefing and argument on the merits. *See Nken v. Mukasey*, 555 U.S. 1042, 1042 (2008) (upon granting an application for a stay, the Court ruled that "the application for stay is treated as a petition for writ of certiorari").

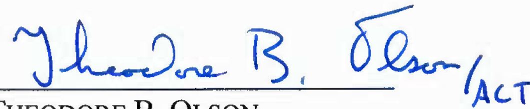
By applying to this Court for a stay, Clerk McQuigg has already signaled her intention to file a petition for a writ of certiorari. *See* Application at 1 (referencing "Petitioner's forthcoming petition for a writ of certiorari"). Rather than await the filing of Clerk McQuigg's petition—which could be filed as late as October 27, 2014—the Court should treat her application for a stay as her petition for certiorari in the event that the Court grants a stay. That petition should be granted because the extraordinarily important question presented in this litigation directly affects the most basic civil rights of gay and lesbian individuals across the country and is the subject of ongoing litigation in dozens of jurisdictions. Only this Court can definitively resolve that issue and put a swift and immediate end to the denial of gay and lesbian Americans' fundamental right to marry.

Treating Clerk McQuigg's Application as a petition for a writ of certiorari will hasten this Court's resolution of the case and minimize the ongoing, daily irreparable injury that Plaintiffs—and tens of thousands of other gay men and women—will continue to sustain each day that a stay remains in place.

IV. CONCLUSION

For the foregoing reasons, the Application to Stay the Mandate Pending Appeal should be denied. In the alternative, the Court should treat the Application as a petition for a writ of certiorari, grant the petition, and set the case for briefing and argument on the merits.

Respectfully submitted,



THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
CHANTALE FIEBIG
ASHLEY S. BOIZELLE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

THEODORE J. BOUTROUS, JR.
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

THOMAS B. SHUTTLEWORTH
ROBERT E. RULOFF
CHARLES B. LUSTIG
ANDREW M. HENDRICK
ERIK C. PORCARO
SHUTTLEWORTH, RULOFF, SWAIN, HADDAD & MORECOCK, P.C.
4525 South Blvd., Suite 300
Virginia Beach, VA 23452
(757) 671-6000

DAVID BOIES
BOIES, SCHILLER & FLEXNER LLP
333 Main St.
Armonk, NY 10504
(914) 749-8200

ROBERT B. SILVER
JOSHUA I. SCHILLER
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

WILLIAM A. ISAACSON
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, N.W.
Washington, D.C. 20015
(202) 237-2727

JEREMY M. GOLDMAN
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
(510) 874-1000

Counsel for Respondents Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley

August 18, 2014

No. 14A196

IN THE

Supreme Court of the United States

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

v.

TIMOTHY B. BOSTIC, ET AL.,
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 18th day of August, 2014, I caused a copy of the foregoing Response to Application to Stay the Mandate Pending Appeal to be served by electronic mail and UPS overnight mail on the counsel identified below. All parties required to be served have been served.

Brain Babione
David Austin R. Nimocks
J. Caleb Dalton
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260
bbabione@alliancedefendingfreedom.org
animocks@alliancedefendingfreedom.org
cdalton@alliancedefendingfreedom.org

Counsel for Applicant Michèle B. McQuigg

David B. Oakley
Jeffrey F. Brooke
Poole Mahoney PC
860 Greenbrier Circle, Suite 401
Chesapeake, VA 23320
doakley@poolemahoney.com
jbrooke@poolemahoney.com

Counsel for Respondent George E. Schaefer, III

Stuart Raphael
Trevor Stephen Cox
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
sraphael@oag.state.va.us
tcox@oag.state.va.us

Counsel for Respondent Janet M. Rainey

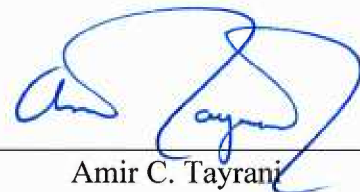
Rebecca K. Glenberg
American Civil Liberties Union of Virginia Foundation, Inc.
701 East Franklin Street, Suite 1412
Richmond, VA 23219
rglenberg@acluva.org

James D. Esseks
Joshua A. Block
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
jesseks@aclu.org
jblock@aclu.org

Gregory R. Nevins
Tara L. Borelli
Lambda Legal Defense and Education Fund, Inc.
730 Peachtree Street, NE, Suite 1070
Atlanta, GA 30308
gnevins@lambdalegal.org
tborelli@lambdalegal.org

Paul M. Smith
Luke C. Platzer
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington D.C. 20001
psmith@jenner.com
lplatzer@jenner.com

Counsel for Respondent Harris Class



Amir C. Tayrani