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, PETITIONER,

V.

TIMOTHY B. BOSTIC, ET AL., RESPONDENTS.

ON APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM BY STATE REGISTRAR JANET M. RAINEY IN SUPPORT OF STAYING THE MANDATE AND REQUESTING THAT THE MOTION TO STAY BE TREATED AS A CROSS-PETITION FOR CERTIORARI IN *RAINEY v. BOSTIC*, No. 14-153

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

Shortly after taking office in January 2014, Virginia Attorney General Mark R. Herring advised the district court that (1) he had determined that Virginia's same-sex-marriage ban violates the Fourteenth Amendment, but (2) State Registrar Janet M. Rainey would continue to enforce the ban until a definitive judicial ruling can be obtained. The Attorney General concluded that this approach is faithful to his oath to support the Constitution of the United States, and consistent with the obligation of the Executive Branch of the Virginia State government to enforce the ban while its validity is adjudicated. *See* Pet'n for Certiorari at 6-7, 203a-212a, *Rainey v. Bostic*, No. 14-153 (U.S. docketed Aug. 12, 2014) (App. A). Although it is painful to keep Virginia's same-sex couples and their children waiting any longer to enjoy the rights guaranteed by the Fourteenth Amendment, the rule of law requires that this Court be afforded the time needed to settle the question. Irreparable harm is threatened whichever way the Court decides the stay request, although determining if the harm is irreparable depends on whether Virginia's ban is unconstitutional. Under these circumstances, the balance of hardships favors a stay. The unintended consequences and injury to third parties if this Court were to permit the district court's injunction to take effect prematurely and later uphold Virginia's ban are greater than the injury to the named plaintiffs if the stay is granted but the ban is later invalidated. Either way, however, the most responsible course of action is to decide the constitutionality of Virginia's ban as quickly as possible. Accordingly, the Court should grant the stay, treat the stay application as a cross-petition for certiorari in No. 14-153, and grant both petitions at the Court's earliest opportunity.

ARGUMENT

I. The traditional factors warrant a stay.

The Court follows "familiar standards," *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam), in determining whether to stay a lower court's mandate pending petition for

certiorari. "To warrant that relief, [the movant] must demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)).

A. There is a "reasonable probability" the Court will grant certiorari.

As set forth in Rainey's petition for certiorari, this case raises an exceptionally important question on which the Court granted certiorari in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013), but was unable to decide because the petitioners there lacked standing, *id.* at 2667-68. Rainey Pet'n for Certiorari at 14-19 (App. A). It is also a question on which State and federal courts are divided. The Fourth and Tenth Circuits have held that same-sex-marriage bans violate the Due Process and Equal Protection Clauses; the Eighth Circuit, and the highest courts of several States, have held the opposite. *Id.* at 20-21. Lower courts are also divided on whether heightened scrutiny applies to laws that discriminate against gay people, and on whether same-sex-marriage bans constitute gender classifications that, for that reason alone, warrant heightened scrutiny. *Id.* at 25-33. "These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented." *King*, 133 S. Ct. at 3.

B. The outcome is sufficiently in question to satisfy the "fair prospect" standard.

The fair-prospect-of-reversal consideration is more difficult. The Circuit Justice must try to "predict the probable outcome of the case if certiorari were granted," which requires "some skill in the reading of tea leaves as well as in the process of legal reasoning." *Bd. of Ed. v. Super. Court of Ca.*, 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers). Although Rainey agrees with the *Bostic* and *Harris* respondents that the Fourth Circuit's ruling was correct, sufficient uncertainty lurks in the Court's tea leaves to satisfy the "fair prospect" standard.

To be sure, there is good reason to think that a majority of this Court will hold that State same-sex-marriage bans violate the Fourteenth Amendment. Two lines of precedent converge on that result. The first involves cases holding that marriage is "of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). The Court has not limited the right of marriage to the context in which it was historically exercised. That is why the Fourteenth Amendment bars Virginia from banning interracial marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), despite that "interracial marriage was illegal in most States" when the Fourteenth Amendment was adopted, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). The fundamental right in question here is the right to marriage, not the right to marry as it was historically practiced. If the rule were otherwise, there would be no right to interracial marriage; no right of people owing child support to marry, *Zablocki*, 434 U.S. at 388-91; and no right of prison inmates to marry, *Turner v. Safley*, 482 U.S. 78, 94-99 (1987). *Casey*, in fact, specifically rejected the narrowest-historical-context theory that Justice Scalia once proposed as a limitation on fundamental-rights analysis. *See* 505 U.S. at 847-48 (disavowing *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28, n.6 (1989) (opinion of Scalia, J.)). *See also* Rainey Pet'n for Certiorari at 22-25 (App. A).

The second line of precedent in this historical convergence has rejected efforts by the government to discriminate against gay people. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986); *Romer v. Evans*, 517 U.S. 620, 632-36 (1996). Although those cases did not resolve the level of scrutiny that applies to such laws, the Court found *no* legitimate governmental interest sufficient to uphold any of the laws in question. Indeed, the justifications offered to save § 3 of the Defense of Marriage Act in *Windsor*—"encouraging responsible procreation and

childrearing"[1] and preserving "traditional" marriage[2]—are the same justifications offered by Judge Niemeyer and Clerk McQuigg in support of Virginia's refusal to allow gay people to marry or to recognize their marriages lawfully celebrated outside of Virginia. *See* McQuigg Mot. to Stay at 16-17. The majority's decision in *Windsor* that "no legitimate purpose" supported DOMA seems to require the same conclusion here. 133 S. Ct. at 2696. *See* Rainey Pet'n for Certiorari at 26-27 (App. A).

In attempting to predict how five Justices will rule on this question, one cannot overlook Justice Scalia's opinions; he has repeatedly predicted that this Court's decisions in *Romer*, *Lawrence*, and *Windsor* will require the Court to strike down State laws banning same-sex marriage. Colorado's constitutional ban on anti-discrimination laws protecting gay people, which the *Romer* majority found "inexplicable by anything but animus toward the class it affects," 517 U.S. at 632, were defended at the time on the ground that *Bowers* permitted States to criminalize homosexual conduct; if the States could do that, the argument went, "surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct," 517 U.S. at 641 (Scalia, J., dissenting). In other words, "Coloradans [were] . . . *entitled* to be hostile toward homosexual conduct." *Id.* at 644 (Scalia, J., dissenting). When *Lawrence* overruled *Bowers* and held that the Constitution protects the intimate choices of gay people, Justice Scalia said that the "opinion dismantle[d] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." 539 U.S. at 604 (Scalia, J., dissenting). And when *Windsor* held that the federal government could not refuse to recognize same-sex marriages that were validly entered into in

[1] BLAG Merits Br. at 11, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (quoting H.R. Rep. No. 104-664, at 12, 13 (1996)).

[2] *Id.* at 10, 46.

another jurisdiction, Justice Scalia said that "the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion . . . . How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status." 133 S. Ct. at 2709 (Scalia, J., dissenting).

Despite those predictions, however, the legal question here remains fraught with uncertainty. The majority in *Windsor* expressly declined to address the question presented in this case, *id.* at 2696, a point the Chief Justice took pains to underscore. *Id.* at 2697 (Roberts, C.J., dissenting). And Justice Alito, joined by Justice Thomas, wrote in dissent that the Constitution does not choose among what he called two viable views of marriage: one that he termed the "'traditional' or 'conjugal' view," and the "newer view" that he termed "the 'consent-based' vision of marriage." *Id.* at 2718. Justice Alito found the Constitution's silence on that question "enough to end the matter as far as the judiciary is concerned," *id.*, and he "would not presume to enshrine either vision of marriage in our constitutional jurisprudence," *id.* at 2719. So it appears from the dissents in *Windsor* that at least three Justices are receptive to the arguments raised by Judge Niemeyer in the court of appeals, arguments capably taken up by Clerk McQuigg in this Court.

That the Court views the controversial question posed here as an open one is also buttressed by reasonable inferences drawn from the fact that the Court has twice stayed lower court rulings that would have allowed same-sex marriages to proceed in Utah before this Court could have the final say. The Court issued no opinion either time and no Justice dissented. It is difficult to conceive of a rational explanation for those stays that would square with refusing to stay the Fourth Circuit's mandate here.

On December 20, 2013, a district court struck down Utah's same-sex-marriage ban and enjoined its enforcement. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013)

("*Kitchen I*"). Both the district court and the Tenth Circuit declined to stay the injunction pending appeal. On Utah's emergency motion, the Court stayed the injunction on January 6, 2014, pending disposition of Utah's appeal to the Tenth Circuit. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) ("*Kitchen II*").

In the week that followed the district court's ruling, local clerks issued more than 900 marriage licenses to same-sex couples.[3] During the 17-day window in which marriage licenses were issued, approximately 1,400 gay couples got married in Utah.[4]

Four of those newlywed couples then filed suit to require Utah to recognize their marriages. On May 19, 2014, the Utah district court issued a preliminary injunction ordering just that. *Evans v. Utah*, No. 2:14-cv-55, 2014 U.S. Dist. LEXIS 69177, at *57 (D. Utah May 19, 2014). The district court denied Utah's request to stay the injunction, although it allowed a temporary reprieve for Utah to seek review in the Tenth Circuit. *Id.* at *50-51.

In the meantime, on June 25, 2014, the Tenth Circuit issued its judgment in *Kitchen*, affirming the district court's ruling striking down Utah's same-sex-marriage ban under the Fourteenth Amendment. *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935, at *97 (10th Cir. June 25, 2014) ("*Kitchen III*"). Citing the Supreme Court's stay in *Kitchen*, the Tenth Circuit stayed its mandate pending the disposition of any subsequently filed petition for certiorari. *Id.* Utah's petition for certiorari is now pending. *Herbert v. Kitchen*, No. 14-124 (U.S. docketed Aug. 5, 2014).

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[3] Marissa Lang, *Same-sex couples shatter marriage records in Utah*, The Salt-Lake Tribune (Dec. 26, 2013), at http://www.sltrib.com/sltrib/news/57310957-78/sex-county-marriages-couples.html.csp.

[4] David Ingram, *Obama administration recognizes Utah same-sex marriages*, Reuters (Jan. 10, 2014), at http://www.reuters.com/article/2014/01/10/us-usa-gaymarriage-utah-justice-idUSBREA090WI20140110.

Having decided that Utah's marriage ban was unconstitutional, the Tenth Circuit, on July 11, 2014, denied Utah's request to stay the injunction in *Evans*, but permitted a ten-day window for Utah to seek another stay from this Court. *Evans v. Utah*, No. 14-4060 (10th Cir. July 11, 2014) (ECF No. 01019277937). Judge Kelly would have issued the stay, explaining that the panel's haste "complement[ed] the chaos begun by the district court in *Kitchen*" and warning that "undoing what is about to be done will be labyrinthine." *Id*. at 2, 3 (Kelly, J., concurring in part and dissenting in part).

On July 18, 2014, this Court granted Utah's motion to stay the injunction in *Evans* pending disposition of the appeal to the Tenth Circuit. *Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014). Given that the Tenth Circuit had already struck down Utah's marriage ban, the stay in *Evans* makes sense only if this Court is reserving to itself the final decision on whether the Constitution prohibits States from denying gay people the right to marry.

The Fourth Circuit below did not reconcile its refusal to stay the mandate with this Court's stays in *Kitchen* and *Evans*; no reasonable distinction presents itself. Other circuits, by contrast, have taken the cue. The Tenth Circuit panel that struck down Oklahoma's ban, on the same day the Court issued its stay in *Evans*, concluded *sua sponte* that a stay was appropriate pending the disposition of petitions for certiorari. *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733, at *71 (10th Cir. July 18, 2014) (citing *Kitchen III*). The Sixth Circuit similarly stayed the injunction striking down Michigan's same-sex-marriage ban, likewise finding this Court's stay in *Kitchen* to be controlling. *DeBoer v. Snyder*, No. 14-1341, 2014 U.S. App. LEXIS 7259, at *4 (6th Cir. Mar. 25, 2014) (finding "no apparent basis to distinguish" *Kitchen II*). And the Ninth Circuit likewise stayed the injunction striking down Idaho's same-sex-marriage ban. *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (ECF No. 11). Judge Hurwitz read this

Court's stay in *Kitchen* as having "virtually instructed courts of appeals to grant stays in the circumstances before us today." *Id.* at 3 (Hurwitz, J., concurring).

In short, given the views expressed in *Windsor* by at least three Justices, and in light of the unmistakable signals from this Court's stays in *Kitchen* and *Evans*, the fair-prospect-of-reversal consideration should be treated as satisfied here.

C. Irreparable harm is threatened regardless of whether a stay is issued, but the balance of hardship favors a stay.

The irreparable-harm analysis is complicated here because whether a stay will cause irreparable injury depends on how the Court decides the underlying legal question. If Virginia's same-sex-marriage ban violates the Fourteenth Amendment—whether because it impinges upon a fundamental right, fails strict or heightened scrutiny, or lacks a rational basis—the continued withholding of Plaintiffs' right to marry is irreparable. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). On the other hand, if the ban survives constitutional scrutiny, then their constitutional rights have not been infringed and letting the injunction take effect would pose a different kind of irreparable harm. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 133 S. Ct. at 3 (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

Because irreparable injury is threatened either way, it is "appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright v. Frommert*, 556 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)) (internal quotation marks omitted). That balance favors staying the mandate.

The Plaintiffs here are two couples—Timothy Bostic and Tony London, and Carol Schall and Mary Townley. Bostic and London have lived together for 25 years and wish to marry; Schall and Townley wish to have their California marriage recognized so Schall can adopt Townley's sixteen-year-old biological daughter, and so Schall and Townley can both be listed as parents on their daughter's birth certificate. Rainey Pet'n for Certiorari at 5-6 (App. A).

If the injunction takes effect, it is unlikely that Bostic and London will rush to take advantage of it by marrying right away, or that Schall and Townley will quickly move for Schall to adopt their daughter. These well-represented couples, no doubt, are attuned to the risk that doing that could moot this case before they have finished the important work they started. In fact, on August 14, 2014, one day after the Fourth Circuit declined to stay the mandate, Bostic and London appeared on their local television station and announced that they do not intend to marry right away. Bostic said "we've waited 25 years for this, so waiting another six months so we can do it right is not that big of an issue for us." WAVY News, *Video: Tony London, Tim Bostic talk about gay marriage case*, at 1:33 (4 p.m. ed., Aug. 14, 2014), at http://wavy.com/2014/08/14/video-tony-london-tim-bostic-talk-about-gay-marriage-case/.

By contrast, it would be a very "big issue" for the Commonwealth and third parties who must rely on presumptively valid marriages. For starters, Virginia will likely see many more same-sex marriages than the 1,400 performed in Utah in the 17-day window in *Kitchen*. Virginia's population is 2.8 times as large as Utah's (8.2 million compared to 2.9 million).[5] If this Court denies the stay, marriages will be performed during a period extending far longer than 17 days. And if the Court ultimately were to uphold Virginia's ban, the hundreds or thousands of marriages taking place in the interim would be rendered doubtful.

[5] *See* U.S. Census Bureau, State & County Quick Facts, at http://quickfacts.census.gov/qfd/index.html.

It would be one thing if the burden fell only on those same-sex couples willing to assume the legal risk of having their marriage invalidated. But it would not. Not only might their marriages have to be unwound, but all of the legal relationships and transactions of third parties who pass through their orbit would have to be untangled.

Children would be at greatest risk for having their lives disrupted. More than 2,500 same-sex couples in Virginia are raising more than 4,000 children younger than age 18.[6] The biological children of one spouse who are adopted by the other parent (as Schall wishes to do) could well have to be *un-adopted*. And same-sex spouses who adopt children together could face having their adoptions dissolved. Such scenarios are not fanciful. One of the same-sex couples in *Evans*, who had previously wed in the District of Columbia, commenced adoption proceedings in Utah just days after the ruling in *Kitchen I*, seeking to have the non-biological parent adopt the couple's four-year-old son. 2014 U.S. Dist. LEXIS 69177, at *9. To be sure, Virginia's same-sex-marriage ban already denigrates the children of same-sex couples. It deprives them of the incalculable benefit and security of having two legal parents and makes it "more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. But permitting these children to be adopted, only to have the State say it was just kidding, would heap another gross indignity upon them.

Countless other third parties will be affected by an un-stayed ruling that is later reversed. Employers and insurers who pay benefits to the same-sex spouse of an employee or of an insured might have to seek restitution or, alternatively, might lack any remedy to recover the value of benefits paid. A same-sex spouse whose partner dies intestate would have a superior claim to the

[6] Br. of *Amicus Curiae* Gary J. Gates in Support of Plaintiffs-Appellees and Intervenors at 5, *Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. July 28, 2014) (No. 14-1167) (ECF 169-1).

estate, but if this Court's ruling invalidated the marriage, the statutory heirs could contest the spouse's inheritance. *See* Va. Code Ann. § 64.2-200 (2012) (governing descent of property passing by intestate succession). The spouse's right to remain in the family residence pending settlement of the estate would likewise be jeopardized. *Id.* § 64.2-307 (2012). And the Virginia Department of Taxation would likely have to rescind tax returns filed by same-sex couples, married filing jointly, and require the parties to file separate returns and to pay any resulting deficiencies.

Virginia will not be the only State affected. A decision allowing the injunction to take effect in this case will signal lower federal courts to follow suit—the opposite signal sent by the stays in *Kitchen* and *Evans*. The Attorney General of North Carolina has already informed a federal district court that North Carolina's same-sex-marriage ban is "indistinguishable" from Virginia's under the circuit precedent established in this case.[7] And circuit courts hearing cases in the Fifth, Sixth, Seventh and Ninth Circuits, *see* Rainey Pet'n for Certiorari at 15-17 & nn. 7-17 (collecting cases) (App. A), likely would not stay any forthcoming rulings striking down same-sex-marriage bans if this Court signaled that such stays are now unnecessary.

By no means would refusing to stay the mandate spell disaster. If this Court ultimately were to rule that same-sex-marriage bans are unconstitutional, permitting marriage equality in the interim would be like speeding without a seatbelt; if no accident occurs, the passengers will be just fine. Some will be quite thrilled; others may feel nervous. But if this Court's decision should go the other way, same-sex couples, their children, and innumerable third parties who interact with them risk being thrown from the car. The status quo ante could not be restored, and putting the pieces back together would pose a wrenching and insurmountable task.

[7] State Defs.' Br. on Future Proceedings at 4, *Fisher-Borne v. Smith*, No. 1:12-CV-589 (M.D.N.C. Aug. 13, 2014) (ECF No. 104).

The Attorney General of Virginia has concluded that Virginia's ban is unconstitutional and that a majority of this Court is likely to strike it down. But the responsible course is to maintain the status quo until this Court can definitively decide the question. "It takes time to decide a case on appeal. Sometimes a little; sometimes a lot . . . . A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken v. Holder*, 556 U.S. 418, 421 (2009).

II. The Court should treat McQuigg's motion to stay as a cross-petition for certiorari in *Rainey v. Bostic*, No. 14-153, and grant both petitions.

Although this Court cannot make time stand still, it should recognize that time is of the essence. In urging the Court to grant certiorari in No. 14-153, Rainey's petition for certiorari asks "how much longer must these citizens and their children wait to realize the promise of equal justice under law?" Rainey Pet'n for Certiorari at 39 (App. A). Given the huge stakes involved and the threat of irreparable harm regardless of how the stay question is decided, the Court should reach and decide the merits as quickly as the rule of law will permit.

"The Court may treat an application [for a stay] as a petition for certiorari and grant the petition, either at the suggestion of the party or on its own motion." Stephen M. Shapiro et al., Supreme Court Practice ch. 17.9, at 891 (10th ed. 2013) (collecting cases). The Court did that in *Nken v. Mukasey*, 555 U.S. 1042 (2008), when an alien who fled persecution in Cameroon faced deportation. It should do that here as well, to resolve as quickly as possible what many view as the most important civil rights issue of our time.

McQuigg's motion to stay the mandate lays out the same deep division among lower courts that Rainey described in her own petition for certiorari. Rainey disagrees with McQuigg about how the question presented should be answered. But they agree that this Court alone can provide a definitive answer, and that it should grant certiorari to do that. There is no need to require

McQuigg to file a cross-petition for certiorari when her stay motion serves the same purpose. With the completion of briefing on this motion, the table is set and the necessary participants are present. And as shown in Rainey's petition for certiorari, this case is the ideal vehicle to resolve the controversy. Rainey Pet'n for Certiorari at 33-38 (App. A).

CONCLUSION

The Court should stay the mandate of the court of appeals, treat the stay application as a cross-petition for certiorari in No. 14-153, and grant both petitions at its earliest opportunity.

Respectfully submitted,

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I certify that on August 18, 2014, a copy of this paper was served by e-mail and U.S. mail on the following counsel:

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