

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CASIE JO MCGEE and SARAH ELIZABETH
ADKINS; JUSTIN MURDOCK and WILLIAM
GLAVARIS; and NANCY ELIZABETH
MICHAEL and JANE LOUISE FENTON,
individually and as next friends of A.S.M., a minor
child;

Plaintiffs,

v.

KAREN S. COLE, in her official capacity as
CABEL COUNTY CLERK; and VERA J.
MCCORMICK, in her official capacity as
KANAWHA COUNTY CLERK;

Defendants,

and

STATE OF WEST VIRGINIA;

Defendant-Intervenor.

No. 3:13-cv-24068

Hon. Robert Chambers

MOTION TO LIFT STAY AND ENTER JUDGMENT

COMES NOW Plaintiffs, Casie Jo McGee and Sarah Elizabeth Adkins, Justin Murdock and William Glavaris, and Nancy Elizabeth Michael and Jane Louise Fenton (individually and as next friends of A.S.M.) (collectively, "Plaintiffs"), by counsel, and hereby submit the following Motion to Lift Stay and Enter Judgment whereby Plaintiffs request that the Court lift the stay of proceedings entered September 16, 2014 and enter judgment in favor of the Plaintiffs on their Motion for Summary Judgment (D.E. 40) based on the Fourth Circuit's now-final decision in *Bostic*.

I. No Further Stay Is Warranted.

On September 16, 2014, this Court issued an Order staying this case pending a decision from the Supreme Court in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (D.E. 130). On October 6, 2014, the Supreme Court denied the petition for certiorari in *Bostic*. See *McQuigg v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014). That denial rendered final the Fourth Circuit’s decision that the Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. See *Bostic*, 760 F.3d at 384.

Now that the Fourth Circuit has finally resolved the merits issues presented by this case, there is no justification for any continued delay in the adjudication of this case, and this Court may proceed without delay to enter judgment in Plaintiffs’ favor.

II. *Bostic* Controls This Case.

The Fourth Circuit’s opinion striking down Virginia’s marriage ban — a law it recognized as “similar” to the one at issue here — dictates the outcome of this case. See *Bostic*, 760 F.3d at 367 n.1 (describing West Virginia’s marriage ban as “similar” to Virginia’s). As an initial matter, the Court rejected entirely the contention — identical to the one made by the State here — that consideration of a constitutional challenge to a marriage ban is barred by *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.). The Fourth Circuit “decline[d] to view *Baker* as binding precedent” in light of “the Supreme Court’s apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case.” *Bostic*, 760 F.3d at 375. Accordingly, the Court addressed the constitutional challenge on the merits.

Regarding the due process and equal protection claims at issue in *Bostic* — claims

identical to the ones asserted by Plaintiffs, see Complaint (D. E. 8) at 21, 24 — the Fourth Circuit held that the fundamental right to marry encompasses the right of all individuals to marry the person of their choice. *See Bostic*, 760 F.3d at 376 (“the fundamental right to marry encompasses the right to same-sex marriage”). The Court therefore held that strict scrutiny applied to bans excluding same-sex couples from marriage. *Id.* The Court rejected arguments, similar to those made by the State, that the right to marry simply did not extend to same-sex couples, reasoning that “[i]f courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.” *Id.* at 377.

Applying strict scrutiny, the Court rejected any possible state interest that Virginia asserted to justify its marriage ban:

- The Court held that neither “states’ traditional authority over marriage” nor the fact that a marriage ban was passed via a “democratic process” is sufficient to exempt it from constitutional scrutiny or justify the burden on same-sex couples. *Id.* at 378-79.
- The Court found that the “‘history and tradition’ of opposite-sex marriage” is not a compelling interest that permits states to exclude same-sex couples from marriage. *Id.* at 380.
- The Court rejected the argument that allowing same-sex couples equal access to marriage would “destabilize the institution of marriage” or “sever the link between marriage and procreation,” because “it is more logical to think that ... allowing loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage.” *Id.* at 380-81.
- The Court held that “excluding same-sex couples from marriage due to their inability to have unintended children makes little sense,” and that “barring same-sex couples’ access to marriage does nothing to further [a state’s] interest in responsible procreation.” *Id.* at 382-83.
- The Court rejected any rationale that a state interest in promoting “optimal childrearing” would justify a marriage ban, finding such logic to rely on “overbroad generalizations,” and holding that “there is no link between banning same-sex marriage and promoting optimal childrearing.” *Id.* at 383-84.

Finding that no justification existed for the marriage ban’s burden on same-sex couples and their

families, the Court held it to violate the Fourteenth Amendment's due process and equal protection guarantees. *Id.* at 384. As the Court explained:

Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

Id.

In so holding, the Fourth Circuit joined the avalanche of federal and state court decisions that have struck down state marriage bans as unconstitutional in the little over a year since *Windsor* was decided.¹ Other states, including North Carolina, have announced that further

¹ See *Baskin v. Bogan*, No. 14-23862014, 2014 WL 4359059 (7th Cir. Sept. 4, 2014) (unanimously finding that the exclusion by Indiana and Wisconsin of same-sex couples from marriage violates the Equal Protection Clause of the Fourteen Amendment); *Bostic v. Schaefer*, No. 14-1167, slip op. (4th Cir. July 28, 2014), affirming *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), affirming *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), affirming *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Brenner v. Scott*, No. 4:14cv107-RH/CAS, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2014) (preliminary injunction for plaintiffs in constitutional challenge to marriage ban); *Burns v. Hickenlooper*, No. 14-cv-01817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, No. 3:13-cv-750, 2014 WL 2957671 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, No. 1:14-cv-00355, 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, 6:13-cv-02256, 2014 WL 2054264 (D. Or. May 19, 2014); *Evans v. Utah*, No. 2:14-cv-00055, 2014 WL 2048343 (D. Utah, May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482, 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 WL 997525 (M.D. Tenn. Mar. 14, 2014) (preliminary injunction); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (preliminary injunction); *Lee v. Orr*, 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bourke v. Beshear*, 3:13-cv-750-H, 2014 WL 556729 (W.D. Ky. Feb 12, 2014); *Gray v. Orr*, 2013 U.S. Dist. LEXIS 171473 (N.D. Ill., Dec. 5, 2013) (preliminary injunction); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Barrier v. Vasterling*, No. 1416-CV03892 (Jackson Cnty. Cir. Ct., Mo., Oct. 3, 2014); *In re Costanza and Brewer*, No. 2103-0052 (Parish of Lafayette, Sept. 22, 2014) (finding Louisiana's marriage ban unconstitutional); *In Re: Estate of Bangor*, No. 502014CP001857XXXXMB (Palm Beach Cnty. Cir. Ct., Fla., Aug. 5, 2014) (finding Florida's ban unconstitutional); *Pareto v. Ruvin*, No.

defense of their marriage bans is futile in light of the overwhelming legal precedent on this question.² As of October 6, 2014, the Supreme Court has denied seven different petitions for certiorari in these cases, thereby rendering final the decisions in *Bostic* and six other cases holding that marriage bans are unconstitutional. *Bostic* is now binding precedent in the Fourth Circuit pursuant to which West Virginia's marriage ban should be held unconstitutional.

Finally, to the extent Defendants have tried to raise doubts about whether Plaintiffs' claims in this case are procedurally sound, the Fourth Circuit's decision in *Bostic* laid them to rest. In *Bostic*, the plaintiffs asserted claims against George E. Schaefer, III in his official capacity as the Clerk for the Circuit Court for the City of Norfolk, for denying them a marriage license. The Fourth Circuit held that there was Article III standing to assert claims against the Clerk:

This license denial constitutes an injury for standing purposes *Bostic* and *London* can trace this denial to Schaefer's enforcement of the allegedly unconstitutional Virginia Marriage Laws, and declaring those laws unconstitutional and enjoining their enforcement would redress

14-1661 (Miami-Dade County Cir. Ct., July 25, 2014) (invalidating Florida's ban); *Huntsman v. Heavilin*, No. 2014-CA-305-K (Monroe County Cir. Ct., July 17, 2014) (same); *Brinkman v. Long*, No. 13-cv-32572, 2014 WL 3408024 (Adams County Dist. Ct., July 9, 2014) (invalidating Colorado's ban); *A.L.F.L. v. K.L.L.*, No. 2014-CI-02421 (Bexar Cnty. Dist. Ct., Tex., Apr. 22, 2014) (declaring Texas' ban unconstitutional on its face); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013); *Wright v. Arkansas*, No. 60CV -13-2662, 2014 WL 1908815 (Pulaski County Cir. Ct., May 9, 2014) (invalidating Arkansas' ban); *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (invalidating New Jersey's ban). *But see Robicheaux v. Caldwell*, Case 3:13-cv-24068, No. 13-5090 (E.D. La. Sept. 3, 2014) *appeal pending* (granting summary judgment in favor of defendants and upholding the State of Louisiana's marriage ban under a rational basis standard of review).

² See Associated Press, NC Attorney General Won't Defend Gay Marriage Ban Following Va. Ruling, WJLA.com (July 28, 2014), available at <http://www.wjla.com/articles/2014/07/nc-attorney-general-won-t-defend-gay-marriage-ban-following-va-ruling-105530.html> (noting that the North Carolina attorney general announced that the state would no longer defend its marriage ban because to do so in light of *Bostic* would be "futile"); Statement of the Attorney General of Colorado, Oct. 6, 2014, available at [http://www.coloradoattorneygeneral.gov/press/news/2014/10/06/colorado_attorney_general_comments_us_supreme_court_decision_deny_ruling_same_\(announcing_that_Colorado_will_abide_by_the_decision_of_the_10th_Circuit_with_respect_to_Utah_and_Oklahoma's_bans_and_will_begin_issuing_marriage_licenses_shortly\)](http://www.coloradoattorneygeneral.gov/press/news/2014/10/06/colorado_attorney_general_comments_us_supreme_court_decision_deny_ruling_same_(announcing_that_Colorado_will_abide_by_the_decision_of_the_10th_Circuit_with_respect_to_Utah_and_Oklahoma's_bans_and_will_begin_issuing_marriage_licenses_shortly)).

Bostic and London's injuries. Bostic and London therefore possess Article III standing with respect to Schaefer.

Bostic, 760 F.3d at 371. The fact that other defendants may also have been named in *Bostic* was irrelevant to the Fourth Circuit's analysis of the plaintiffs' standing vis-à-vis the Clerk. In this case, as in *Bostic*, the denial of a marriage license to the Plaintiffs "constitutes an injury for standing purposes," and declaring West Virginia's marriage ban unconstitutional and enjoining its enforcement would redress Plaintiffs' injuries. Accordingly, the decision in *Bostic* controls the result in this case on both procedural grounds and the merits.

CONCLUSION

Accordingly, Plaintiffs respectfully pray that this Court deny in full Defendants Cole and McCormick's Motions to Dismiss.

Dated: October 6, 2014

Respectfully submitted,

**CASIE JO MCGEE and SARAH
ELIZABETH ADKINS, et al.**

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UNITED STATES DISTRICT COURT FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2014, I electronically filed the foregoing
“*Motion to Lift Stay and Enter Judgment*” with the Clerk of the Court using the CM/ECF system
which will send notification of such filing to the following CM/ECF participants:

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Exhibit A

(ORDER LIST: 574 U.S.)

MONDAY, OCTOBER 6, 2014

APPEAL -- SUMMARY DISPOSITION

13-1461 BACKUS, VANDROTH, ET AL. V. SOUTH CAROLINA, ET AL.

The appeal is dismissed for want of jurisdiction.

CERTIORARI -- SUMMARY DISPOSITIONS

13-10522 HATCHER, DAVID W. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Paroline v. United States*, 572 U. S. ____ (2014).

13-10790 HALIBURTON, JERRY L. V. FLORIDA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Florida for further consideration in light of *Hall v. Florida*, 572 U. S. ____ (2014).

ORDERS IN PENDING CASES

14A39 MOORE, KEVIN D. V. UNITED STATES

The application for a certificate of appealability addressed to Justice Thomas and referred to the Court is denied.

14A219
(13-10717) GRADY, FRANCIS G. V. UNITED STATES

The application for a stay addressed to Justice Thomas and referred to the Court is denied.

14M1 VO, JACK V. CASH, WARDEN

14-5193 KHAMATI, ELIZABETH M. V. LEW, SEC. OF TREASURY
14-5295 TORKORNOO, BISMARCK K. V. TORKORNOO, MARY
14-5334 PEGO, WAYLON J. V. UNITED STATES
14-5337 HEREDIA, AARON A. V. MARTEL, WARDEN
14-5338 McLAIN, FRANCIS L. V. UNITED STATES
14-5366 MARTIN, KENNETH V. UTTECHT, SUPT., COYOTE RIDGE
14-5399 TILLOTSON, CHRIS V. McCOY, T. J.
14-5403 WHITBY, ADONIS B. V. OPM
14-5433 FLETCHER, REGINA J. V. COLVIN, ACTING COMM'R, SOC. SEC.
14-5450 FLORES, JOHNNIE V. UNITED STATES
14-5593 SUI, YAN, ET UX. V. 2176 PACIFIC HOMEOWNERS ASSN.
14-5624 NAJARRO-RAMIREZ, RONY V. HOLDER, ATT'Y GEN.
14-5644 HAASE, RICHARD A. V. PATENT AND TRADEMARK OFFICE
14-5705 MILLER, GREGORY J. V. CAROLINAS HEALTHCARE SYSTEM
14-5706 ZINNI, RENEE M., ET VIR V. MARSHALL & ILSLEY BANK, ET AL.
14-5850 FOOTE, RONNIE V. MONIZ, SEC. OF ENERGY

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until October 27, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI DENIED

13-254 RUNYON, DAVID A. V. UNITED STATES
13-791 MOORES, JOHN J., ET AL. V. HILDES, DAVID
13-1049 YOWELL, RAYMOND D. V. ABBEY, ROBERT, ET AL.
13-1055 BRANTLEY, CLINTON V. BANKS, IRA, ET AL.
13-1059 ORTEGA, RICHARD V. IMMIGRATION & CUSTOMS
13-1102 ALGER, JARED T. V. CALIFORNIA

14-97 SANCHEZ, LUKE V. LABATE, C., ET AL.
14-98 GILBERT, SANDRA K. V. DONAHOE, POSTMASTER GEN.
14-99 UNGER, MARK S. V. MICHIGAN
14-100 LERNER, JUDGE, ETC., ET AL. V. CORBETT, GOV. OF PA, ET AL.
14-101 WOOD, WINSTON V. INDIANA
14-107 HECTOR, FRED M. V. FARGO, ND
14-109 SMITH, WILLIAM N. V. UNITED STATES
14-112 SINGH, MUKHTIAR V. MICHIGAN
14-113 SINGH, GURBACHAN V. MICHIGAN
14-118 NASELSKY, CHARLES M. V. UNITED STATES
14-121 SCOTT, WILLIAM S. V. FRANKEL, STEVEN A., ET AL.
14-122 COX, JESSEE D. V. UNITED STATES
14-124 HERBERT, GOV. OF UT, ET AL. V. KITCHEN, DEREK, ET AL.
14-125 PRICE, JOHN V. BOTTOM, WARDEN
14-128 RANFTLE, RONALD J. V. LEIBY, J. CRAIG
14-129 PIVER, ANTHONY V. MASSACHUSETTS
14-135 HAINES, MADELYN, ET AL. V. ARTHUR E. LANGE REVOCABLE TRUST
14-136 SMITH, SALLY H. V. BISHOP, MARY, ET AL.
14-141 NORTHERN BUILDING CO., ET AL. V. HANOVER INSURANCE COMPANY
14-143 FARKAS, JANOS V. GMAC MORTGAGE, ET AL.
14-147 DEWALD, JEROME W. V. WRIGGELSWORTH, GENE
14-153) RAINEY, JANET M. V. BOSTIC, TIMOTHY B., ET AL.
)
14-225) SCHAEFER, GEORGE E. V. BOSTIC, TIMOTHY B., ET AL.
)
14-251) McQUIGG, MICHELE B. V. BOSTIC, TIMOTHY B., ET AL.
14-154 LOCKERBY, GLENN V. TUCSON, AZ, ET AL.
14-155 McNEIL, KENNETH C. V. UNITED STATES
14-158 ADAMS, KENDALE L., ET AL. V. INDIANAPOLIS, IN
14-159 BLAKE, ALLEN V. UNITED STATES

14-162 MONZINGO, JOE L. V. McDONALD, SEC. OF VA
14-166 PHELPS, COY V. UNITED STATES
14-169 AYALA-VAZQUEZ, ANGEL V. UNITED STATES
14-170 WHITEHEAD, WILBUR D. V. UNITED STATES
14-174 SETEVAGE, JOHN V. DEPT. OF HOMELAND SEC., ET AL.
14-177 PILLARS, TYRONE V. PALMER, WARDEN
14-188 COLLYARD, GARY A. V. UNITED STATES
14-189 ESQUENAZI, JOEL, ET AL. V. UNITED STATES
14-196 ADAMS, DAVID E. V. HALES CORNERS, WI
14-201 LOS ANGELES, CA, ET AL. V. CHAUDHRY, RUKHSANA, ET AL.
14-202 LISBON, ARTIS V. UNITED STATES
14-205 MEADE, RICHARD D., ET AL. V. UNITED STATES
14-219 WASHINGTON, JERRY W., ET AL. V. COUNTRYWIDE HOME LOANS, INC.
14-222 JAMESON, MICHAEL L. V. SAMUELS, CHARLES E.
14-229 BANKS, DAVID A., ET AL. V. UNITED STATES
14-277) BOGAN, PENNY, ET AL. V. BASKIN, MARILYN R., ET AL.
14-278) WALKER, GOV. OF WI, ET AL. V. WOLF, VIRGINIA, ET AL.
14-5002 SMITH, THOMAS E. V. UNITED STATES
14-5003 TIRADO, FRANCISCO V. NEW YORK
14-5004 WILSON, KELVIN K. V. FLORIDA
14-5005 KRISTON, ZACHARY A. V. PEROULIS, TONY
14-5007 DORSEY, ADRIAN V. UNITED STATES
14-5008 MURPHY, ROBBY A. V. UNITED STATES
14-5009 SOLOMON, JELANI V. UNITED STATES
14-5010 MOSLEY, JERMAINE L. V. UNITED STATES
14-5011 MILLER, TAURUS D. V. BITER, WARDEN
14-5012 MORA, ERNEST A. V. McEWEN, WARDEN
14-5013 GLEASON, MICHAEL V. DINGUS, WARDEN