

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

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**TIMOTHY B. BOSTIC, et al.,**

*Plaintiffs-Appellees,*

and

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

*Intervenors-Appellees,*

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,*

and

**MICHÈLE B. MCQUIGG,** in her official capacity as Prince William County Clerk of Circuit Court,

*Intervenor/Defendant-Appellant.*

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**THE HARRIS CLASS'S OPPOSITION TO  
APPELLANT MICHÈLE B. MCQUIGG'S  
MOTION TO STAY THE MANDATE**

Intervenors Christy Berghoff, Joanne Harris, Jessica Duff, and Victoria Kidd, on behalf of themselves and all others similarly situated (the “*Harris class*”), oppose Appellant Michelle McQuigg’s Motion to Stay the Mandate.

Pursuant to F.R.A.P. 41(d)(2) and Local Rule 41, a party seeking a stay of the mandate pending motion for a petition for certiorari “must show that the certiorari petition would present a substantial question and that there is good cause for a stay.” The *Harris class* agrees that a substantial question is presented, but disputes that there is good cause for a stay. Specifically, as this Court recognized, Virginia’s marriage bans impose severe and ongoing harm on members of the *Harris class*, while advancing no legitimate government interests.

In determining a motion to stay the mandate, courts of appeal consider “whether there is a reasonable probability that the Supreme Court will grant certiorari, whether there is a fair prospect that the movants will prevail on the merits, whether the movants are likely to suffer irreparable harm in the absence of a stay, and the balance of the equities, including the public interest.” *Doe v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005) (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308, 65 L. Ed. 2d 1098, 101 S. Ct. 1 (1980) (Brennan, J., in chambers); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers)).

Even assuming that the Supreme Court will grant a writ of certiorari, three out of the four factors still counsel against granting a stay. First, the movants do not appear to have a “fair prospect” of prevailing on the merits. Every one of the federal court decisions rendered on the issues presented in this case to date have found state laws denying same-sex couples the freedom to marry or denying recognition to marriages entered by same-sex couples in other jurisdictions to be unconstitutional. *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 U.S. App. LEXIS 13733, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935, 2014 WL 2868044 (10th Cir. June 25, 2014); *Love v. Beshear*, No. 3:13-cv-750-H, 2014 U.S. Dist. LEXIS 89119, 2014 WL 2957671 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 2014 U.S. Dist. LEXIS 86114, 2014 WL 2884868 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 2014 WL 2558444 (W.D. Wis. 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 U.S. Dist. LEXIS 68771, 2014 WL 2058105 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 U.S. Dist. LEXIS 68171, 2014 WL 2054264 (D. Or. May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 U.S. Dist. LEXIS 66417, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, 2014 U.S. Dist. LEXIS 51211, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *Tanco v. Haslam*, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn.

Mar. 14, 2014); *Bourke v. Beshear*, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 647-49 (W.D. Tex. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

Additionally, the balance of equities and the public interest weigh heavily against staying the mandate. The *Harris* Class consists of approximately 14,000 same-sex couples, who would suffer irreparable harm if the mandate is stayed pending resolution of a petition for certiorari. While those petitions are pending, children may be born, people may die, and loved ones may fall unexpectedly ill.<sup>1</sup> More generally, as this Court recognized, “[t]he Virginia Marriage Laws erect . . . a barrier, which prevents same-sex couples from obtaining the emotional, social, and financial benefits that opposite-sex couples realize upon marriage,” Op. 31-32,<sup>2</sup> and “prohibit[] them from participating fully in our society.” Op. 63. These irreparable harms are visited not only upon the plaintiff couples, but upon their children as well. “[B]y preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by

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<sup>1</sup> Indeed, within hours after McQuigg's motion to stay was mentioned in the media, counsel received a communication from a member of the *Harris* class who is struggling with cancer and who needs the Court's ruling to go into effect in order to benefit from the health insurance of her wife, a state employee.

<sup>2</sup> Citations to “Op.” refer to the Court’s opinion in this case dated July 28, 2014, ECF #234.

stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters.” Op. 60.

By contrast, this Court has found that Virginia has no legitimate interest in continuing to enforce its discriminatory marriage laws. None of the purported interests advanced by the defendants justifies withholding marriage from the plaintiffs. *See* Op. 48 (“Virginia’s federalism-based interest in defining marriage . . . cannot justify its encroachment on the fundamental right to marry”); Op. 51 (“Preserving the historical and traditional status quo is . . . not a compelling interest that justifies the Virginia Marriage Laws”); Op. 53 (“we have no reason to think that legalizing same-sex marriage will have a . . . destabilizing effect. In fact, 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”); Op. 59 (“barring same-sex couples’ access to marriage does nothing to further Virginia’s interest in responsible procreation”); Op. 61-62 (“The Virginia Marriage Laws . . . do not further Virginia’s interest in channeling children into optimal families, even if we were to accept the dubious proposition that same-sex couples are less capable parents.”) Because Virginia’s discrimination against same-sex couples does not advance any government interests, it follows that the government will not be irreparably harmed if the stay is denied and the district court injunction becomes effective.

Finally, “upholding constitutional rights surely serves the public interest.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4<sup>th</sup> Cir. 2002); accord *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). The public interest is also served by ensuring that all parents who wish to marry are able to raise their children in families that are afforded the full legal protections of marriage.

McQuigg’s arguments do not alter this conclusion. McQuigg asserts that a stay of the mandate in this case is necessary because the Supreme Court granted stays pending appeal in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) and *Herbert v. Evans*, No. 14A65, 2014 U.S. LEXIS 4715, 2014 WL 3557112 (July 18, 2014). But a stay is “an exercise of judicial discretion,” and “[t]he propriety of its issue is dependent upon the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672-73 (1926). “The traditional stay factors contemplate individualized judgments in each case.” *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 772 (1987)). This Court must therefore make its own determination of whether a stay would be equitable in this case based on its independent assessment of equities. If the Supreme Court disagrees with this Court’s assessment of the equities it can issue its own order staying the mandate. The *Harris* Class does not object to a brief 14-day interim

stay of the mandate to give McQuigg an opportunity to seek that relief from the Supreme Court.

Pointing to Utah, McQuigg states that, if the mandate goes into effect and marriages take place, those marriages will be left in "limbo" if this Court's decision is ultimately overturned. (Mot. Stay 9.) But the "legal limbo" in Utah has been caused by the Utah Governor and Attorney General's assertion that they can place these valid marriages "on hold" -- an assertion that has been rejected by the lower courts under both Utah state law and the federal Constitution. *Evans v. Utah*, 2014 U.S. Dist. LEXIS 69177 (D. Utah May 19, 2014). In contrast, Virginia's Governor and Attorney General have never asserted they would seek to retroactively invalidate legal marriages in this manner. Moreover, neither McQuigg nor appellant George E. Schaefer, III, has any job duties that relate to the recognition of marriages that have already taken place. Their job duties relate solely to the issuance of new marriage licenses.

### **CONCLUSION**

The plaintiffs and their children have waited long enough to exercise the constitutional rights to which this Court has held they are entitled. The defendants have not demonstrated that they will suffer any irreparable harm if immediate relief is granted. The *Harris* Class respectfully requests that the motion to stay the mandate be denied.

Dated: August 1, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**



I hereby certify that on the 1<sup>st</sup> day of August, 2014, I effected service upon counsel for Appellants and Appellees by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ Rebecca K. Glenberg  
REBECCA K. GLENBERG