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,

Applicant,

v.

Timothy B. Bostic, et al.,

Respondents.

Reply in Support of 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

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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:

Michèle B. McQuigg, in her official capacity as Prince William County Clerk of Circuit Court, respectfully submits this reply in support of her application to stay the Fourth Circuit's mandate pending the final disposition of all timely filed petitions for a writ of certiorari.

ARGUMENT

Respondents agree that the standard this Court outlined in *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam), governs here, *see* Bostic Response at 4, and do not dispute that four Justices will consider the question presented worthy of this Court's review. Their arguments on the remaining factors are unpersuasive.

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

By issuing the stay in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), this Court already indicated that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below" and uphold the man-woman marriage laws enacted throughout the various States. *See Hollingsworth*, 558 U.S. at 190. The lower-court decisions that have issued since *Herbert v. Kitchen*, a point emphasized by Respondents (*see* Bostic Response at 10-11; Harris Response at 10), do not eliminate *this Court's own prior assessment* that litigants defending man-woman marriage laws have a fair prospect of succeeding on appeal.

In arguing that government officials defending man-woman marriage laws have no chance of success on appeal, Respondents rely heavily on lower-court rulings decided

after *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See* Bostic Response at 7; Harris Response at 2, 9. But *Windsor* does not undermine the States' man-woman marriage laws. Indeed, *Windsor* expressly confined its "holding" and "opinion" to the peculiar situation where the federal government refused to recognize "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96; *see also id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States . . . may continue to utilize the traditional definition of marriage.").

The Court there emphasized that "[t]he State's power in defining the marital relation [wa]s of *central relevance* in th[at] case," *id.* at 2692 (emphasis added), because the federal government unusually "depart[ed] from [its] history and tradition of reliance on state law to define marriage," *id.* Here, in contrast, States that have retained the man-woman marriage definition have not departed from, but have simply reaffirmed, their history and tradition on marriage. Therefore, in this case, the State's authority over marriage "come[s] into play on the other side of the board," *id.* at 2697 (Roberts, C.J., dissenting), and bolsters the constitutionality of the challenged marriage laws. Accordingly, the lower courts that have read *Windsor* to condemn States' man-woman marriage laws have done so in error, and thus those decisions do not undercut the fair prospect that a majority of this Court will vote to reverse the judgment below.

Tellingly, even though Registrar Rainey believes "that the Fourth Circuit's ruling was correct," she admits that "sufficient uncertainty" surrounding that decision

"satisf[ies] the 'fair prospect' standard." Rainey Response at 2.[1] "That the Court views the controversial question posed here as an open one," Registrar Rainey explains, is "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." *Id.* at 5. There is thus a fair prospect that this Court will reverse the judgment below.

II. Irreparable Harm Will Result from Denying the Stay.

Respondents do not deny that enjoining the enforcement of Virginia's man-woman marriage laws will inflict "a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (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)). Standing alone, that (implicitly conceded) harm satisfies the "irreparable harm" prong of this Court's stay analysis.

Unable to dispute this irreparable injury, the Bostic and Harris Respondents mischaracterize the gravity of the harm by reducing it to a prohibition on public officials "enforc[ing] democratically enacted laws," Bostic Response at 8, or "seeing the state's

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[1] When attempting to justify the Fourth Circuit's decision, Registrar Rainey incorrectly asserts that this Court in *Windsor* already rejected "the same justifications offered by Judge Niemeyer and Clerk McQuigg" in support of Virginia's man-woman marriage laws. *See* Rainey Response at 3-4. As *Windsor* itself recognized, the federal government has "no authority . . . on the subject of marriage." 133 S. Ct. at 2691 (internal quotation marks omitted). Thus, when Congress raised various marriage-related interests, those interests were not legitimate because they fell outside Congress's authority. In contrast, the States, which have "essential authority to define the marital relation," *id.* at 2692, advance various legitimate and compelling interests through their regulation of man-woman marriage.

law enforced," Harris Response at 13. But the decision below, by erasing Virginia's enduring marriage definition, would silence the voice of countless Virginians—including the more than 1.3 million who approved the Commonwealth's marriage definition and sought to "shap[e] the destiny of their own times" on marriage. *Windsor*, 133 S. Ct. at 2692. It would eradicate their "fundamental right" "to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process" on this profoundly important question of public policy. *See Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014). This concrete harm to citizens throughout the Commonwealth will unquestionably occur in the absence of the requested stay.

Because this irreparable injury is irrefutable, the Bostic and Harris Respondents shift the focus to themselves, claiming that they will experience irreparable harm *if* the stay is granted and *if* they ultimately prevail in this lawsuit. *See* Bostic Response at 9-10; Harris Response at 14. Yet the "irreparable harm" analysis considers the "likelihood that irreparable harm will result from the *denial* of a stay"—not the *granting* of one. *Hollingsworth*, 558 U.S. at 190 (emphasis added); *accord King*, 133 S. Ct. at 2 (Roberts, C.J., in chambers) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)); *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) ("a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued").

III. The Balance of the Equities Weighs in Clerk McQuigg's Favor.

Because the primary three factors of the stay analysis weigh decidedly in Clerk McQuigg's favor, her stay application does not present a "close case[]," and the Court

need not "balance the equities [or] weigh the relative harms to the applicant and to the respondent[s]." *See Hollingsworth*, 558 U.S. at 190.

Nevertheless, the balance of the equities warrants a stay. While the Bostic Respondents argue that confusion and "uncertainty" would "fall[]" only "on those same-sex couples who choose to marry before this Court has ruled," Bostic Response at 9, the uncertainty would, as Registrar Rainey explains, affect countless "third parties," such as "[e]mployers and insurers," and government agencies and officials, like "the Virginia Department of Taxation," Rainey Response at 10-11. Should this Court uphold the validity of man-woman marriage laws, undoing all that follows as a consequence of the Fourth Circuit's mandate would, in the words of Registrar Rainey, "pose a wrenching and insurmountable task." *Id.* at 11.

Unable to diminish the harm identified by Clerk McQuigg, the Bostic Respondents argue that they would experience irreparable harm if a stay is issued. *See* Bostic Response at 9-10. But Mr. Bostic himself has publicly stated that "waiting another six months . . . is not that big of an issue." Rainey Response at 9 (internal quotation marks omitted); *see also* Peter Dujardin, *Allies Diverge on Whether Supreme Court Should Delay Same-Sex Marriage Ruling*, DailyPress, Aug. 19, 2014, http://www.dailypress.com/news/dp-nws-nn-request-for-stay-20140818,0,1376310.story ("No matter [whether the Court grants a stay], Tim Bostic and Tony London . . . say they will wait until the Supreme Court hands down its final ruling."). "By contrast," Registrar Rainey affirms, declining to stay the mandate "would be a very 'big issue' for the Commonwealth and third parties" throughout Virginia. Rainey Response at 9.

The balance of the harms thus reduces to this: the Bostic and Harris Respondents have identified *potential* harms (e.g., a delay in obtaining state recognition of their relationships) that will result only if they ultimately prevail in this case, whereas Clerk McQuigg and Registrar Rainey have identified *certain* harms (e.g., enjoining a duly enacted state constitutional provision) that will result as soon as the Fourth Circuit issues its mandate. That balance tips sharply in favor of staying the Fourth Circuit's mandate.

The Bostic Respondents argue that balancing the equities in this case differs from *Herbert v. Kitchen*, claiming that "the Commonwealth has no legitimate interest in" enforcing its laws because the Virginia Attorney General here, unlike the Utah Attorney General in *Herbert*, believes that the challenged laws are unconstitutional. *See* Bostic Response at 11. For purposes of this stay inquiry, however, the proper question is whether Registrar Rainey intends to *enforce* the Commonwealth's man-woman marriage laws pending appeal (not the Attorney General's views about those laws' constitutionality). In that respect, *Herbert v. Kitchen* is indistinguishable from this case. Indeed, Registrar Rainey, like the Utah state officials in *Herbert v. Kitchen*, has made it clear that she "will continue to enforce [the challenged marriage laws] until a definitive judicial ruling can be obtained" from this Court. *See* Rainey Response to Stay Motion at 6, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. Aug. 5, 2014). Therefore, the cases are not distinguishable for purposes of granting a stay, and this Court should follow what it did in *Herbert*.

The Harris Respondents, for their part, argue that although confusion and uncertainty occurred in Utah because the state officials continued enforcing their man-

woman marriage laws after this Court stayed the district court's injunction, "there is [no] reason to believe [that] would recur here." Harris Response at 12. On the contrary, there is every reason to think that would happen here because, as stated above, the Virginia Attorney General has indicated that Registrar Rainey will continue to enforce the challenged marriage laws until this Court finally resolves this case.[2]

The Harris Respondents additionally argue that this Court's stay orders in *Herbert* and *Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014), are "distinguishable because they stayed district court judgments that had not yet been reviewed by the court of appeals." Harris Response at 11. But the same analysis applies whether the applicant asks this Court to stay a district court's order or a court of appeals' mandate. *Compare Conkright*, 556 U.S. at 1402 (Ginsburg, J., in chambers) (outlining the standard for analyzing an application for a stay of a court of appeals' mandate), *with Hollingsworth*, 558 U.S. at 189-90 (outlining the same standard for analyzing "an application for a stay of the District Court's order"). And the same reasons why this Court has stayed a district-court judgment that enjoins a State's man-woman marriage laws—e.g., providing for the orderly administration of justice, maintaining the status quo until the case is finally decided, and avoiding the irreparable harm, confusion, and

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[2] The Harris Respondents also argue that California's experience with a temporary redefinition of marriage in 2008 shows that confusion and uncertainty will not result in Virginia. *See* Harris Response at 12 n.3. But those circumstances were very different from the facts at hand. California issued marriage licenses to same-sex couples pursuant to a *final* decision of the California Supreme Court construing state law. *See In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). Here, however, absent the requested stay, public officials in the Commonwealth would issue marriage licenses to same-sex couples pursuant to a district-court decision that is still subject to this Court's review.

uncertainty that will likely result from prematurely upending the status quo—equally compel this Court to stay a court of appeals' mandate affirming such a judgment. Moreover, this Court granted the stay in *Herbert v. Evans* even after the Tenth Circuit had already declared Utah's man-woman marriage laws unconstitutional in *Kitchen v. Herbert*. Therefore, that stay order, as Registrar Rainey notes, "makes sense only if this Court is reserving to itself the final decision on whether the Constitution prohibits States from" defining marriage as the union of a man and a woman. Rainey Response at 7.[3]

CONCLUSION

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

[3] The Court converts stay applications to petitions for a writ of certiorari "only where an obvious emergency calls for expedition by the Court." Eugene Gressman et al., Supreme Court Practice 418-19 (9th ed. 2007); *see, e.g.*, *Nken v. Holder*, 556 U.S. 418, 423 (2009) (converting stay application to petition for a writ of certiorari where the applicant was to be deported and where he "asked in the alternative that [the Court] grant certiorari"); *Barefoot v. Estelle*, 459 U.S. 1169 (1983) (converting stay application to petition for a writ of certiorari where the applicant was to be executed one day later). Should the Court determine that such an emergency exists here, Clerk McQuigg does not oppose treating her application as a petition for a writ of certiorari.

Dated: August 19, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2014, I caused the foregoing Reply in Support of Application to Stay Mandate Pending Appeal to be served on the following counsel via electronic mail and First-class United States mail (postage prepaid):

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