Record Nos. 14-1167 (L), 14-1169, 14-1173

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC; TONY C. LONDON;
CAROL SCHALL; and MARY TOWNLEY,

Plaintiffs – Appellees,

CHRISTY BERGHOFF, JOANNE HARRIS, JESSICA DUFF, and
VICTORIA KIDD, on behalf of themselves and others similarly situated,

Intervenors,

v.

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for
Norfolk Circuit Court; and JANET M. RAINEY, in her official capacity as State
Registrar of Vital Records,

Defendants – Appellants,

MICHÈLE McQUIGG, in her official capacity
as the Clerk of Court for Prince William County Circuit Court,

Intervenor – Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia (Norfolk Division)

RESPONSE OF JANET M. RAINEY TO INTERVENOR-APELLANT'S
MOTION TO STAY THE MANDATE PENDING CERTIORARI

There are three reasons the Court should stay the mandate pending the disposition of petitions for certiorari to the United States Supreme Court. First, the Supreme Court has twice issued stays of injunctions invalidating State same-sex-marriage bans under circumstances materially indistinguishable from this case. Second, if the Supreme Court should reverse this Court's decision, unwinding marriages that occur without a stay and restoring the celebrants and third parties to the status quo ante would present wrenching and intractable problems. Third, the controversy will likely be resolved in the next term of the Supreme Court, and to minimize delay, Rainey intends to file her own petition for certiorari this Friday.

ARGUMENT

Rule 41 of the Federal Rules of Appellate Procedure provides that a motion to stay the mandate "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Local Rule 41 adds that a motion to stay the mandate "[o]rdinarily . . . shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay." Loc. R. 41 (4th Cir).

Clerk McQuigg has sufficiently demonstrated that her plan to file a petition for certiorari is not frivolous and not interposed merely for delay, and that the petition for certiorari will present a substantial question. Indeed, the appeal raises the same question on which the Supreme Court granted certiorari in *Hollingsworth*

v. Perry, but the Court dismissed that case, for lack of standing, without determining whether California's same-sex-marriage ban (Proposition 8) was unconstitutional. 133 S. Ct. 2652 (2013). Accordingly, the baseline standards of Rule 41 have been satisfied.

Three additional considerations, however, strongly support a stay.

I. The Supreme Court's stays in *Kitchen II* and *Evans* require that the mandate be stayed here as well.

The debate over the traditional four-factor test engaged in by the parties is eclipsed by the fact that the Supreme Court has twice stayed injunctions blocking a State's same-sex-marriage ban under circumstances that cannot be materially distinguished from this case. In *Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (U.S. July 18, 2014) ("*Evans*"), the Supreme Court just recently stayed the district court's injunction that would have required Utah to recognize hundreds of same-sex marriages. The marriages had been celebrated during the three-week window from December 20, 2013, when the district court struck down Utah's same-sex-marriage ban and enjoined its enforcement, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) ("*Kitchen I*"), until January 6, 2014, when the Supreme Court stayed that injunction pending disposition of the appeal to the Tenth Circuit, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) ("*Kitchen II*").

While there was no opinion in *Evans* to explain the Supreme Court's thinking, the Court stayed the injunction even though the Tenth Circuit had already

issued its decision striking down Utah's same-sex-marriage ban. *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014) ("*Kitchen III*"). And the stay issued despite arguments that the interim marriages were valid without regard to whether Utah's marriage ban ultimately would be upheld by the Supreme Court. *See* Lyle Denniston, *Utah challenges "interim" same-sex marriages* (July 17, 2014), http://www.scotusblog.com/2014/07/utah-challenges-interim-same-sex-marriages/.

It is difficult to conceive of an explanation for the Supreme Court's stays in *Kitchen II* and *Evans* that does not also call for a stay in this case as well. Indeed, the Tenth Circuit panel that struck down Utah's ban in *Kitchen III* concluded, *sua sponte*, that a stay was appropriate pending the disposition of petitions for certiorari in "consideration of the Supreme Court's decision" in *Kitchen II*. 2014 U.S. App. LEXIS 11935, at *97. The Tenth Circuit again stayed its mandate when it struck down Oklahoma's same-sex-marriage ban. *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733, at *71 (10th Cir. July 18, 2014).

The Sixth Circuit similarly stayed the injunction striking down Michigan's same-sex-marriage ban, finding *Kitchen II* to be controlling. *DeBoer v. Snyder*, No. 14-1341, 2014 U.S. App. LEXIS 7259 (6th Cir. Mar. 25, 2014). The court of appeals could find "no apparent basis to distinguish" it. *Id.* at *4. And the Ninth Circuit stayed the injunction striking down Idaho's same-sex-marriage ban in *Latta*

v. Otter, No. 14-35420 (9th Cir. May 20, 2014) (ECF No. 11). Judge Hurwitz wrote a concurring opinion explaining that he joined in issuing the stay because *Kitchen II* "has virtually instructed courts of appeals to grant stays in the circumstances before us today." *Id.* at 3 (Hurwitz, J., concurring).

Similarly, in staying its injunction striking down Wisconsin's same-sex-marriage ban, the district court in *Wolf v. Walker* said that if it were considering the four-factor test "as a matter of a first impression," it "would be inclined to agree" that no stay was warranted. No. 14-cv-64, 2014 U.S. Dist. LEXIS 82242, at *17 (W.D. Wis. June 13, 2014). But the court said it "cannot ignore the Supreme Court's order in" *Kitchen II*. *Id.* The court found it difficult to impose the stay after having seen "the expressions of joy on the faces of so many newly wedded couples featured in media reports." *Id.* at *19. But since there was "no way to distinguish" the case from *Kitchen II*, the court was obliged "to follow the guidance provided by the Supreme Court." *Id.*

II. A stay is warranted to avoid the intractable problems that would otherwise result if the Supreme Court were to reverse the Fourth Circuit's decision.

In urging that the mandate issue now so the injunction can take immediate effect, the *Bostic* plaintiffs mistakenly assert that the "risk of uncertainty falls on those same-sex couples who choose to marry before the Supreme Court has ruled, rather than on . . . the Commonwealth." Bostic Opp. 4. That assertion overlooks

the myriad difficulties that would be confronted by the Commonwealth, local governments, and private parties in Virginia if no stay is in place and the Supreme Court reverses this Court's decision.

Those problems were discussed at oral argument in the district court. (JA 292-94.) Virginia state government and Virginia courts, for example, would confront having to:

- revoke adoptions by same-sex couples;
- require birth and death certificates to be revised;
- require same-sex couples filing joint tax returns to file corrected returns;
- referee disputes between surviving same-sex partners and other claimants with regard to distributions from a decedent's estate;
- reconsider the portion of a wrongful death award made to a surviving same-sex spouse; and
- determine whether same-sex couples who were married in the interim are precluded from marrying again without first seeking a divorce.

Likewise, employers and third parties would face significant legal uncertainty with regard to whether they could seek (or would have to seek) restitution of benefits conferred on an employee or same-sex partner by virtue of a marriage that was later deemed invalid. Countless other scenarios presenting difficult challenges would likely arise.

The "formula cannot be reduced to a set of rigid rules." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). When practical problems present such bedeviling

complexity, staying the mandate is the more prudent course. Such problems may well explain why the Supreme Court issued stays in both *Evans* and *Kitchen II*.

III. To avoid any further delay, Rainey is filing her own petition for certiorari to expedite the resolution of this controversy.

Clerk McQuigg has not indicated *when* during the 90-day period she plans to file her petition for certiorari. We are confident that Clerk McQuigg plans to take this case to the Supreme Court, but we do share the Bostic and Harris parties' concern that the appeal be prosecuted as quickly as possible.

To that end, Rainey intends to file her own petition for certiorari on Friday, August 8, to enable the Supreme Court to consider this case at its September conference. As the Supreme Court squarely held in *United States v. Windsor*, "even where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for [appellate] jurisdiction in the fact that the Government intend[s] to enforce the challenged law against that party.'" 133 S. Ct. 2675, 2686-87 (2013) (quoting *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983)). The Attorney General has made clear that, while he has concluded that Virginia's same-sex-marriage ban is unconstitutional, Rainey will continue to enforce it until a definitive judicial ruling can be obtained. (JA 244.) Because the controversy is not over yet, the Attorney General will continue do whatever he can to enable the Supreme Court to decide

the question as soon as possible. The speed with which this controversy may now be resolved presents an additional reason to stay the mandate in the interim.

CONCLUSION

This case has moved with unusual speed. It was argued in the district court in February and in this Court in May, and it is now ready for review by the Supreme Court. Speed is warranted, for it is unjust for Virginia's same-sex couples to have to wait even a little while longer for the promise of the Fourteenth Amendment to be fulfilled. As this Court observed, across the Commonwealth, more than 2,500 same-sex couples are raising more than 4,000 children. They are our fellow Virginians. And the Attorney General is committed to ensuring that the government stops treating them as second-class citizens.

It is with great reluctance, therefore, that the Attorney General agrees that a stay is warranted. The unintended consequences that will befall the Commonwealth and its people if the injunction takes effect prematurely, and the clear signal sent by *Evans* and *Kitchen II*, show the necessity of staying the mandate until the Supreme Court can conclusively resolve what may well be the most important civil rights issue of our time.

We are nearly there.

Respectfully submitted,

JANET M. RAINEY, in her official capacity,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a copy to counsel of record.

/s/
Stuart A. Raphael