

**In the United States District Court
For the Western District of Virginia
Harrisonburg Division**

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

Plaintiffs,

v.

JANET M. RAINEY, in her official capacity as
State Registrar of Vital Records; THOMAS E.
ROBERTS, in his official capacity as Staunton
Circuit Court Clerk,

Defendants.

No. 5:13-cv-00077

**CONSENT MOTION TO SUSPEND BRIEFING AND ORAL ARGUMENT
IN CONTEMPLATION OF STIPULATION OF DISMISSAL**

The plaintiffs (the “*Harris* class”), by counsel, respectfully request that the Court suspend briefing and oral argument on Plaintiffs’ Motion to Lift the Stay and Enter Judgment and Defendants’ Motions to Dismiss. In support of this Motion, plaintiffs state as follows:

1. On March 31, 2014, the Court stayed proceedings in this case pending the decision of the U.S. Court of Appeals for the Fourth Circuit in *Bostic v. Schaefer*, No. 14-1167 (“*Bostic*”), in which appeal the *Harris* class had intervened. (Dkt. #138.) On July 28, 2014, the Fourth Circuit ruled in favor of the appellees and the *Harris* class, holding that Virginia’s laws prohibiting the marriage of same-sex couples, and the recognition of such marriages from other jurisdictions, were unconstitutional. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014). On August 20, 2014, the U.S. Supreme Court stayed the Fourth Circuit mandate in *Bostic* pending the

disposition of any petitions for *certiorari*. *McQuigg v. Bostic*, 189 L.Ed.2d 884 (2014). On October 6, 2014, the Supreme Court denied all three petitions for *certiorari* filed in the case. *Schaefer v. Bostic*, 83 U.S.L.W. 3189 (2014); *McQuigg v. Bostic*, 83 U.S.L.W. 3189 (2014); *Rainey v. Bostic*, 2014 83 U.S.L.W. 3189 (2014). The Fourth Circuit mandate issued the same day.

2. On October 16, 2014, the *Harris* class filed a Motion to Lift the Stay and Enter Judgment in this Court. (Dkt. #140.) On October 29, 2014, defendant Roberts and defendant Rainey each filed a Motion to Dismiss (Dkt. #142, 144), and a brief in support of their Motions to Dismiss and in opposition to the *Harris* class's Motion to Lift the Stay and Enter Judgment (Dkt. #143, 145.)

3. On November 11, 2014, this Court granted a consent motion to extend the time for plaintiffs to file a consolidated reply in support of their motion and response to defendants' cross-motions until November 19, 2014.

4. Oral argument on both motions is currently scheduled for December 11, 2014.

5. Counsel for the *Harris* class and for Rainey have since conferred in a good faith effort to resolve all remaining claims by the *Harris* class in this case and in *Bostic*, including any outstanding claims against Defendant Roberts. Acknowledging further the legal costs and expense associated with litigating these issues, Rainey and the *Harris* class have agreed to resolve their differences through a proposed Consent Order to be submitted to Judge Wright Allen in *Bostic v. Rainey*, No. 2:13cv395 (E.D.Va.). A copy of that proposed Consent Order is attached as Exhibit A.

6. Counsel for the *Harris* Class and Rainey intend to submit the proposed Consent Order to Judge Wright Allen. Once the Consent Order is entered in *Bostic*, the parties intend to submit to this Court a stipulation of dismissal pursuant to Federal Rule of Civil Procedure 41(b).

7. In the event that the Consent Order is denied in *Bostic*, the parties will inform this Court and propose a schedule for continuing to brief the pending motions.

8. Plaintiffs' counsel has consulted with counsel for each of the defendants, both of whom consent to the granting of this Motion.

9. Counsel are available upon the Court's request to answer any questions about their proposed resolution of this matter.

For the foregoing reasons, the *Harris* class respectfully requests that the Court suspend briefing and oral argument on Plaintiffs' Motion to Lift the Stay and Enter Judgment and Defendants' Motions to Dismiss.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2014, I effected service upon counsel for Defendants by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

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November 14, 2014

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

TIMOTHY B. BOSTIC, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
JOANNE HARRIS and JESSICA DUFF, and	)	
CHRISTY BERGHOFF and VICTORIA KIDD, on	)	
behalf of themselves and all others similarly	)	
situated,	)	
	)	
Intervenor-Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 2:13-cv-00395-AWA-LRL
JANET M. RAINEY, in her official capacity as	)	
State Registrar of Vital Records,	)	
	)	
GEORGE E. SCHAEFER, III, in his official	)	
capacity as Clerk of the Circuit Court of the City of	)	
Norfolk,	)	
	)	
Defendants,	)	
	)	
MICHÈLE B. MCQUIGG, in her official capacity	)	
as the Clerk of the Circuit Court of Prince William	)	
County,	)	
	)	
Intervenor-Defendant.	)	

CONSENT ORDER

THIS ACTION came before the Court on the motion of Intervenor-Plaintiffs—Joanne Harris and Jessica Duff, and Christy Berghoff and Victoria Kidd, on behalf of themselves and all others similarly situated (the “*Harris Class*”)—and Defendant Janet M. Rainey, in her official capacity as State Registrar of Vital Records, for the entry of this Consent Order resolving all claims by Intervenor-Plaintiffs that remain in this action and in related litigation; and

IT APPEARING TO THE COURT THAT:

1. On February 24, 2014, this Court entered a judgment declaring that Virginia’s marriage laws are facially unconstitutional under the Due Process and Equal Protection Clauses

of the Fourteenth Amendment to the United States Constitution to the extent such laws deny the rights of marriage to same-sex couples or recognition of lawful marriages between same-sex couples that are validly entered into in other jurisdictions. The Court enjoined Rainey, and Clerk Schaefer and Clerk McQuigg (also in their official capacities), and their respective officers, agents and employees, from enforcing Article I, § 15-A of the Virginia Constitution, Virginia Code §§ 20-45.2 and 20-45.3, and any other Virginia law if and to the extent that it denies to same-sex couples the rights and privileges of marriage that are afforded to opposite sex couples. The Court stayed the effect of the judgment pending appeal and severed Plaintiffs' claims for attorneys' fees and costs for consideration after the final disposition of the appeal. (*See* ECF No. 72.) Notices of appeal were filed by Rainey, Schaefer, and McQuigg.

2. At the time of that judgment, the *Harris* Class was not a party to this litigation. The *Harris* Class was certified as a plaintiff class on January 31, 2014 by the United States District Court for the Western District of Virginia. *Harris v. Rainey*, No. 5:13cv077, 2014 U.S. Dist. LEXIS 12801 (W.D. Va. Jan. 31, 2014). *Harris* involves identical legal challenges to Virginia's same-sex-marriage prohibition. The district court there certified the *Harris* Class as a representative class on behalf of (1) all same-sex couples in Virginia who have not married in another jurisdiction, and (2) all same-sex couples in Virginia who have married in another jurisdiction, excluding "any person who is a plaintiff in the pending case of *Bostic*" *Id.* at *4.

3. On March 10, 2014, the United States Court of Appeals for the Fourth Circuit granted the *Harris* Class's motion to intervene in this case on the side of the plaintiffs-appellees, over the objection of all of the other parties. On March 31, 2014, the District Court in *Harris* stayed further proceedings there in light of the *Harris* Class's intervention in this case. *Harris v.*

Rainey, No. 5:13cv00077, 2014 U.S. Dist. LEXIS 45559 (W.D. Va. Mar. 31, 2014). The *Harris* Class participated actively in proceedings in the Fourth Circuit, including filing a brief in support of affirmance and participating actively in oral argument.

4. On July 28, 2014, the Fourth Circuit affirmed the judgment of this Court. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014). On August 20, 2014, the Supreme Court stayed the Fourth Circuit's mandate pending the timely filing and disposition of a petition for writ of certiorari. *McQuigg v. Bostic*, 189 L. Ed. 2d 884 (2014). The *Harris* Class continued to participate actively in appellate proceedings, including filing briefs in opposition to the request for a stay of the mandate (both in the Fourth Circuit and the Supreme Court), a brief in the Supreme Court in response to *Rainey*'s petition for certiorari, and letter responses to the petitions for certiorari filed by *Schaefer* and *McQuigg*.

5. On October 6, 2014, the Supreme Court denied all three petitions for certiorari. *Rainey v. Bostic*, 190 L. Ed. 2d 140 (2014); *Schaefer v. Bostic*, 190 L. Ed. 2d 140 (2014); *McQuigg v. Bostic*, 190 L. Ed. 2d 14 (2014). The Fourth Circuit's mandate issued at 1:00 p.m. on October 6, 2014, at which time this Court's judgment took effect.

6. On October 21, 2014, this Court entered a consent order providing that any prevailing party wishing to file an application for attorneys' fees and costs under 42 U.S.C. § 1988 must file such application by November 21, 2014.

7. On October 16, 2014, the *Harris* Class filed a motion in *Harris* seeking the entry of a judgment similar to the judgment entered in this case. The *Harris* Class maintains that it is a prevailing party under § 1988 by virtue of its success on appeal in this case, both at the Fourth Circuit and at the Supreme Court, and that it is entitled to recover its attorneys' fees and costs for its work both in *Harris* and in this case. On October 29, 2014, Defendant *Rainey* filed a motion

in *Harris* to dismiss that case as moot, opposed the entry of any judgment in *Harris*, and argued that the *Harris* Class is not a prevailing party.

8. Counsel for the *Harris* Class and Rainey have since conferred in a good faith effort to resolve all remaining claims by the *Harris* Class in this case and in *Harris*. The *Harris* Class provided counsel for Rainey with detailed time records by its attorneys at Jenner & Block documenting in excess of \$150,000 in attorneys' fees for work specifically to defend the appeal in the Fourth Circuit and to response to the petitions for certiorari in the Supreme Court. The *Harris* Class represents that its attorneys' fees and costs in *Harris* and in this case—which which includes work performed by attorneys at Jenner & Block, the ACLU, the ACLU of Virginia, and Lambda Legal—total approximately \$1,000,000.

9. Rainey denies that the *Harris* Class is entitled to recover fees either in *Harris* or in this case, contests the billing rates and charges, and disputes a number of the entries. But the parties to this Consent Order acknowledge the uncertainty and risks to each party associated with (i) litigating whether the *Harris* Class is a “prevailing party” within the meaning of § 1988, and (ii) the range of possible outcomes with regard to the quantum of fees sought. Acknowledging further the legal costs and expense associated with litigating these issues, Rainey and the *Harris* Class have agreed to resolve their differences through this Consent Order, each term of which is material to the parties' willingness to enter into it.

IT IS, THEREFORE, AGREED AND ORDERED that:

1. The *Harris* Class is hereby entitled to the benefit of the declaratory and injunctive relief entered on February 24, 2014 against Defendant Rainey (and her respective agents and employees) in her official capacity as State Registrar of Vital Records.

2. Attorneys' fees and costs in the amount of \$60,000 are hereby awarded to the *Harris* Class in full satisfaction of all of their claims for attorneys' fees and costs, whether made in this case or in *Harris*. That amount shall be paid by the Commonwealth of Virginia within 75 days of the entry of this order. This award constitutes a discharge of any and all claims for attorneys' fees and costs made by the *Harris* Class against any party in *Harris* or in this case.

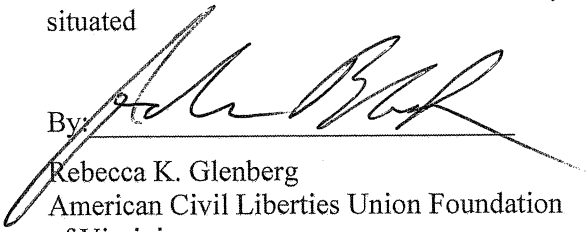
3. The *Harris* Class will seek no further relief against any party in this case or in *Harris*, except in connection with enforcing its rights under this Consent Order. The *Harris* Class will cooperate with Defendant Rainey in seeking an agreed dismissal of the lawsuit in *Harris* in light of this Consent Order.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

WE ASK FOR THIS:

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

By: 

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JANET M. RAINEY, in her official capacity as
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