

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

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

Plaintiffs,

v.

Civil Action No. 3:13-24068

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

Defendants,

and

STATE OF WEST VIRGINIA,

Defendant-Intervenor.

**STATE OF WEST VIRGINIA'S MOTION
TO CONTINUE MERITS STAY AND
TO CALENDAR ORAL ARGUMENT ON THRESHOLD ISSUES**

The State of West Virginia moves this Court: (1) to continue its stay on the merits until after the U.S. Court of Appeals for the Fourth Circuit issues the mandate in *Bostic v. Schaefer*; and (2) to calendar oral argument on the threshold non-merits questions in this case.

ARGUMENT

I. This Court Should Continue To Stay Its Consideration of This Case's Merits.

On June 10, 2014, this Court stayed this case “pending a decision from the Fourth Circuit in *Bostic v. Schaefer*.” Doc. 125 (citing *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir.)). As the order explained, this Court concluded that it was best to await the higher court’s determination because that ruling could be dispositive of the merits in this case. Specifically, the stay was justified by the “overlap in the issues present in that case and the one before this Court.”

Id.

Although the parties had not requested the stay, this Court’s decision was fully consistent with the views of all the parties in this case. Throughout the briefing, all the parties made clear their agreement that this Court should not effectuate any judgment until the Fourth Circuit and the Supreme Court had finally reviewed this case. Plaintiffs expressly volunteered that if they prevailed, they “would not oppose an order staying this Court’s ruling pending appeal by either the State or one or both of the County Clerk Defendants.” Doc. 61 at 17. In turn, the State and Defendant Clerks specifically requested a stay of any decision by this Court in Plaintiffs’ favor. *See* Doc. 67 at 50 (“In the event this Court determines to grant summary judgment to Plaintiffs, the State moves the Court stay the effect of its order until the matter has been fully resolved on appeal.”); Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a).

This Court’s stay has ensured an orderly process for review of West Virginia’s marriage laws while avoiding uncertainty for the public. As other federal district courts have recognized, “[i]t is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes.” *Love v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *14 (E.D. Ky. Mar. 19, 2014). A stay pending complete appellate review “prevent[s]

any legal and practical complications.” *De Leon v. Perry*, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014).

Where district courts have failed to take steps to allow for orderly appellate review, confusion has followed. In Utah, for example, 1400 same-sex couples sought marriage licenses during the time between a federal district court’s decision and the Supreme Court issuing a stay. 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. A second lawsuit ensued to resolve whether these licenses were valid—a lawsuit that would have been unnecessary had the district court issued a prompt stay. See *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *1-4 (D. Utah May 19, 2014). Similar events occurred in Michigan before the Sixth Circuit stayed a district court judgment. See *DeBoer v. Snyder*, No. 14-1341, Stay Order (6th Cir. Mar. 25, 2014); Paul Egan & Tresa Baldas, *Court issues stay on Mich. same-sex marriages*, USA Today (Mar. 23, 2014) <http://www.usatoday.com/story/news/nation/2014/03/22/court-issues-stay-on-mich-same-sex-marriages-/6743367/>.

Yesterday afternoon, the Fourth Circuit issued an opinion in *Bostic* affirming the district court. *Bostic v. Schaefer*, slip op. at 62, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Jul. 28, 2014). Over a dissent, the court concluded that “Virginia’s same-sex marriage bans impermissibly infringe on its citizens’ fundamental right to marry.” *Id.* at 20. In dissent, Judge Niemeyer concluded that “there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it.” *Id.* at 98.

To the extent this Court is now weighing the possibility of lifting its stay order, the State urges the Court to continue to stay its consideration of the merits in this case until the Fourth

Circuit issues the mandate in *Bostic*. As this Court is aware, the Fourth Circuit's decision has no binding legal effect until the mandate issues. See *United States v. Mohamadi*, 10-4704, 2012 WL 5954178 (4th Cir. Aug. 17, 2012) ("This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41."); Fourth Circuit I.O.P. 41.1 ("On the date of issuance of the mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals *takes effect that day*." (emphasis added)). Under the rules, the mandate may issue no earlier than 21 days from the date of decision. See Fed. R. App. P. 41 ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."). That delay is specifically designed to allow parties to seek further relief while the decision is *non-final*. To lift the stay at this time and move forward in this case based on a *non-final* decision of the Fourth Circuit would defeat the very point of this Court having issued the stay in the first place.

Critically, it is highly likely that the Fourth Circuit's mandate will be stayed until the Supreme Court completes its review of the matter. It is expected that numerous parties to the *Bostic* litigation will seek Supreme Court review.¹ At least some of those parties will also seek a

¹ Indeed, consistent with his position that he intends to enforce the Virginia marriage laws while their legality is resolved by the courts, it has been reported that the Virginia Attorney General will file a petition for a writ of certiorari. See Joshua Blackman, *4th Circuit Invalidates Virginia's Same-Sex Marriage Ban, Does Not Stay Ruling*, Josh Blackman's Blog (Jul. 28, 2014), http://joshblackman.com/blog/2014/07/28/4th-circuit-invalidates-virginias-same-sex-marriage-ban-does-not-stay-ruling/?utm_source=dlvr.it&utm_medium=twitter ("the Virginia AG stated that he would file a cert petition"); see also Notice of Change of Position by Def. Janet M. Rainey, *Bostic v. Rainey*, Civ. Action No. 2:13-cv-00395, Doc. 96 (Jan. 23, 2014) ("The Attorney General will not defend the constitutionality of those laws [but] will work to ensure that both sides of the issue are responsibly and vigorously briefed and argued before the courts to facilitate a decision on the merits, consistent with the rule of law. [The State] will continue to

stay of the mandate from the Fourth Circuit and, if necessary, the Supreme Court itself.² *See* Fed. R. App. P. 41(d)(2). Actions by other courts of appeal strongly suggest that the Fourth Circuit will grant such a request. *See, e.g., Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014) (“We STAY our mandate pending the disposition of any subsequently-filed petition for writ of certiorari.”); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014) (“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.”). But if the Fourth Circuit declines to grant a stay, it is very likely that the Supreme Court itself would issue a stay. *See Herbert v. Kitchen*, 134 S. Ct. 893 (U.S. Jan. 6, 2014) (granting Utah a stay pending final disposition of the State’s appeal); *Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014) (staying recognition of same-sex marriage licenses pending appeal).³

enforce the provisions of Virginia law at issue until the judicial branch can render a decision in this matter.”).

² Robert Barnes & Jenna Portnoy, *Appeals court upholds decision overturning Virginia’s same-sex marriage ban*, Wash. Post (July 28, 2014), http://www.washingtonpost.com/politics/courts_law/appeals-court-upholds-decision-overturning-virginias-same-sex-marriage-ban/2014/07/28/02764842-167e-11e4-85b6-c1451e622637_story.html (“[Virginia Attorney General] Herring said he does not favor same-sex marriages taking place in Virginia while the legal issue is ongoing.”)

³ The *Bostic* case will be one of many cases on petitions for certiorari before the Supreme Court in the very near future. Earlier this month, the State of Utah announced its intention to seek Supreme Court review of the Tenth Circuit’s decision in *Kitchen* speaking to these constitutional questions. *See, e.g.,* Michael Winter, *Utah to appeal gay marriage case to Supreme Court*, USA TODAY (July 9, 2014), <http://www.usatoday.com/story/news/nation/2014/07/09/utah-gay-marriage-supreme-court/12424151/>.

II. This Court Should Set Argument On The Jurisdictional And Procedural Issues

Although a stay is warranted on the merits in light of the “overlap[ping]” constitutional issues, there is little benefit to delaying resolution of the threshold jurisdictional and procedural questions in this case. As this Court recognized early in this case, the responsible West Virginia state officials are absent from this case and their absence raises serious jurisdictional and procedural questions. In its first ruling in this case on January 29, 2014, this Court expressed “concern[] as to whether the State’s inclusion as an Intervenor Defendant—represented by the Attorney General—is sufficient to support jurisdiction.” Doc. 56 at 13. The Court thus directed Plaintiffs to either “seek joinder of ... additional parties” or “file a responsive pleading explaining ... why joinder of additional parties is not necessary.” *Id.* The parties briefed these issues thoroughly and the State filed a motion to dismiss for lack of jurisdiction. Doc. 88 (Pl. Response); 89 (Pl. Opposition); Doc. 92 (Def. Reply); Doc. 100-101 (Def. Replies).⁴

The *Bostic* case and other similar cases working toward the Supreme Court do not have the core problem that is present in this case: the absence of the state officials charged under state law with the administration of state marriage laws. Indeed, other courts have held that the *presence* of such state officials as defendants have given rise to jurisdiction to consider the merits. *E.g., Kitchen*, 2014 WL 2868044 at * 4-7 (holding that standing exists to challenge the state marriage laws where the defendants include the state governor in charge of directing state agencies to issue licenses for and recognize same-sex marriages); *Bostic*, slip op. at *33 (holding

⁴ In total, the threshold issues in this case raised by the State are contained in: (1) the State of West Virginia’s Motion To Dismiss For Lack Of Subject-Matter Jurisdiction Due To Failure To Join The Proper Defendants, *see* Doc. 85-86; (2) the supplemental briefing filed in response to this Court’s Order of January 29, 2014, *see* Docs. 84, 86; and (3) the State of West Virginia’s Motion for Summary Judgment, *see* Docs. 66-67 (arguing that this Court lacks jurisdiction to enjoin West Virginia Code § 48-2-104(c) and the proper parties).

that the plaintiffs' "injuries are traceable to" the defendant state registrar's "enforcement of the Virginia Marriage Laws").

The State respectfully requests that the Court calendar argument on the jurisdictional and procedural questions while this matter is stayed on the merits. A ruling on those issues will benefit all the parties, as it will resolve whether additional steps must be taken before this Court may consider applying the eventual ruling in *Bostic* to West Virginia's laws on the merits. To select a date for argument, this Court could convene a status conference by telephone with all counsel.

Respectfully submitted,

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Dated: July 29, 2014

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CERTIFICATE OF SERVICE

I, Elbert Lin, counsel for the State of West Virginia, hereby certify that on July 29, 2014, I electronically filed the foregoing *State Of West Virginia's Motion To Continue Merits Stay And To Calendar Oral Argument On Threshold Issues* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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