No. 14A____

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.

Application to Stay Mandate Pending Appeal

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

David A. Cortman
Byron J. Babione
Counsel of Record
David Austin R. Nimocks
James A. Campbell
Kenneth J. Connelly
Kellie M. Fiedorek
J. Caleb Dalton
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 (Fax)
bbabione@alliancedefendingfreedom.org

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

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:

Petitioner Michèle B. McQuigg, in her official capacity as Prince William County Clerk of Circuit Court, respectfully applies for a stay of the issuance of the Fourth Circuit's mandate in the above-captioned case pending the final disposition of all timely filed petitions for a writ of certiorari. Petitioner already sought a stay of the mandate from the Fourth Circuit on August 1, 2014, but that court, in a split decision, declined to stay its mandate on August 13. The Fourth Circuit subsequently issued a letter stating that the mandate is scheduled to issue at 8:00 a.m. on August 21. Petitioner thus requests that the Court grant the requested stay on or before August 20.

The two other party-defendants in this case—Janet M. Rainey, in her official capacity as State Registrar of Vital Records for the Commonwealth of Virginia, and George E. Schaefer, III, in his official capacity as the Clerk of Court for the Norfolk Circuit Court—support the relief that Petitioner seeks in this application. On behalf of Registrar Rainey, the Office of the Virginia Attorney General agrees that a stay of the Fourth Circuit's mandate is appropriate pending disposition of Petitioner's forthcoming petition for a writ of certiorari and of Registrar Rainey's pending petition for a writ of certiorari in *Rainey v. Bostic*, No. 14-153. Registrar Rainey anticipates filing a response in support of staying the mandate.

INTRODUCTION

This case presents a constitutional challenge to Virginia's authority to define marriage as the union of a man and a woman. Earlier this year, in *Herbert v. Kitchen*, 134

S. Ct. 893 (2014), this Court unanimously stayed a nearly identical federal-court decision in a case assessing whether the State of Utah may define marriage as the union of a man and a woman. By doing this, the Court signaled to all lower federal courts that they must take similar steps to preserve the enforcement of man-woman marriage laws until this Court definitively settles whether the Fourteenth Amendment to the United States Constitution forbids States from retaining that definition of marriage. Lest there be any doubt, this Court reiterated its message just last month in another Utah case involving a claim for recognition of marriages between same-sex couples. *See Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014) (staying an injunction that would require Utah to treat as valid marriage licenses issued to same-sex couples).

Unlike the Fourth Circuit in this case, the Tenth Circuit has already interpreted this Court's order in *Herbert* as requiring it to stay its mandate in cases challenging States' man-woman marriage laws. In the Utah marriage case, for example, the Tenth Circuit stated that "[i]n consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal to our circuit, we conclude it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari." *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *32 (10th Cir. June 25, 2014). The Tenth Circuit similarly stayed its mandate in a case challenging Oklahoma's man-woman marriage definition. *See Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847, at *21 (10th Cir. July 18, 2014) ("We STAY our mandate pending the disposition of any subsequently-filed petition for writ of certiorari."); *see also* Order, *Latta v. Otter*, No. 14-35420, at 3 (9th Cir. May 20, 2014) (Hurwitz, J., concurring)

(noting that "the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays" in these cases).

Parting from this Court's guidance in *Herbert* and the Tenth Circuit's example in *Kitchen* and *Bishop*, the Fourth Circuit (without mentioning *Herbert* and without engaging in any substantive analysis) declined to stay its mandate in this case. This Court should correct the Fourth Circuit's misstep because similar cases are pending before other circuits and those cases are expeditiously moving toward appellate rulings. *See, e.g.*, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *appeal docketed*, No. 14-1341 (6th Cir. argued Aug. 6, 2014); *Baskin v. Bogan*, No. 1:14-cv-00355, 2014 WL 2884868 (S.D. Ind. June 25, 2014), *appeal docketed*, No. 14-2386 (7th Cir. argument scheduled for Aug. 26, 2014); *Latta v. Otter*, No. 1:13-cv-00482, 2014 WL 1909999 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420, 14-35421 (9th Cir. argument scheduled for Sept. 8, 2014). Unless this Court issues the stay requested here and makes clear that the courts of appeals should stay their mandates in these cases, it is likely that other circuits will mistakenly follow the Fourth Circuit's lead. Yet that would invite needless chaos and uncertainty rather than facilitate the orderly and dignified resolution of a constitutional question of enormous national importance. Therefore, for the same reasons that this Court issued a stay in *Herbert*, it should stay the Fourth Circuit's mandate here.

BACKGROUND

Virginia is one of the many States that defines marriage as the union of one man and one woman. *See* Va. Const. art. I, § 15-A. Plaintiffs in this case allege that Virginia's man-woman marriage laws violate the Fourteenth Amendment. In their Amended

Complaint, Plaintiffs named as defendants Janet M. Rainey, in her official capacity as State Registrar of Vital Records for the Commonwealth of Virginia, and George E. Schaefer, III, in his official capacity as the Clerk of Court for the Norfolk Circuit Court.

Plaintiffs named Clerk Schaefer as a defendant because state circuit-court clerks in Virginia enforce the Commonwealth's man-woman marriage laws. *See* Pls. First Am. Compl. ¶ 15 (ECF No. 18). Indeed, Virginia laws charge those clerks with the duty of issuing marriage licenses only to man-woman couples. *See* Va. Code § 20-14; Va. Const. art. I, § 15-A. And those clerks—each of whom is an independent, elected, constitutional officer, *see* Va. Const. art. VII, § 4, that has sworn to uphold the law and faithfully discharge her duties, *see* Va. Const. art. II, § 7—would be subject to potential imprisonment, a fine, or even removal from office if they were to violate their official duties. *See* Va. Code §§ 20-33, 24.2-233(1).

Registrar Rainey, then represented by Virginia Attorney General Ken Cuccinelli, and Clerk Schaefer moved for summary judgment, arguing that the Fourteenth Amendment does not prohibit Virginia from defining marriage as a man-woman union. Plaintiffs cross-moved for summary judgment.

After the parties completed summary-judgment briefing but before the District Court heard oral argument, it became apparent that Registrar Rainey's incoming counsel, recently elected Attorney General Mark R. Herring, would not defend the challenged marriage laws. Thus Petitioner, in her official capacity as Prince William County Clerk of Circuit Court, intervened to ensure that her significantly protectable interest in enforcing Virginia's man-woman marriage laws was adequately represented. *See* Memo of Law in

Support of Mot. to Intervene at 6-8, 11-15 (ECF No. 73). The District Court "conclude[d] that the intervention as requested [was] proper" and permitted Petitioner to intervene as a party-defendant. *See* Order Granting Intervention at 4 (ECF No. 91). The court also allowed Petitioner to adopt as her own the motion for summary judgment (and all associated briefing) that former Attorney General Cuccinelli filed on behalf of Registrar Rainey. *See* Order at 1 (ECF No. 115). As Petitioner anticipated, Registrar Rainey, now represented by Attorney General Herring, changed her position and began arguing that Virginia's man-woman marriage definition violates the Fourteenth Amendment. *See* Rainey's Notice of Change in Legal Position at 1 (ECF No. 96).

In February 2014, the District Court issued its opinion and order declaring Virginia's marriage definition unconstitutional and enjoining its enforcement. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014). The injunction expressly binds all of the party-defendants (including Petitioner): it provides that "[t]he Clerk of the Circuit Court of the City of Norfolk, the Clerk of the Circuit Court of Prince William County, and their officers, agents, and employees, and the officers, agents, and employees of the Commonwealth of Virginia including the State Registrar of Vital Records are hereby ENJOINED from enforcing [Virginia's man-woman marriage laws]." Judgment at 1-2 (ECF No. 139) (App. A). But "[i]n accordance with th[is] Court's issuance of a stay in *Kitchen v. Herbert*, . . . [the District] Court stay[ed] execution of [its] injunction pending the final disposition of any appeal to the Fourth Circuit." *Bostic*, 970 F. Supp. 2d at 484.

Registrar Rainey, Clerk McQuigg, and Clerk Schaefer each promptly filed a notice of appeal. Soon thereafter, the Fourth Circuit granted a motion to intervene filed by the

Harris class—a group of plaintiffs that the United States District Court for the Western District of Virginia certified to represent the class of same-sex couples in Virginia. *See Harris v. Rainey*, No. 5:13CV077, 2014 WL 352188, at *12 (W.D. Va. Jan. 31, 2014).

On July 28, the Fourth Circuit, in a 2-to-1 decision, upheld the District Court's decision striking down the challenged marriage laws. *See* Opinion at 62, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. July 28, 2014) (App. B) (hereinafter "*Bostic* Op.") (available at 2014 WL 3702493). The majority "declined to view" this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "as binding precedent" in light of what it referred to as this "Court's apparent abandonment of *Baker*." *Bostic* Op. at 38. It then concluded that Virginia's man-woman marriage laws "impede the [fundamental] right to marry by preventing same-sex couples from marrying" and that "[s]trict scrutiny therefore applies." *Id.* at 44-45. Finally, the majority held that the challenged laws could not withstand strict scrutiny. *Id.* at 62. Judge Niemeyer dissented, concluding that the fundamental right to marry does not include the right to marry a person of the same sex, *id.* at 67-68, and that "Virginia was well within its constitutional authority to adhere to its traditional definition of marriage as the union of a man and a woman," *id.* at 68.

On August 1, Petitioner, with the consent of the Virginia Attorney General and Clerk Schaefer, asked the Fourth Circuit to follow this Court's guidance in *Herbert* and stay its mandate. On August 13, however, the Fourth Circuit, again in a 2-to-1 decision, declined to stay its mandate. *See* Order Denying Mot. to Stay Mandate at 5, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Aug. 13, 2014) (App. C). The order does not mention this Court's decision in *Herbert* or provide any substantive legal

analysis. *See id.* The following day, the Fourth Circuit issued a letter stating that "[o]n the current record, the mandate is scheduled to issue at 8:00 a.m. on Thursday, August 21, 2014." Letter Regarding Mandate, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Aug. 14, 2014) (App. D); *see also* Fed. R. App. P. 41(b) ("mandate must issue . . . 7 days after entry of an order denying a timely . . . motion for stay of mandate" unless the court of appeals "shorten[s] or extend[s] the time"). Because the District Court stayed "execution of [its] injunction pending the final disposition of any appeal to the Fourth Circuit," *Bostic*, 970 F. Supp. 2d at 484, the issuance of the mandate would finally dispose of the appeals to the Fourth Circuit and thus lift the stay of the District Court's injunction.

On August 8, a few days before the Fourth Circuit declined to stay its mandate, Registrar Rainey filed her petition for a writ of certiorari with this Court. *See* Petition for Writ of Certiorari, *Rainey v. Bostic* (No. 14-153). As a result, this Court will soon have the opportunity to decide whether to grant review in this case.

The foregoing discussion illustrates that the stay Petitioner seeks "is not available from any other court or judge." Sup. Ct. R. 23(3). Indeed, Petitioner already sought a stay from the Fourth Circuit, and that court denied the requested relief. This Court, therefore, is the only remaining tribunal able to grant the stay that Petitioner requests, and a Circuit Justice has jurisdiction under 28 U.S.C. § 2101(f) to stay a court of appeals' mandate. *See also* Sup. Ct. R. 23.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (applying this same standard); *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302-03 (1987) (Rehnquist, C.J., in chambers) (outlining the standard for analyzing, and ultimately granting, an "application for a stay of the Court of Appeals' mandate pending the filing and disposition of a petition for certiorari"). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Each of these factors weighs decisively in favor of issuing the requested stay.

As discussed above, in *Herbert v. Kitchen*—the current challenge to Utah's man-woman marriage laws—this Court already conducted this analysis and unanimously determined that the factors weighed in favor of staying a lower court's decision in a similar case. On the basis of that decision alone, this Court should conclude that these factors are satisfied here and that Petitioner is entitled to an order staying the Fourth Circuit's mandate.

Numerous circuit courts have correctly discerned that this Court's decision in *Herbert* requires them to issue stays pending appeal in cases where a party-defendant

appeals a lower-court decision invalidating a State's man-woman marriage laws. *See, e.g.*, *Kitchen*, 2014 WL 2868044, at *32 ("In consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal to our circuit, we conclude it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari."); *Bishop*, 2014 WL 3537847, at *21 ("We STAY our mandate pending the disposition of any subsequently-filed petition for writ of certiorari."); Order, *Baskin v. Bogan*, No. 14-2386 (7th Cir. June 27, 2014) (granting the government's motion for a stay pending resolution of the appeal); Order, *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (Hurwitz, J., concurring) ("I concur in the order granting the stay pending appeal . . . because I believe that the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays in the circumstances before us today."); Order, *Tanco v. Haslam*, No. 14-5297 (6th Cir. Apr. 25, 2014) (granting a stay pending appeal and noting that "the public interest and the interests of the parties would be best served by . . . imposing a stay on the district court's order until this case is reviewed on appeal"); Order, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (granting the government's motion to stay the district court's order pending appeal). This consistent line of precedent originating with this Court's order in *Herbert* thus confirms that a stay is warranted here.

I. It Is Probable That Four Justices Will Consider the Question Presented Sufficiently Meritorious to Grant Certiorari.

This Court has already indicated that it considers the question presented here worthy of review. Just a year and a half ago, in *Hollingsworth v. Perry*, this Court granted

certiorari to decide the substantive constitutional question raised here. *See* Petition for a Writ of Certiorari, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2012 WL 3109489, at *i ("Question Presented: Whether the . . . Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman."); *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (granting certiorari). While a jurisdictional hurdle prevented this Court from deciding that constitutional question there, nothing suggests that this Court would be disinclined to review this important issue now. On the contrary, the *Herbert* stay order confirms that the Justices still consider this question sufficiently important to merit review.

The need for this Court's review (and thus the likelihood that this Court will grant review) has grown significantly since the *Hollingsworth* decision. At present, each of the thirty-one States that define marriage as a man-woman union is facing at least one lawsuit that raises a federal constitutional challenge to that marriage definition. *See* Michael Winter, *Lawsuit Challenges North Dakota Gay Marriage Ban*, USA Today, June 6, 2014, http://www.usatoday.com/story/news/nation/2014/06/06/north-dakota-same-sex-marriage-ban/10082033/. The lower courts and States need the Court's guidance on this widely litigated issue of significant public importance. It is therefore likely that the Court will soon take up the question presented here.

This Court, moreover, is likely to grant review because the Fourth Circuit's decision, together with the Tenth Circuit's recent decisions in the Utah and Oklahoma marriage cases, conflicts with binding precedent of this Court holding that the man-woman definition of marriage does not violate the Fourteenth Amendment. *See* Sup. Ct.

R. 10(c). In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court squarely presenting the question whether a State that maintains marriage as a man-woman union violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *see also* Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). That summary dismissal in *Baker* is a decision on the merits that constitutes "controlling precedent, unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

Underscoring the likelihood that this Court will grant certiorari is the existence of a split in appellate authority on the question whether the Fourteenth Amendment forbids States from defining marriage as the union of a man and a woman. *See* Sup. Ct. R. 10(a); *King*, 133 S. Ct. at 2 (Roberts, C.J., in chambers) (concluding that "there [was] a reasonable probability this Court [would] grant certiorari" because the decision under review "conflict[ed] with decisions" of two circuit courts and a state supreme court). The Eighth Circuit has unanimously upheld the constitutionality of a Nebraska law defining marriage as the union of a man and a woman. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006). And all the state appellate decisions that have addressed a federal constitutional challenge to the man-woman definition of marriage have upheld the challenged laws. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 681 (Tex. App. 2010), *review granted*, No. 11-0024 (Tex. Aug. 23, 2013); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-

PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995) (per curiam); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 191 N.W.2d at 186-87. In contrast, the Fourth Circuit in this case and the Tenth Circuit in the Utah and Oklahoma cases, all in 2-to-1 decisions, struck down laws preserving the man-woman definition of marriage. *See Bostic* Op. at 62; *Bishop*, 2014 WL 3537847, at *8; *Kitchen*, 2014 WL 2868044, at *32. This deep and irreconcilable split in appellate case law reinforces the likelihood that this Court will grant review.

II. There Is a Fair Prospect That this Court Will Reverse the Judgment Below.

By issuing the stay order in *Herbert*, this Court necessarily concluded that there is "a fair prospect that a majority of the Court will vote to reverse" a lower-court decision striking down a state law that defines marriage as the union of a man and a woman. *See Hollingsworth*, 558 U.S. at 190 (outlining the factors for issuing a stay pending appeal). This Court, therefore, already determined that this factor supports Petitioner's application.

Furthermore, that this Court, the Eighth Circuit, and six state appellate courts have already rejected constitutional challenges to state laws defining marriage as the union of a man and a woman demonstrates that there is a fair prospect that this Court will reverse the decision below. *See King*, 133 S. Ct. at 3 (Roberts, C.J., in chambers) ("[G]iven the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below.").

At least six additional considerations show that this Court is likely to reverse the decision below. First, the Fourth Circuit's fundamental-rights analysis hinged on the majority's removing gender complementarity from the historical definition of marriage. *See Bostic* Op. at 79 (Niemeyer, J., dissenting) (noting that the majority "define[d] terms as convenient to attain an end"). Yet that conflicts with this Court's acknowledgment in *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013), that the uniting of a man and a woman "no doubt had been thought of by most people as *essential to the very definition of [marriage]* . . . throughout the history of civilization." *Id.* (emphasis added).

Second, this Court in *Windsor* affirmed that States have the "essential authority to define the marital relation," *id.* at 2692, identifying "[t]he definition of marriage [as] the foundation of the State's broader authority to regulate the subject of domestic relations," *id.* at 2691. And *Windsor* extolled the benefits of "allow[ing] the formation of consensus" through political processes when the People seek "a voice in shaping the destiny of their own times" on the definition of marriage. *Id.* at 2692.[1] But the decision below prohibits States from using political processes to maintain the marriage definition (a union of "a

[1] In *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), a plurality of this Court similarly confirmed the right of citizens throughout the various States to "shap[e] the destiny of their own times" on sensitive matters of public policy. *Id.* at 1636 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[.]" *Id.* at 1636-37. That a particular question of public policy is "sensitive," "complex," "delicate," "arcane," "difficult," "divisive," or "profound" does not disable the People from "prudently" addressing it. *Id.* at 1637-38. Concluding otherwise would "demean[] . . . the democratic process" and impermissibly restrict "the exercise of a fundamental right held not just by one person but by all in common"—namely, "the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637.

man and a woman") that most people have considered "essential" to marriage's "role and function throughout the history of civilization." *Id.* at 2689. The Fourth Circuit thus rendered illusory *Windsor*'s affirmation of States' authority to define marriage through political processes and, instead, effectively federalized a genderless definition of marriage.

Third, the Fourth Circuit's analysis (*see Bostic* Op. at 41) is incompatible with the analytical principles that this Court outlined in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). This Court in *Glucksberg* explained the process for ascertaining whether an asserted right is fundamental. *Id.* The reviewing court must provide "a careful description of the asserted fundamental liberty interest," *id.* at 721 (internal quotation marks omitted); and it must determine whether the carefully described right is "objectively, deeply rooted in this Nation's history and tradition," *id.* at 720-21 (internal quotation marks omitted). Here, however, the court below did not carefully describe the right at issue (the right to marry a person of the same sex), and its refusal to do so was contrary to the careful analysis prescribed in *Glucksberg*.[2] Moreover, *Glucksberg* instructed lower courts that when they evaluate substantive-due-process claims, they

[2] The court below was not excused from *Glucksberg*'s careful-description requirement simply because it purported to apply an already-established fundamental right. *See Bostic* Op. at 41. The majority attempted to create a line between recognizing a new fundamental right and expanding an established fundamental right, but such an elusive distinction cannot lead to a consistent body of substantive-due-process jurisprudence. Moreover, *Glucksberg*'s careful-description requirement remains vital in all substantive-due-process cases (not just cases where the plaintiffs openly admit to creating a new fundamental right) because it enables courts to discern when a plaintiff seeks to disguise a novel right as an established liberty interest. This Court, therefore, will likely overturn the Fourth Circuit's failure to apply *Glucksberg*'s prescribed analysis.

must look for "concrete examples" of asserted fundamental rights "in our legal tradition." *Id.* at 722. But the Fourth Circuit did not do this and thus sidestepped the fact that our Nation's legal traditions, as this Court acknowledged in *Windsor*, provide no concrete examples of marriage between persons of the same sex. *See Windsor*, 133 S. Ct. at 2689 ("It seems fair to conclude that, until recent years, many citizens *had not even considered the possibility* that two persons of the same sex might [enter into a] lawful marriage." (emphasis added)).

Fourth, the Fourth Circuit's reliance on *Lawrence v. Texas*, 539 U.S. 558 (2003), is misplaced. That court read *Lawrence* to "indicate that the choices that individuals make in the context of same-sex relationships," including "the choice to marry someone of the same sex," "enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic* Op. at 44. But *Lawrence*—which struck down a criminal statute that prohibited "the most private human conduct, sexual behavior, . . . in the most private of places, the home," 539 U.S. at 567—explicitly stated that it did "not involve," and thus did not decide, "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578. *Lawrence* therefore, as the First Circuit has acknowledged, does not "mandate[] that the Constitution requires states to permit same-sex marriages." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012).

Fifth, the Fourth Circuit's freestanding fundamental right to marry—"by everyone and to anyone," *Bostic* Op. at 67-68 (Niemeyer, J., dissenting)—reaches beyond the same-sex-marriage issue and substantially curtails the States' historically broad authority

over marriage. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (recognizing that States have a near "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created"). Given the breadth of the constitutional right to marry recognized by the Fourth Circuit, one is left to wonder what authority the States retain over their marriage policy. Unless they can satisfy the stringent requirements of strict scrutiny, States now must recognize all emotional relationships (including polygamous, polyamorous, and incestuous) as marriages. *See Bostic* Op. at 83-84 (Niemeyer, J., dissenting); Transcript of Oral Argument at 46-47, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Sotomayor, J.) (wondering "what State restrictions could ever exist" on marriage if courts adopt the broadly conceived fundamental right to marry urged by litigants challenging man-woman marriage laws). But if States must recognize all relationships as marriages, their purpose for having a marriage policy in the first place—to recognize and subsidize particular relationships because of the societal interests that they serve—would be eradicated. This far-reaching effect on the States' marriage policy would unsettle well-established federalism principles in the area of domestic relations, and thus this Court is likely to reverse the Fourth Circuit's decision.

Sixth, the decision below is subject to reversal because of its dismissive treatment of Virginians' legitimate and logical concerns about the long-term effects of redefining marriage. *See, e.g.*, *Bostic* Op. at 51-53. Redefining marriage in genderless terms would transform it into an institution that no longer has any intrinsic definitional connection to its enduring social purposes of regulating naturally procreative relationships and connecting children to both their mother and their father. *See Windsor*, 133 S. Ct. at 2718

(Alito, J., dissenting) (noting that marriage "throughout human history" has been "inextricably linked to procreation and biological kinship"). It is thus logical for the People to project that redefining marriage will jeopardize, for example, its effectiveness in connecting children to both their mother and their father. Genderless marriage, after all, necessarily undermines the importance of, and eliminates the Commonwealth's preference for, children being raised by both their mother and their father. *See* Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18-19 (2008). As over seventy prominent scholars have acknowledged, that would tend to alienate fathers from "tak[ing] responsibility for the children they beget," *id.*, and encourage mothers to create or raise children apart from their fathers. Those developments, collectively, would lead to more children being raised without their fathers. The People may reasonably seek to avoid that societal change. But the Fourth Circuit summarily dismissed these rational concerns and forced Virginians to redefine marriage.

For all these reasons, it is likely that this Court will reverse the judgment below.

III. Irreparable Harm Will Likely Result from Denying the Stay, and the Balance of the Equities Weighs Decisively in Petitioner's Favor.

In *Herbert*, this Court necessarily concluded that irreparable harm results from enjoining man-woman marriage laws before this Court definitively resolves whether the Fourteenth Amendment bans States from defining marriage as the union of a man and a woman. Indeed, many Justices of this Court and many circuit courts have acknowledged that "any 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

(Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *accord Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002). In this litigation, Petitioner appears in her official capacity, and as such, she represents the government and the People that she serves. The District Court's injunction prohibits Petitioner from enforcing Virginia's man-woman marriage laws. Thus she, and by extension the government and the People that she represents, will suffer irreparable harm—in the same way Utah officials experienced irreparable harm in *Herbert*—if the constitutional amendment reflecting Virginians' "considered perspective on the . . . institution of marriage" is enjoined. *See Windsor*, 133 S. Ct. at 2692-93.

In addition to this imminent and irreparable harm, the balance of the equities weighs in favor of staying the Fourth Circuit's mandate because the absence of a stay will likely produce legal uncertainty and confusion that will affect the Commonwealth, public officials throughout the Commonwealth, same-sex couples, employers, businesses, and other entities operating in Virginia.

Utah's experience serves as a tangible example of this uncertainty and confusion. In Utah, after the district court struck down the State's man-woman marriage laws, the district court and the Tenth Circuit declined to issue a stay. *See* Order on Motion to Stay, *Kitchen v. Herbert*, No. 2:13-cv-00217-RJS (D. Utah Dec. 23, 2013); Order Denying Emergency Motion for Stay and Temporary Motion for Stay, *Kitchen v. Herbert*, 13-4178 (10th Cir. Dec. 24, 2013). As a result of the district court's injunction taking

immediate effect, many same-sex couples in Utah obtained marriage licenses. *See* Jennifer Dobner, *Same-sex couples sue Utah over refusal to recognize gay marriages*, Chicago Tribune, January 21, 2014, http://articles.chicagotribune.com/2014-01-21/news/sns-rt-us-usa-gaymarriage-utah-20140109_1_governor-gary-herbert-gay-marriages-utah. Days later, however, this Court stayed the injunction, and Utah's man-woman marriage laws went back into effect. Thus, the State of Utah now declines to recognize the licenses that were issued to same-sex couples during that interim period. *See* Press Release, Office of the Utah Governor, *Governor's Office gives direction to state agencies on same-sex marriages* (Jan. 8, 2014), http://www.utah.gov/governor/news_media/article.html?article=9617.[3]

Same-sex couples who obtained licenses during that period subsequently filed a lawsuit in federal court to force the State to recognize those licenses as valid. *See Evans v. Utah*, No. 2:14-cv-55, 2014 WL 2048343 (D. Utah May 19, 2014). The district court issued an injunction compelling the State to recognize the interim licenses, *see id.* at *20-21, and after the district court and the Tenth Circuit declined to stay the injunction, this Court stayed it pending appellate resolution. *See Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014) (staying recognition of same-sex marriage licenses pending appeal). Thus, the validity of those licenses is still in limbo.

---

[3] Similar events occurred in Michigan. *See* Paul Egan & Tresa Baldas, *Court issues stay on Mich. same-sex marriages*, USA Today (Mar. 23, 2014), *available at* http://www.usatoday.com/story/news/nation/2014/03/22/court-issues-stay-on-mich-same-sex-marriages-/6743367/.

Declining to stay the mandate here is likely to result in similar confusion and uncertainty in Virginia. Without a stay, same-sex couples in Virginia would obtain marriage licenses only to have their validity become immediately suspect should this Court determine that the Constitution does not mandate genderless marriage. The effects of this uncertainty would extend beyond the couples who obtain marriage licenses. Many private and governmental entities, from employers to business establishments, would be placed in difficult situations as they are asked to recognize marriages of doubtful validity. And public officials throughout the Commonwealth would have to revise forms, policies, and rules to accommodate the District Court's injunction, all the while facing a very real prospect of being forced to undo those revisions if this Court ultimately upholds the Commonwealth's man-woman marriage laws. In addition, assuming that the Fourth Circuit's decision is overturned, public officials throughout Virginia will confront the thorny problem of how to treat the marriage licenses issued to same-sex couples. Considerable administrative and financial costs will be incurred to resolve that problem. *See INS v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Labor*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (determining that "considerable administrative burden" on the government supported an application for a stay).

If the Fourth Circuit's mandate issues, this harm, confusion, and uncertainty will not be confined to Virginia; it will extend to the three other States in the Fourth Circuit (West Virginia, North Carolina, and South Carolina). Legal challenges similar to this one are pending in all of those States. *See, e.g.*, *McGee v. Cole*, No. 3:13-cv-24068 (S.D.W.V.); *Fisher-Borne v. Smith*, No. 1:12-cv-00589 (M.D.N.C.); *Bradacs v. Haley*,

No. 3:13-cv-02351 (D.S.C.). Staying the Fourth Circuit's mandate will prevent its decision from bringing about changes in those States that will need to be undone if this Court ultimately disagrees with the Fourth Circuit's decision. Thus, granting this application will facilitate the orderly resolution of this important constitutional question not only in Virginia, but also in West Virginia, North Carolina, and South Carolina. Furthermore, to the extent that other circuits mistakenly follow the Fourth Circuit's example and decline to stay their mandate in similar cases, the uncertainty, confusion, and hardships that have occurred in Utah could spread throughout the Nation.

On the other side of the equities scale, the only interim harm that Plaintiffs can claim (assuming that Plaintiffs eventually prevail in this case) is a modest delay in obtaining the Commonwealth's official sanction of their relationships. As a practical matter, Registrar Rainey has reduced the period of this delay by already filing her petition for a writ of certiorari in this case. More importantly, though, the necessarily speculative harm that Plaintiffs have identified cannot overcome the certain irreparable injury that will result if the District Court's injunction goes into effect and Virginia's man-woman marriage laws are enjoined. *See King*, 133 S. Ct. at 3 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1351 (Rehnquist, J., in chambers)).

In short, the irreparable harm inflicted on Petitioner and the balance of the equities confirm that this Court should issue a stay pending appeal.

IV. *National Organization for Marriage* and *Santai-Gaffney* Do Not Control Here.

Over the past few months, this Court has declined to grant stay applications in two other marriage cases, but both of those cases are readily distinguishable from the

circumstances presented here. In the first case, *National Organization for Marriage v. Geiger*, No. 13A1173, 2014 WL 2514491 (U.S. June 4, 2014), this Court denied an application to stay a district-court decision enjoining Oregon's man-woman marriage laws when the application was filed by a nonparty private organization and its anonymous members, none of whom were bound by the district court's judgment. In the second case, *Santai-Gaffney v. Whitewood*, No. 14A19 (U.S. July 9, 2014), Circuit Justice Alito denied an application to stay a district-court decision enjoining Pennsylvania's man-woman marriage laws when the application was filed by a nonparty county clerk who was not bound by the district court's judgment. Here, however, unlike in *National Organization for Marriage* or *Santai-Gaffney*, this application is filed by a party-defendant who is charged with enforcing the challenged marriage laws and is expressly bound by the District Court's injunction. Those cases thus do not control here. Notably, when opposing Petitioner's stay motion before the Fourth Circuit, neither Plaintiffs nor the *Harris* class suggested that *National Organization for Marriage* or *Santai-Gaffney* governs this case.

Presumably, this Court and Justice Alito declined to act in those cases because they did not want to address questions concerning the Article III standing of those petitioners. *See Kitchen*, 2014 WL 2868044, at *32 n.15 (stating that this "Court may have denied a stay in [*National Organization for Marriage*] for lack of a proper party requesting one"). In contrast, Petitioner in this case, as a party-defendant bound by the District Court's injunction, unquestionably has Article III standing to appeal from the District Court's judgment and the Fourth Circuit's decision affirming that judgment. *See*

Horne v. Flores, 557 U.S. 433, 445-46 (2009) (finding standing to appeal where the district court's injunction ran against the defendant); *Gilchrist v. Gen. Elec. Capital Corp.*, 262 F.3d 295, 300-01 (4th Cir. 2001) (finding standing to appeal even for nonparties where injunctions directed against them risk subjecting them to contempt proceedings); *Castillo v. Cameron County, Tex.*, 238 F.3d 339, 348-50 & n.16 (5th Cir. 2001) (similar); *United States v. Kirschenbaum*, 156 F.3d 784, 794 (7th Cir. 1998) (similar); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996) (similar); *see also Zablocki v. Redhail*, 434 U.S. 374, 381-82 (1978) (entertaining without question an appeal by a party-defendant county clerk who was bound by a lower-court decision striking down a challenged marriage law).[4]

CONCLUSION

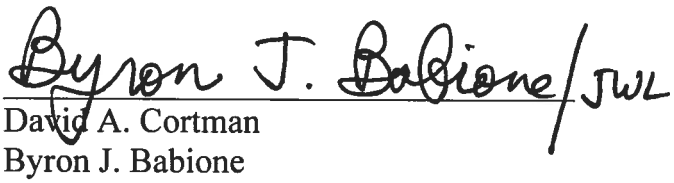
For the foregoing reasons, Petitioner respectfully requests an order staying the issuance of the Fourth Circuit's mandate.

---

[4] This Court's analysis in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), reinforces Petitioner's Article III standing. *Hollingsworth* held that a private nonprofit group and individual proponents of California's man-woman marriage law lacked standing to appeal a decision invalidating that law. *Id.* at 2668. This Court reasoned that the appellants there did not "possess a 'direct stake in the outcome' . . . of their appeal" because "the District Court had not ordered them to do or refrain from doing anything." *Id.* at 2662. Here, however, the District Court has ordered Petitioner to cease carrying out her official duty to issue marriage licenses only to man-woman couples. Petitioner thus has a direct stake in this appeal. In addition, the *Hollingsworth* Court observed that an appellant who has "no role—special or otherwise—in the enforcement of [the challenged law]" has "no 'personal stake' in defending its enforcement." *Id.* at 2663. But here, Petitioner has an undeniable role in enforcing Virginia's man-woman marriage laws. Therefore, she, unlike the private-citizen appellants in *Hollingsworth*, has Article III standing to defend the enforcement of those laws.

Dated: August 14, 2014

Respectfully Submitted,



David A. Cortman
Byron J. Babione
Counsel of Record
David Austin R. Nimocks
James A. Campbell
Kenneth J. Connelly
Kellie M. Fiedorek
J. Caleb Dalton
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 (Fax)
bbabione@alliancedefendingfreedom.org

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2014, I caused the foregoing Application to Stay Mandate Pending Appeal to be served on the following counsel via electronic mail and First-class United States mail (postage prepaid):

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

Attorneys 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

Attorneys for Respondent Janet M. Rainey

Theodore B. Olson
Gibson Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
tolson@gibsondunn.com

David Boies
Boies, Schiller & Flexner, LLP
333 Main Street
Armonk, NY 10504
dboies@bsfllp.com

Attorneys for Respondents Timothy Bostic et al.

Rebecca K. Glenberg
ACLU of Virginia
701 East Franklin Street, Suite 1412
Richmond, VA 23219
rglenberg@acluva.org

Attorney for Respondent Harris Class

Byron J. Babione/JWL

Byron J. Babione