

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

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ELLEN W. GERBER, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO. 1:14-cv-00299
	:	
ROY COOPER, in his official capacity as the	:	
Attorney General of North Carolina, <i>et al.</i> ,	:	
	:	
Defendants.	:	
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PLAINTIFFS' RESPONSE TO ORDER OF JULY 30, 2014

As Defendants predicted in obtaining a recommendation for a stay from the Magistrate Judge, the Fourth Circuit's decision in *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, ___ F.3d ___, 2014 WL 3702493 (4th Cir. July 28, 2014), *request to stay mandate denied* (4th Cir. Aug. 13, 2014), controls the result here. The Virginia marriage ban declared unconstitutional in *Bostic* is indistinguishable from the North Carolina prohibitions challenged in this matter, and judgment should be entered for Plaintiffs. Plaintiffs respectfully submit this response to the Court's July 30 Order (Dkt. No. 55) to (1) demonstrate that *Bostic* is both controlling and directly applicable to the facts of this case; and (2) state that the next order of proceedings should be for Plaintiffs to move formally for summary judgment and then for the Court to enter judgment for Plaintiffs modeled after the judgment affirmed in *Bostic*.

1. In *Bostic*, the Court's decision unequivocally held that Virginia's statutory and constitutional prohibition of same-sex marriage in Virginia and recognition of such marriages legally performed in other states violated the Due Process and Equal Protection Clauses of the Fourteenth

Amendment of the United States Constitution. 2014 WL 3702493, at *17. Those holdings are dispositive here because, in all relevant respects, the North Carolina marriage laws challenged in this action are identical to the Virginia marriage laws struck down in *Bostic*. Indeed, the Fourth Circuit specifically noted in its opinion that “[t]hree other states in this Circuit have similar bans[, including] North Carolina.” *Bostic*, 2014 WL 3702493, at *1 n.1 (citing N.C. Const. art. XIV, § 6; N.C. Gen. Stat. §§ 51-1, 51-1.2). Both Virginia’s and North Carolina’s statutory and constitutional schemes are materially identical because they operate to “prevent same-sex couples from marrying and prohibit [the State] from recognizing same-sex couples’ lawful out-of-state marriages.” *Id.* at *17. A side-by-side comparison of the relevant portion of each state’s laws demonstrates that they are identical in all material respects, and the holding of *Bostic* controls any constitutional analysis of the North Carolina bans:

Virginia	North Carolina
“[O]nly a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.” Va. Const. art. I, § 15-A.	“Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.” N.C. Const. art. XIV, § 6.
“A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.” Va. Code Ann. § 20-45.2; see also Va. Code Ann. § 20-45.3 (extending same prohibition to civil unions and similar arrangements).	“A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife” N.C. Gen. Stat. § 51-1. “Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.” N.C. Gen. Stat. § 51-2.

2. The Fourth Circuit further held: “In the aggregate,” Virginia’s marriage laws and constitutional amendment “prohibit same-sex marriage, ban other legally recognized same-sex

relationships, and render same-sex marriages performed elsewhere legally meaningless under Virginia state law.” 2014 WL 3702493, at *17. This is precisely what the North Carolina legal scheme provides and is exactly the reason for the challenge Plaintiff advance here. North Carolina’s marriage laws, like Virginia’s, therefore “impermissibly infringe on its citizens’ fundamental right to marry” in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Bostic*, 2014 WL 3702493, at *1.

3. In the extensive briefing filed to date, Defendants repeatedly acknowledged that *Bostic*, if decided in favor of the plaintiffs, would likely control the disposition of this matter. For instance, Defendants argued to the Court in securing the stay they requested that:

- “The Fourth Circuit’s opinion will certainly impact, potentially resolve, and could serve as binding precedent on the issues implicated by the instant matter” (Dkt. No. 24, at 1.)
- “[A] decision in *Bostic* may well control the disposition of this case” (*Id.* at 5.)
- “The issue at the heart of this case—whether states are required to amend their own laws to include same-sex marriage—is at the heart of *Bostic*.” (*Id.*)

4. The State Defendants acknowledged that “[i]f the Fourth Circuit resolves the same-sex issue raised in *Bostic* in favor of those plaintiffs, [Plaintiffs] may be able to marry, or have their existing marriages recognized, *at that time*.” (Dkt. No. 33, at 10; emphasis added.) And, as Defendant Donna Hicks Spencer admitted in her filing: “As North Carolina is within the jurisdiction of the Court of Appeals for the Fourth Circuit, *Bostic* is controlling and applies to the constitutional provision and statutes at issue in this case.” (Dkt. No. 56, at 1.)

5. Moreover, Magistrate Judge Peake, in recommending that the case be stayed pending the Fourth Circuit’s decision in *Bostic*, likewise recognized that “the decision of the Fourth

Circuit in *Bostic* will provide the controlling legal principles for this Court to apply in evaluating the motions” in this case. (Dkt. No. 49, at 2.)

6. As the Court observed in its July 30, 2014 Order, “this court is bound by directly controlling Fourth Circuit authority.” *Alexander v. City of Greensboro*, 2011 WL 13857, at *5 n.5 (M.D.N.C. Jan. 4, 2011). And, that authority is immediately binding upon this Court upon issuance by the Fourth Circuit. See *Friel Prosthetics, Inc. v. Bank of America*, 2005 WL 348263, at *1 n.4 (D. Md. Feb. 9, 2005) (Although “Defendants apparently concede that although a stay of the Wachovia [the Fourth Circuit case] mandate may affect what the district court can do in that case, it does not prevent the Fourth Circuit decision from having precedential value and binding authority on the undersigned in the matter *sub judice*.”). Moreover, on August 13, 2014, the Fourth Circuit refused to stay the mandate of its *Bostic* decision pending further review, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, Order (4th Cir. Aug. 13, 2014) (Dkt. No. 247), and the mandate is scheduled to be issued by August 20, 2014.

7. Particularly where this Court “cannot distinguish [the Fourth Circuit’s] firm language from the facts of th[e] case,” the Court must follow the Fourth Circuit’s guidance. *Baldwin v. City of Winston-Salem*, 544 F. Supp. 123, 124 (M.D.N.C. 1982), *aff’d*, 710 F.2d 132 (4th Cir. 1983). In light of the nearly identical marriage laws at issue in this case, *Bostic* directly applies to and completely resolves all issues in this matter.

8. Because *Bostic* mandates a single result here—judgment in favor of Plaintiffs—Plaintiffs respectfully submit that the appropriate course is for (a) Plaintiffs promptly to file a motion for summary judgment with a proposed judgment in the form of the judgment affirmed in *Bostic*; (b)

for the Court to (i) deny the pending motion to dismiss under Rule 12(b)(6);¹ (ii) grant Plaintiffs' motion for summary judgment; and (iii) enter judgment for Plaintiffs in the form affirmed by *Bostic*. In light of Defendant Donna Hicks Spencer's brief in response to the order of July 30, 2014 filed with the Court on August 6, 2014 (Dkt. No. 56), Plaintiffs will confer in good faith with her to discuss a potential mutually acceptable agreement.

¹ In addition, the motion for preliminary injunction has been pending since April 2014. (Dkt. No. 3.)

This the 13th day of August 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been filed electronically with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This the 13th day of August, 2014.

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