IN THE 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, *ex rel.* PATRICK MORRISSEY, ATTORNEY GENERAL, Intervenor-Defendant.	No. 3:13-cv-24068 Hon. Robert Chambers

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT STATE OF WEST VIRGINIA'S MOTION TO CONTINUE MERITS STAY AND CROSS-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 respectfully request that this Court (1) deny Defendant-Intervenor State of West Virginia's Motion to Continue

Merits Stay (D.E. 126); (2) lift the stay of proceedings entered on June 10, 2014 (D.E. 125); and (3) enter judgment in favor of the Plaintiffs on their Motion for Summary Judgment (D.E. 40) based on the Fourth Circuit's decision in *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (4th Cir. July 29, 2014).

Plaintiffs strongly oppose further stay of this matter. The State's motion grossly misrepresents Plaintiffs' position in this case, and conflates two entirely distinct concepts: a stay of the Court's consideration of the merits in this case pending adjudication of *Bostic* by the Fourth Circuit—which is no longer necessary by virtue of that Court's decision—and a stay *pending appeal* of any judgment by this Court in Plaintiffs' favor. While Plaintiffs have agreed that they would not object to the latter[1], Plaintiffs have never and would never agree to halt these proceedings for the *entirety* of any further proceedings in the Fourth Circuit and even the Supreme Court in the *Bostic* case.

Furthermore, the stay requested by the State is entirely unwarranted—there is no reason why these Plaintiffs should be deprived of determination of their claims for months or potentially years because parties in other states are also litigating similar claims. Delaying justice for these Plaintiffs based on the timetable of other parties and other courts is fundamentally unfair and violates Supreme Court and Fourth Circuit precedent, as set forth below. Moreover, inherent in the State's argument for a stay is the notion that the result in this case is controlled by *Bostic*. If the State will not concede that, and instead intends to distinguish West Virginia's marriage ban from the Virginia marriage ban found unconstitutional in *Bostic*, then surely the State cannot fairly ask this Court to stay Plaintiff's claims in this case. And if the State *will* make that

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[1] *See* Memorandum of Law in Response to Court's Order of January 29, 2014 (D.E. 61) at 17 ("Plaintiffs would not oppose an order staying this Court's ruling *pending an appeal*" (emphasis added)).

concession, then there is no reason why this Court cannot simply enter judgment in Plaintiffs' favor now based on the Fourth Circuit's decision in *Bostic*.

Now that the Fourth Circuit has resolved the merits issues presented by this case, this Court may proceed without delay to enter judgment in Plaintiffs' favor. Indeed, the Fourth Circuit's decision *underlines* the urgency of a speedy and full resolution of this case on the merits, so as to more expeditiously cure the constitutional violation that Plaintiffs continue to suffer. This Court appears to have recognized as much in its order entering a stay, as the Court did not enter such a stay until the Fourth Circuit's *mandate* issued, but solely until "a decision from the Fourth Circuit in *Bostic v. Schaefer*." Order (D.E. 125) at 1. With that decision now in hand, there is no reason to delay any further.

I. *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*, 2014 WL 3702493, at *1 n.1 (4th Cir. July 29, 2014) (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*, 2014 WL 3702493, at *8. 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*, 2014 WL 3702493, at *9-10 ("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 *9.

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 *11-12.

- 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 *12.

- 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 *13.

- 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 *14-15.

- 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 *17.

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 *17. 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 thirteen months since *Windsor* was decided.[2] Not one court has upheld such a ban against constitutional challenge. In light of *Bostic*, West Virginia's marriage ban should similarly 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

[2] *See 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); *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); *Pareto v. Ruvin*, No. 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); *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).

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

Id. at *4. The fact that other defendants may also have been named in *Bostic* was irrelevant to the Fourth Circuit's analysis here. 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.

II. No Further Stay Is Warranted.

There is no justification for any continued delay in the adjudication of this case. If anything, the Fourth Circuit's decision underscores the significant harm inflicted on same-sex couples by their exclusion from marriage, and calls for it to be eliminated as soon as practicable:

> 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.

At least one other state attorney general in the Fourth Circuit has recognized the importance of the *Bostic* decision: the North Carolina attorney general has announced since the decision that the continued defense of any such lawsuits would be "futile." Associated Press, NC Attorney General Won't Defend Gay Marriage Ban Following Va. Ruling, WJLA.com (July 28, 2014),

available at: http://www.wila.com/articles/2014/07/nc-attorney-general-won-t-defend-gay-marriage-ban-following-va-ruling-105530.html.

Indeed, by its very decision to adjudicate the *Bostic* case, the Fourth Circuit has implicitly rejected the course of action that the State suggests here—an indefinite stay of a related proceeding pending a petition for certiorari and/or *en banc* motions. As this Court is likely aware, by the time of the Fourth Circuit's decision, the Tenth Circuit had already decided that Utah's marriage ban was unconstitutional, and Utah had already announced its intention to file a petition for certiorari. *See Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014); Zusha Elinson and Ashby Jones, Utah Will Ask Supreme Court To Hear Gay Marriage Case, *Wall Street Journal* (July 9, 2014), *available at:* http://online.wsj.com/articles/utah-will-ask-supreme-court-to-hear-gay-marriage-case-1404959164. The Fourth Circuit did not simply wait until Utah filed its petition, or the eventual results of that petition, even though *Kitchen* presents similar issues. Rather, it fully adjudicated the case on the merits—as other circuits are also doing (including the Sixth, Seventh, and Ninth, which have oral arguments scheduled for August or September). Indeed, some district courts have continued to adjudicate marriage equality cases even though other cases in that Circuit are already pending on appeal. *See, e.g.*, *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014) (striking down marriage ban while similar cases from Nevada and Hawai'i were pending before Ninth Circuit); *Love v. Beshear*, No. 3:13-cv-750-H, 2014 WL 2957671 (W.D. Ky. July 1, 2014) (striking down marriage ban while similar decisions from Michigan and Ohio were pending before Sixth Circuit).

These results are consistent with the standard for granting a stay in circumstances such as this. "'Only in rare circumstances will a litigant in one cause be compelled to stand aside while a

litigant in another settles the rule of law that will define the rights of both.'" *Maryland v. Universal Elections, Inc.* 729 F.3d 370, 379 (4th Cir. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). "[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005); *see also Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 128, (4th Cir. 1983) (noting that a "clear case of hardship or inequity" must be found in order to enjoin proceedings).

Simply put, the State has articulated *no cognizable prejudice* from proceeding on the merits of Plaintiffs' claims—indeed, the State effectively concedes that this Court may adjudicate at least a part of this proceedings by suggesting oral argument on the pending procedural issues. The only inchoate prejudice that the State alleges – confusion about the effect of this Court's decision on lesbian and gay families – would entirely be avoided by a stay of judgment pending appeal in this case, something that Plaintiffs already concede this Court may do.[3]

CONCLUSION

Accordingly, Plaintiffs request that this Court lift the stay it has entered in this case, deny the State's motion for a further stay, and enter judgment for the Plaintiffs in accordance with the Fourth Circuit's decision in *Bostic*.

[3] Further, to the extent that this Court determines that a continued stay of this matter is appropriate, it should do so only until the termination of *en banc* proceedings in *Bostic*. Whatever rationale the Court might find compelling is significantly less so for the long period during which a petition for certiorari may pend with the U.S. Supreme Court.

Dated: July 30, 2014

Respectfully submitted,

CASIE JO MCGEE and SARAH ELIZABETH ADKINS, et al.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2014, I electronically filed the foregoing "Plaintiffs' Motion to Lift Stay and For Entry of Judgment," along with the accompanying exhibits, 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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