

**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.

ROBERT F. MCDONNELL, in his official  
capacity as Governor of Virginia; 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

**PLAINTIFFS’ RESPONSE TO *BOSTIC* PLAINTIFFS’ REQUEST  
TO BE EXCLUDED FROM CERTIFIED CLASS**

Plaintiffs do not object to an order excluding the *Bostic* plaintiffs from the class certified in this case, but the pendency of the *Bostic* litigation does not trigger application of the “first filed” rule or undermine the need for class certification to protect the interests of other Virginia same-sex couples and their families.

**FACTUAL BACKGROUND**

On July 9, 2013, the American Civil Liberties Union, the ACLU of Virginia, and Lambda Legal, with support from Equality Virginia, announced that they intended to bring a federal lawsuit challenging Virginia’s statutory and constitutional bans on allowing same-sex couples to marry and on recognizing their legal marriages from other jurisdictions. *See* Press Release, Lambda Legal, *Lambda Legal Announces Plans for Federal Marriage Case in Virginia* (July 9,

2013), available online at [http://www.lambdalegal.org/news/va\\_20130709\\_federal-marriage-case-plans-announcement](http://www.lambdalegal.org/news/va_20130709_federal-marriage-case-plans-announcement). As detailed in Plaintiffs' motion for class certification, these organizations collectively have extensive experience successfully litigating cases on behalf of same-sex couples seeking the freedom to marry, as well as other types of cases on behalf of lesbian, gay, bisexual, and transgender people and their families, including victories in *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 43 Cal.4th 757 (Cal. 2008); *Lewis v. Harris*, 188 N.J. 415 (N.J. 2006); and *Baehr v. Lewin*, No. 91-1394 (Circuit Ct. of the First Circuit) (Haw. Dec. 3, 1996), *appeal dismissed as moot sub nom. Baehr v. Miike*, 92 Haw. 634 (Haw. 1999).

Subsequently, on July 18, 2013, Timothy Bostic and Tony London filed their own lawsuit in the Eastern District of Virginia, represented by private counsel. Compl., *Bostic v. McDonnell*, No. 20:13-cv-00395 (E.D. Va. July 18, 2013), ECF No. 1. Their original complaint included only Mr. Bostic and Mr. London as plaintiffs and did not include any claims with respect to Virginia's refusal to recognize the marriages of same-sex couples from other jurisdictions. *Id.* The defendants named in the complaint were the Clerk of the Circuit Court of Norfolk, Attorney General Cuccinelli, and Governor McDonnell, in their official capacities. *Id.* The lawsuit did not include any class allegations and did not purport to represent the legal interests of anyone other than the individual interests of Mr. Bostic and Mr. London. *Id.*

On August 1, 2013, Plaintiffs filed this action on behalf of themselves and all those similarly situated. Unlike the plaintiffs in the *Bostic* litigation, Plaintiffs challenged Virginia's refusal to recognize the marriages of same-sex couples from other jurisdictions. The defendants in this case are the Clerk of the Circuit Court of Harrisonburg, the State Registrar of Vital

Records, and Governor McDonnell, in their official capacities. The only common party for the original complaints in both actions was Governor McDonnell. Plaintiffs filed the pending motion for class certification on August 16, 2013.

Approximately a week after Plaintiffs moved for class certification in this case, the *Bostic* plaintiffs and defendants submitted a proposed scheduling order. The proposed order provided that the *Bostic* Plaintiffs would submit an amended complaint by August 30, 2013, and that the parties would submit cross-motions for summary judgment by September 30, 2013. *See id.* at ECF No. 14 (Aug. 22, 2013); *Bostic* Request at 3 (noting that the *Bostic* Plaintiffs “negotiated with the *Bostic* defendants an expedited schedule that calls for cross-motions for summary judgment to be fully briefed by October 31, 2013.”). The *Bostic* plaintiffs apparently intend to proceed with their summary judgment motion on a purely legal theory without any discovery and without submitting any expert witnesses or other factual evidence in support of their challenge. *See* State Def. Opp. to Class Cert. at 5 (stating that *Bostic* claims have “been pled as turning on a pure issue of law” that does not depend on evidentiary facts). The proposed schedule was not so ordered by the Court until August 30, 2013. *See Bostic*, at ECF No. 16 (Aug. 30, 2013).

On September 3, 2013, the *Bostic* plaintiffs filed an amended complaint. *See id.* at ECF No. 18 (Sept. 3, 2013). The complaint added new plaintiffs and a new defendant, the Registrar of Vital Records, and for the first time asserted claims based on Virginia’s failure to recognize marriages from other jurisdictions. *Id.* On September 5, 2013, the *Bostic* plaintiffs voluntarily dismissed their allegations against Governor McDonnell and Attorney General Cucinelli. *See id.* at ECF No. 19 (Sept. 5, 2013).

The same day that they filed their amended complaint, the *Bostic* plaintiffs filed the pending request with this Court to be excluded from the certified class in this case. The *Bostic*

plaintiffs have not requested that venue be transferred or that the two cases be consolidated for resolution in one proceeding. Rather, the *Bostic* plaintiffs state that “[t]hey want only to prosecute their own case, for their own families, with their own counsel, on their own terms, and to let the *Harris* plaintiffs do the same.” *Bostic Request*. at 5.

### ARGUMENT

Plaintiffs do not object to an order excluding the *Bostic* plaintiffs from the class certified in this case. “[A]s a general matter, due process does not require that (b)(1) or (b)(2) class members be given an opportunity to opt out,” but “the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions.” *Eubanks v. Billington*, 110 F.3d 87, 92-94 (D.C. Cir. 1997); *accord McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009); *Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994); *Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 994 (5th Cir. Unit B Jan. 1981); *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 364 (D. Md. 2004).

Although certification should be granted whether or not the *Bostic* plaintiffs are excluded from the certified class, excluding the *Bostic* plaintiffs only bolsters the argument in favor of certification. In opposing class certification, the State Defendants assert that this class action conflicts with the litigation strategy of the *Bostic* plaintiffs, who intend to proceed via cross-motions for summary judgment without discovery, expert testimony, or evidence in support of their claims. *State Def. Opp. to Class Cert.* at 5. As Plaintiffs explained in their reply in support of certification, any purported conflict between this case and the litigation strategy of the *Bostic* plaintiffs does not undermine the adequacy of class representation or undermine the appropriateness of class certification. *See Newberg on Class Actions* at § 3:65 (“As a general rule, disapproval of the action by some class members will not preclude a class action on the

ground of inadequate representation. . . . [C]ourts are skeptical of this type of alleged conflict even in mandatory class actions under Rule 23(b)(1) or (b)(2).” But allowing the *Bostic* plaintiffs to opt out of the class should definitively put defendants’ arguments regarding adequacy of representation to rest.

Because Plaintiffs do not object to the exclusion of the *Bostic* plaintiffs from the class, the “first to file” arguments raised in the *Bostic* plaintiffs’ request are simply irrelevant. Plaintiffs wish to clarify, nonetheless, that the “first to file” rule neither applies to the *Bostic* litigation nor undermines the appropriateness of class certification in this case.

The original complaint in *Bostic* – and the only complaint at the time this action was filed – did not include any claims related to the recognition of marriages from other states. The *Bostic* plaintiffs have since amended their complaint to include plaintiffs married in another jurisdiction, but waited until September 3, 2013 to do so – over a month after the complaint in this case was filed. For those claims, this case is the first-filed action – not the one in *Bostic*. *Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, Inc.*, 351 F.Supp.2d 1188, 1194 (D. Kan. 2005) (using date that amended complaint with new counterclaims was filed instead of date original complaint was filed for purpose of determining which suit is entitled to priority).<sup>1</sup>

---

<sup>1</sup> Additional equitable factors also suggest that the first to file rule is not relevant here. First, the chronology of events reflects that the *Bostic* litigation was not filed until after the ACLU, ACLU of Virginia, and Lambda Legal had made a heavily publicized announcement that they intended to imminently file suit, and courts have recognized that “[w]hen the circumstances suggest a race to the courthouse, the first-to-file rule loses much of its force.” *Samsung Elec. Co., Ltd. v. Rambus, Inc.*, 386 F.Supp.2d 708, 724 (E.D. Va. 2005). In addition, although the *Bostic* plaintiffs and defendants have entered into a plan for expedited briefing, at the present time this action has progressed further because the only pleading presently on file in *Bostic* is an amended complaint, which has not been responded to with any responsive pleading or motion. See *Elderberry of Weber City, LLC v. Living Ctrs.-Se., Inc.*, No. 6:12-CV-00052, 2013 WL 1164835, at \*5 (W.D. Va. March 20, 2013) (declining to invoke first-filed rule where earlier-filed case “has not advanced any further than this action”).

More fundamentally, a complaint filed by an individual plaintiff is not a first-filed suit for purposes of a subsequent class action brought by different class representatives. The “first-to-file” rule applies in class actions, but only when the first-filed case is also a class action. “In a class action, the classes, and not the class representatives, are compared.” *Ross v. U.S. Bank Nat’l. Ass’n.*, 542 F.Supp.2d 1014, 1020 (N.D. Cal. 2008); *see Dubee v. P.F. Chang’s China Bistro, Inc.*, No. C 10–01937 WHA, 2010 WL 3323808, at \*2 (N.D. Cal. Aug. 23, 2010) (“first-to-file” rule not implicated by subsequently filed class action even though “this class—if certified—could encompass the plaintiff” bringing individual claims in an earlier-filed case). Otherwise an individual plaintiff pursuing his or her individual interests could preclude an entire class of similarly situated people from having their day in court with attorneys who have taken on a duty to represent the entire class’s interest instead of just the interest of an individual litigant.

Finally, the underlying concerns of the “first to file” rule are not implicated here because the rule is intended to facilitate the resolution of all claims in a single forum, but the *Bostic* Plaintiffs do not seek to have the two actions consolidated and resolved in the same proceeding. To the contrary, because Plaintiffs in this action intend to submit expert testimony and evidence in support of their constitutional claims, the *Bostic* plaintiffs apparently believe that consolidation would interfere with their strategy to move their case forward without any evidentiary submissions. In light of the different litigation strategies of the two sets of plaintiffs, invoking the “first to file” rule in these circumstances makes little sense.

Plaintiffs do not object to an order excluding the *Bostic* plaintiffs from the certified class to allow them “to prosecute their own case, for their own families, with their own counsel, on their own terms.” *Bostic Request.* at 5. But the pendency of the *Bostic* litigation does not

undermine the need for class certification in this action to protect the interests of thousands of other Virginia same-sex couples and their families. The rest of the class is also entitled to its day in court and to representation by class counsel, who have taken on a duty to protect the interests of the class as a whole.

Dated: September 9, 2013  
Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION  
OF VIRGINIA FOUNDATION, INC.

\_\_\_\_\_/s/  
Rebecca K. Glenberg (VSB No. 44099)  
701 E. Franklin Street, Suite 1412  
Richmond, Virginia 23219  
Phone: (804) 644-8080  
Fax: (804) 649-2733  
rglenberg@acluva.org

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

James D. Esseks  
Amanda C. Goad  
Joshua A. Block  
125 Broad Street, 18th Floor  
New York, New York 10004  
Phone: (212) 549-2500  
Fax: (212) 549-2650  
jesseks@aclu.org  
agoad@aclu.org  
jblock@aclu.org

LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.

Greg Nevins  
730 Peachtree Street, NE, Suite 1070  
Atlanta, Georgia 30308  
Phone: (404) 897-1880  
Fax: (404) 897-1884  
gnevins@lambdalegal.org

Tara L. Borelli  
3325 Wilshire Boulevard, Suite 1300  
Los Angeles, California 90010  
Phone: (213) 382-7600  
Fax: (213) 351-6050  
tborelli@lambdalegal.org

JENNER & BLOCK LLP

Paul M. Smith  
Luke C. Platzer  
Mark P. Gaber  
1099 New York Avenue, NW Suite 900  
Washington, D.C. 20001-4412  
Phone: (202) 639-6000  
Fax: (202) 639-6066  
psmith@jenner.com  
lplatzer@jenner.com  
mgaber@jenner.com

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, Rebecca K. Glenberg, hereby certify that the foregoing document was filed on September 9, 2013, with the Clerk of Court using the CM/ECF system, which will automatically send a copy to the following:

E. Duncan Getchell, Jr.  
Solicitor General of Virginia  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
dgetchell@oag.state.va.us

Rosalie Pemberton Fessier  
Timberlake, Smith, Thomas & Moses, P.C.  
25 North Central Avenue  
P.O. Box 108  
Staunton, VA 24402-0108  
rfessier@tstm.com

Charles B. Lustig  
Shuttleworth, Ruloff, Swain, Haddad & Morecock, P.C.  
4525 South Blvd., Ste. 300  
Virginia Beach, VA 23452  
clustig@srgslaw.com

September 9, 2013

/s/ Rebecca K. Glenberg  
Rebecca K. Glenberg (VSB No. 44099)  
701 E. Franklin Street, Suite 1412  
Richmond, Virginia 23219  
Phone: (804) 644-8080  
Fax: (804) 649-2733  
rglenberg@acluva.org