

Nos. 14-2225(L), 14-2228, 14-2230, 14-2278, & 14-2279

**In the United States Court of Appeals
for the Fourth Circuit**

GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, et al.,

Plaintiff-Appellees,

v.

THOM TILLIS, Speaker of the North Carolina House of Representatives;
PHIL BERGER, President Pro Tempore of the North Carolina Senate

Movants-Appellants,

and

DREW RESINGER, Register of Deeds for Buncombe County, et al.,

Defendants,

and

ROY COOPER, Attorney General of North Carolina et al.,

Intervenor.

On Appeal from the United States District Court
Western District of North Carolina

The Honorable Judge Max O. Cogburn
United States District Court Judge
Case No. 3:14-cv-0021

MARCIE FISHER-BORNE et al.,

Plaintiff-Appellees,

v.

THOM TILLIS, Speaker of the North Carolina House of Representatives;
PHIL BERGER, President Pro Tempore of the North Carolina Senate

Intervenors/Defendants-Appellants,

and

JOHN W. SMITH et al.,

Defendants,

and

ROY COOPER, appearing in a Representative capacity on behalf of the State of
North Carolina

Intervenor.

On Appeal from the United States District Court
Middle District of North Carolina

The Honorable Judge William L. Osteen
United States District Court Judge
Case No. 1:12-cv-00589

ELLEN W. GERBER et al.,

Plaintiff-Appellees,

v.

THOM TILLIS, Speaker of the North Carolina House of Representatives;
PHIL BERGER, President Pro Tempore of the North Carolina Senate

Intervenors/Defendants-Appellants,

and

JEFF THIGPEN, Register of Deeds for Guilford County, et al.,

Defendants,

and

ROY COOPER, appearing in a Representative capacity on behalf of the State of
North Carolina

Intervenor.

On Appeal from the United States District Court
Middle District of North Carolina

The Honorable Judge William L. Osteen
United States District Court Judge
Case No. 1:14-cv-00299

APPELLANTS' MOTION FOR STAY OF PROCEEDINGS

Pursuant to Federal Rule of Appellate Procedure 27, Appellants Thom Tillis and Phil Berger ("Movants") respectfully move for a stay of the proceedings pending a final decision by the United States Supreme Court regarding the petitions for writ of certiorari filed in *Deboer v. Snyder*, 2014 U.S. App. LEXIS 21191 (6th Cir. Mich. 2014), *Robicheaux v. George*, No. 14-596, November 20, 2014, and any petition for writ of certiorari before judgment filed in the instant case. In support of this motion, Appellants state the following:

Background

1. On July 28, 2014, this Court issued its decision in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), invalidating an amendment to the Virginia Constitution and related statutes, which together provided that only a union between one man and one woman is a valid marriage in the Commonwealth of Virginia.

2. Petitions for writs of certiorari were denied by the Supreme Court of the United States on October 6, 2014. *McQuigg v. Bostic*, 2014 U.S. LEXIS 6316 (Oct. 6, 2014); *Rainey v. Bostic*, 2014 U.S. LEXIS 6053 (Oct. 6, 2014); *Schaefer v. Bostic*, 2014 U.S. LEXIS 6405 (Oct. 6, 2014). Similar petitions from two other courts of appeal were also denied the same day. *Bogan v. Baskin*, 2014 U.S. LEXIS 5797 (Oct. 6, 2014) (7th Circuit); *Walker v. Wolf*, 2014 U.S. LEXIS 6655 (Oct. 6, 2014) (7th Circuit); *Smith v. Bishop*, 2014 U.S. LEXIS 6054 (Oct. 6, 2014) (10th Circuit); *Herbert v. Kitchen*, 2014 U.S. LEXIS 6637 (Oct. 6, 2014) (10th Circuit).

3. On October 9 and 10, 2014, the respective defendants (together, “State Defendants”) in the above-captioned cases filed Answers. The State Defendants conceded that *Bostic v. Schaefer* constitutes binding precedent on the district court and consequently conceded that the respective plaintiffs should be afforded appropriate relief as it pertains to the plaintiffs’ Fourteenth Amendment

Rights. (*General Synod* Dkt. 104 at 12; *Fisher-Borne* Dkt. 115 at 13; *Gerber* Dkt. 70 at 16.)

4. Upon learning of the concessions made by the State Defendants, Appellants Thom Tillis, in his capacity as Speaker of the North Carolina House of Representatives, and Phil Berger, in his capacity as President Pro Tempore of the North Carolina Senate, on behalf of themselves, and their members and constituents, moved to intervene in the district court in order to defend the constitutionality of North Carolina's marriage laws. (*General Synod* Dkt. 107; *Fisher-Borne* Dkt. 119; *Gerber* Dkt. 75.)

5. On October 10, 2014, the district courts acted on the motions to intervene. In *Fisher-Borne* and *Gerber*, the district court granted—as a matter of right—the motions to intervene (*Fisher-Borne* Dkt. 134; *Gerber* Dkt. 90), finding that the North Carolina Attorney General did not intend to appeal any adverse order from the court.

6. Movants' motion was denied in *General Synod* on the grounds that the Movants' interest was adequately represented by the Attorney General and the other state defendants. (*General Synod* Dkt. 120 at 4.) However, no state defendant filed an appeal of the district court's order striking North Carolina's marriage laws.

7. Also on October 10, 2014, the *General Synod* court decided that “North Carolina's laws prohibiting same-sex marriage are unconstitutional as a

matter of law” (*General Synod* Dkt. 121), and entered judgment in the plaintiffs’ favor, (*General Synod* Dkt. 122).

8. On October 14, 2014, the *Fisher-Borne* and *Gerber* courts ordered that that North Carolina’s marriage laws are declared unconstitutional “to the extent those laws prevent same-sex couples from marrying and prohibit the State of North Carolina from recognizing same-sex couples’ lawful out-of-state marriages.”¹ (*Fisher-Borne* Dkt. 135; *Gerber* Dkt. 91.)

9. On November 6, 2014, Movants appealed the districts courts’ orders in *Fisher-Borne* and *Gerber*. (*Fisher-Borne* Dkt. 140; *Gerber* Dkt. 96.)

10. Movants also noticed an appeal of the denial of their motion to intervene in *General Synod* and filed a protective notice of appeal of the court’s order concerning North Carolina’s marriage laws. (*General Synod* Dkt. 124.)

11. Also on November 6, 2014, the United States Court of Appeals for the Sixth Circuit issued its decision in *Deboer v. Snyder*, 2014 U.S. App. LEXIS 21191 (6th Cir. 2014), the consolidated appeal of six separate challenges to the respective marriage laws of Kentucky, Ohio, Michigan and Tennessee. The Sixth Circuit held that the recognition of only a union between one man and one woman as a valid marriage does not violate the Due Process or Equal Protection Clauses of

¹ On October 15, 2014, the court amended its order and judgment to reflect the correct North Carolina statute subject to the order. (*Fisher-Borne* Dkt. 138-39; *Gerber* Dkt. 94-95.)

the Fourteenth Amendment.

12. The decision of the Sixth Circuit has deepened a split among the federal circuit courts about the constitutionality of state laws defining marriage between one man and one woman, joining the Eighth Circuit in holding that such laws are constitutional, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and disagreeing with decisions of the Fourth, Seventh, Ninth, and Tenth Circuits both as to the constitutionality of such laws and the level of scrutiny to be applied to them. *Bostic*, 760 F.3d 352 (fundamental right); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (rational basis review); *Latta v. Otter*, 2014 U.S. App. LEXIS 19620 (9th Cir. Oct. 7, 2014) (heightened scrutiny as to sexual orientation); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (fundamental right); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (fundamental right).

13. Petitions for writs of certiorari from the Sixth Circuit have now been filed. *Obergefell v. Hodges*, No. 14-556, November 14, 2014 (Ohio); *Tanco v. Haslam*, No. 14-562, November 14, 2014 (Tennessee); *DeBoer v. Snyder*, No. 14-571, November 18, 2014 (Michigan); *Bourke v. Beshear*, No. 14-574, November 18, 2014 (Kentucky). The *DeBoer* and *Bourke* Respondents have stated in response that the states of Michigan and Kentucky support review by the Supreme Court.

14. A similar petition for writ of certiorari before judgment from the Fifth Circuit has also been filed. *Robicheaux v. George*, No. 14-596, November 20,

2014. Respondent State of Louisiana has filed a response, agreeing that the Supreme Court should grant certiorari before judgment.

15. Movants intend to file a petition for writ of certiorari before judgment in the instant appeal, and appellants in parallel litigation out of South Carolina, *Condon v. Haley*, No. 14-2241 (Nov. 13, 2014), have likewise indicated that they intend to file a petition for writ of certiorari before judgment in their appeal as well.² See 28 U.S.C. §§ 1254 and 2101(e).

16. The current split among the circuits creates a strong likelihood that at least four Justices will grant one or more of the pending and forthcoming petitions—Movants’ petition and that of the appellants in *Condon v. Haley*, as well as the petitions from the Fifth Circuit and Sixth Circuits, and provide the needed clarity to the important issues involved in this appeal.

This Court Should Grant a Stay of the Proceedings

17. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

18. “The party seeking a stay must justify it by clear and convincing

² Appellees in that appeal have consented to the stay request. (No. 14-2241 Dkt. 21.)

circumstances outweighing potential harm to the party against whom it is operative.” *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983).

19. A stay of the proceedings will promote judicial economy and efficiency while inflicting no harm on the Appellees.

20. Absent a stay of further proceedings, all parties will be required to concurrently litigate this matter in both this Court and the Supreme Court. “[T]he simultaneous proceedings could create confusion and inefficiency.” *O’Brien v. Appomattox County*, 2002 U.S. Dist. LEXIS 22554, 5-6 (W.D. Va. Nov. 15, 2002) (granting stay of proceedings pending appeal). Such concurrent litigation is unnecessarily duplicative and costly and is not designed “to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1.

21. Appellees will suffer no harm if the proceedings are stayed pending resolution by the Supreme Court. Appellees have received the relief they sought from the district court and same-sex couples are currently allowed to marry in North Carolina. Should the Supreme Court grant Movants’ petition, the status quo will remain unchanged during the pendency of the Supreme Court’s review absent a decision by that Court to stay the district court’s judgment, something that it has already declined to issue in other pending cases.

WHEREFORE, Movants respectfully request that proceedings in this Court

be stayed pending resolution of Movants' petition for writ of certiorari before judgment and the pending petitions filed in *Deboer*, *Obergefell*, *Tanco*, *Bourke*, and *Robicheaux*.

Pursuant to Fourth Circuit Rule 27(a), on December 8, 2014, Movants' counsel emailed counsel for the Appellees to request their respective positions on this motion. On December 12, 2014, counsel for the Appellees responded via email and stated that Appellees takes no position on the relief requested by this Motion.

Respectfully submitted,

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