NO. 14-2241

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLLEEN THERESE CONDON and ANNE NICHOLS BLECKLEY,
Plaintiffs—Appellees
v.

NIMRATA (NIKKI) RANDHAWA HALEY, in her official capacity as Governor of South Carolina; ALAN WILSON, in his official Capacity as Attorney General; and IRVIN G. CONDON in his official capacity as Probate Judge of Charleston County,

Defendants, of whom,

ALAN WILSON, in his official Capacity as Attorney General, is

Defendant—Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT CHARLESTON

APPELLEES' MEMORANDUM IN OPPOSITION TO MOTION FOR EMERGENCY STAY

Pursuant to the Court's Order, Appellees Colleen Therese Condon and Anne Nichols Bleckley submit the following memorandum opposing Appellant's Motion for Emergency Stay.

Introduction

Appellant Alan Wilson, in his official capacity as Attorney General, (the "State") has asked this Court to stay the District Court's decision striking down as unconstitutional South Carolina's marriage laws that impede Plaintiffs' ability to marry their same-sex partners. That request should be denied because the State has failed to satisfy any of the necessary requirements for the issuance of a stay. Most notably, the State cannot demonstrate a likelihood of success on the merits because the District Court correctly concluded that the outcome of this case was determined by controlling precedent—namely, the final and binding decision of this Court in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286 (2014) and *cert. denied*, 135 S. Ct. 308 (2014) and *cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014). As the District Court noted, all of the arguments made by the State as to why it would ultimately prevail on the merits were exhaustively addressed and rejected in *Bostic*. *See Condon v. Hayley*, No. 2:14-cv-04010-RMG, slip op. at 20 (citing *Bostic*, 760 F.3d at 377-84 (4th Cir. 2014). Indeed, even the State acknowledges that its request for a stay is based entirely on an argument that *Bostic* was wrongly decided. (State's Motion for Emergency Stay, pp. 4, 14-16.)

A motion for a stay premised on arguments that have already been thoroughly considered and rejected by this Court does not meet the State's burden

of demonstrating a likelihood of success on the merits. Furthermore, the State cannot show that it will suffer irreparable injury if a stay is denied, that the Plaintiffs would not endure irreparable injury if a stay is issued or that a stay would serve the public interest. The Motion must, therefore, be denied.

Argument

Although Rule 8(a)(2) of the Federal Rules of Appellate Procedure allows this Court to issue a stay pending appeal, the party seeking a stay must show: (1) that it will likely prevail on the merits of the appeal, (2) that it will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). The State has failed to meet any of the four requirements.

I. The State fails to show it is likely to succeed on the merits where it merely argues against recent Fourth Circuit precedent.

The State cannot demonstrate that it is likely to prevail on the merits. In *Bostic*, this Court considered and squarely rejected all of the arguments that the State raises as to why it would ultimately prevail on the merits. The State argues, for example, that the outcome of this case is controlled by *Baker v. Nelson*, 409 U.S. 810 (1972), the United States Supreme Court's summary dismissal of an appeal of a failed challenge to Minnesota's law prohibiting same-sex couples from

marrying. But in *Bostic*, this Court concluded that *Baker* did not bar Plaintiffs' claims. Similarly, the State argues that federalism principles deprive federal courts of the ability to consider constitutional challenges to marriage statutes, an argument that likewise was considered and rejected. *Bostic*, 760 F.3d at 375.

A recent, *non-final* decision from another circuit holding to the contrary does not satisfy the State's burden of showing a likelihood of ultimate success. In *DeBoer v. Snyder*, Nos. 14-1341, 14-5291, 14-3057, 14-5297, 14-3464, 14-5818, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6, 2014), *petition for cert. filed, Obergefell, et al., v. Hodges, et al.* (U.S. Nov.14, 2014) (No.14-556), a Sixth Circuit panel, in a split decision, reversed six lower court decisions from four states, all of which had struck down state marriage bans as unconstitutional. The *DeBoer* decision, however, is an outlier—indeed the Sixth Circuit is the only federal circuit since *United States v. Windsor*, 133 S. Ct. 2675 (2013), to uphold state marriage bans as constitutional—and that decision is not final. In contrast, four circuit courts of appeal, including this Court, and numerous lower courts have held otherwise. *See, e.g., Latta v. Otter,* 2014 U.S. App. LEXIS 19828 (9th Cir. Oct. 15, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1206 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Baskin v. Bogan*, No. 1:14-CV-

00355-RLY, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *Bowling v. Pence*, 2014 U.S. Dist. LEXIS 114926 (S.D. Ind. Aug. 19, 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Burns v. Hickenlooper*, U.S. Dist. LEXIS 100894 (D. Colo. July 23, 2014) (granting a preliminary injunction enjoining enforcement of Colorado's ban); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014); *Evans v. Utah*, 2014 U.S. Dist. LEXIS 69177 (D. Utah May 19, 2014) (granting a preliminary injunction enjoining enforcement of Utah's ban); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Henry v. Himes*, No. 1:14-CV-129, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Latta v. Otter*, No. 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *Lee v. Orr*, No. 13-CV-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Obergefell v. Wymslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014) (granting a preliminary injunction enjoining the enforcement of Tennessee's ban); *Whitewood v. Wol*f, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

The State's position here—that the Sixth Circuit decision somehow elevates the State's likelihood of overcoming the controlling effect of *Bostic*—is nothing short of mystifying. Indeed, all other states within this circuit have recognized the binding nature of this Court's opinion in *Bostic*, most recently in *McGee v. Cole*, 2014 U.S. Dist. LEXIS 158680 (S.D.W. Va. Nov. 7, 2014), where the West Virginia district court properly observed that *DeBoer* was neither controlling nor correctly decided. Rather, the court granted summary judgment because the argument "that West Virginia's marriage ban does not violate the Fourteenth Amendment, is unavailing in light of the Fourth Circuit's decision in *Bostic v. Shaefer*." *Id.* at *23. Here, as in *McGee*, "[t]he holding in *Bostic* controls this case." *Id.* at *25.

Simply put, the State here *cannot* meet its burden of showing a likelihood of success on the merits because a panel of this Court is not free to abandon a prior panel ruling and, instead, follow another circuit's ruling on the same issue, where there is no intervening contrary *en banc* or Supreme Court decision.[1] The principle

[1] The State's alternative suggestion—that its intention to seek initial *en banc* review to overrule the panel decision in *Bostic* will somehow increase its likelihood of success on the merits—is similarly unavailing. "An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered . . . ." FED. R. APP. P. 35(a). Had the panel decision in *Bostic* plainly evidenced a conflict that threatened "uniformity of the court's decisions," *Id.*, any of the circuit judges in active service could have requested a poll on whether to rehear that case, Local Rule 35(b). They did not. While this fact is not determinative of the State's request for initial *en*

of interpanel accord means that "a panel considers itself bound by the prior decision of another panel, absent an *en banc* overruling or a superseding contrary decision of the Supreme Court." *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990); *see also Mentavlos v. Anderson*, 249 F.3d 301, 312 n.4 (4th Cir. 2011) ("[A] panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting *en banc* can do that.").

The State's speculation that the Supreme Court will accept a petition for *certiorari* in *DeBoer* does not support the issuance of a stay in this case. Reliance on whether, and when, the Supreme Court will ultimately grant a petition for *certiorari* to resolve the circuit split, and that the Court would reverse this circuit, is tenuous at best. Thus, even if the State could make a showing that the Supreme Court likely will grant *certiorari* in *DeBoer*, the State has no basis, beyond pure speculation, to predict that the Supreme Court will affirm *DeBoer*, thereby overruling the governing law in all the other circuits to have considered the question.

Finally, the Supreme Court's recent refusals to stay similar, non-final marriage litigation that is subject to pending appellate proceedings signals that one

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banc review, should it seek one, it is a factor warranting consideration when assessing the State's likelihood of success at this stage of the litigation.

or more of the factors required for a stay are not present in light of the current circuit consensus (including the Fourth Circuit) on this issue. *See Moser v. Marie*, No. 14A503, 574 U.S. — (Nov. 12, 2014) (denying stay of district court's decision striking down Kansas marriage ban, notwithstanding the Sixth Circuit's decision in *DeBoer*)[2]; *see also Otter, Gov. of Idaho, v. Latta*, No. 14A374, 574 U.S. — (Oct. 10, 2014) (denying stay of Ninth Circuit's decision striking down Idaho marriage ban pending further appellate proceedings). The State here is in no different posture than the State of Kansas in its recent appeal to the Tenth Circuit in *Moser*. Similarly, the State's *likelihood* of success is grounded in little more than pure speculation and hopeful wish.

[2] While the order does not offer an explanation for denying a stay in the Kansas marriage case pending appeal, it is nonetheless telling in that only Justices Scalia and Thomas would have granted the stay. Subsequently, in a separate Order denying a stay in *Maricopa County, Arizona v. Angel Lopez-Valenzuela*, No. 14A493, 574 U.S. — (Nov. 13, 2014), during an appeal from a district court ruling that held unconstitutional an amendment to the Arizona Constitution denying bail to immigrants, Justice Thomas, citing the various marriage litigation decisions and joined by Justice Scalia, lamented the fact that the Court seemed unwilling to grant stays in cases striking down state laws before they reach the stage where a petition for a writ of *certiorari* is presented. What seems clear currently is that there likely are no more than two votes on the Court to stay decisions striking down marriage bans—not even a close vote.

II. The State has failed to show that it will suffer irreparable injury; that other parties will not be substantially harmed; and that granting a stay is in the public interest.

The State cannot satisfy any of the other requirements associated with the issuance of a stay. The State cannot explain specifically *how* it will suffer *any* harm if same-sex couples are permitted to marry pending consideration of the State's appeal. Allowing same-sex couples the freedom to marry will benefit the couples, their children, and the public at large given "the fact that a child's parents are married enhances the child's prospects for a happy and successful life." *See Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014). Currently 34 states permit same-sex couples to marry, or recognize marriages legally-celebrated by same-sex couples in other states. If history is any indicator, the State's claim of potential harm here is overstated, if not completely contrived.

In contrast, if a stay were to issue and same-sex couples in South Carolina were continued to be denied the freedom to marry, then harm would result to them and to their children because marriage discrimination "imposes a heavy cost, financial and emotional, on [the couples] and their children." *Id.* at 669. "The harm to [gays and lesbians] . . . of being denied the right to marry is considerable." *Id*. at 658.

The harm associated with marriage discrimination is indeed considerable. South Carolina's marriage ban creates irreparable harm by instructing Condon's

teenage son—as it does to every child in the State being raised by same-sex couples who wish to marry—that his parent's relationship is unworthy of respect in the eyes of the State and need not be respected by private parties. In refusing to provide Appellees a marriage license and allow them to marry, South Carolina "demeans" and "humiliates" not only same-sex couples but their children, including Condon's, by making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *See Windsor*, 133 S. Ct. at 2694.

Appellees are also denied access to the array of state-law protections intended to safeguard married couples and their families, especially important because of the unpredictability of, for example, illnesses, accidents, emergencies and natural disasters. For instance, same-sex couples are denied family health insurance coverage; employee benefits such as spousal health benefits, retirement benefits, and surviving spouse benefits for public employees; Social Security death and disability benefits; family leave for an employee to care for a spouse; the ability to safeguard family resources under an array of laws that protect spousal finances; the ability to make caretaking decisions for one another in times of death, injury and serious illness, including the priority to make medical decisions for an incapacitated spouse, the automatic right to make organ donation and burial

decisions, and other decisions concerning disposition and handling of remains of deceased spouses; the right to sue for wrongful death; the right to inheritance under the laws of intestacy, and the right of a surviving spouse to an elective share.

The State's continued enforcement of the marriage ban against Appellees violates their constitutional rights which, without more, establishes irreparable harm as a matter of law. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm"); *Ross v. Meese*, 818 F.2d 1132 (4th Cir. 1987) ("the denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction"); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm"); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 774 F. Supp. 977, 986 (D.S.C. 1991) (holding that "a violation of the plaintiffs' constitutional rights . . . constitutes irreparable harm, and that injunctive relief is warranted").

The public interest is best served by allowing the mandate to issue so that constitutional rights may be vindicated. "[T]he public is certainly interested in the prevention of enforcement of [laws] which may be unconstitutional." *Richmond*

Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 829 (E.D. Va. 1998) (quoting *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987)); *Bowden v. Town of Cary*, 754 F. Supp. 2d 794, 808 (E.D.N.C. 2010) ("The Fourth Circuit has stated unequivocally that 'upholding constitutional rights serves the public interest.'") (citing *Newsome v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest.")).

The emergence of a circuit split does not change what recent precedent teaches us: granting a stay would impose severe and irreparable harms on Appellees, as well as all similarly situated same-sex couples and their children. Those harms far outweigh any governmental interest in continuing to enforce marriage bans that have been declared unconstitutional by the lower courts. Defendants below are no different than governmental officials in Arizona, Alaska, Colorado, Idaho, Kansas, North Carolina, West Virginia, and Wyoming, who have stopped enforcing their States' marriage bans despite the theoretical possibility that the Supreme Court may eventually uphold such bans as constitutional. The district court aptly observed, "Defendant Wilson cannot carry his burden of showing a likelihood of success on the merits. Further, the Defendant Wilson has not set forth any meaningful evidence of irreparable injury should the petition for a stay be denied." *Condon*, slip op. at 22.

Conclusion

Same-sex couples in South Carolina should not be forced to endure additional delay before they can access the marriage-related protections and dignities that this Court has already recognized as guaranteed by the United States Constitution.

The motion for an emergency stay should be denied.

Respectfully submitted,

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