



COMMONWEALTH of VIRGINIA

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The Honorable Robert G. Marshall
Member, House of Delegates
Post Office Box 406
Richmond, Virginia 23218

Dear Delegate Marshall:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

Virginia law criminalizes bigamy and voids bigamous marriages. You ask whether these laws are facially unconstitutional in light of the Fourth Circuit Court of Appeals' decision in *Bostic v. Schaefer*.¹ You also ask whether bisexual and transgender Virginians have the right to marry a partner of the same sex.

Response

It is my opinion that Virginia's laws voiding bigamous marriages and criminalizing bigamy are constitutional and that the Fourth Circuit's decision in *Bostic v. Schaefer* does not invalidate §§ 18.2-362, 18.2-363, 20-38.1, 20-40, and 20-45.1 of the *Code of Virginia*, which prohibit bigamy by all persons, regardless of sexual orientation or gender identity. I also conclude that bisexual and transgender Virginians, like all Virginians, have the right to marry the person they choose, so long as the marriage is otherwise lawful.

Applicable Law and Discussion

I. Virginia's Bigamy Laws

The Commonwealth of Virginia defines a bigamous marriage as "a marriage entered into prior to the dissolution of an earlier marriage of one of the parties."² Virginia has a long history of prohibiting such unions. Virginia passed the first law expressly criminalizing marriage to more than one person over 200 years ago.³ Today, a marriage is automatically void in the Commonwealth if either party is already

¹ 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.*, *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 140 (2014).

² VA. CODE ANN. § 20-38.1(a)(1) (2008).

³ *See Reynolds v. United States*, 98 U.S. 145, 165 (1878) (citing 12 Hening's Stat. 691).

married to a living spouse.⁴ The Commonwealth also can charge an individual who commits bigamy with a Class 4 felony or misdemeanor pursuant to §§ 18.2-362 and 20-40 of the *Code of Virginia*.⁵ These statutes are presumed constitutional “unless [they] clearly violate a provision of the United States or Virginia Constitutions.”⁶

The United States Supreme Court has considered bigamy laws like Virginia’s and found them to be constitutional. In *Reynolds v. United States*, the Court upheld a federal law making bigamy illegal in the territories of the United States.⁷ The Court found that “there cannot be a doubt that . . . it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”⁸

The *Reynolds* decision remains good law today. While the United States Supreme Court has struck down various state efforts to restrict monogamous marriage,⁹ it has never overturned its holding that a state may choose to outlaw polygamy. To the contrary, the Court regularly has cited *Reynolds* with approval,¹⁰ and lower federal and state courts continue to cite *Reynolds* in upholding state laws banning one person from entering into two state-recognized marriages.¹¹

Reynolds remains controlling even after the Fourth Circuit’s recent decision in *Bostic v. Schaefer*. In *Bostic*, the court considered the Commonwealth’s constitutional and statutory ban on marriage for same-sex couples.¹² The Fourth Circuit found that, because the Commonwealth’s ban on marriage for same-sex couples interfered with an individual’s fundamental right to marry, the prohibition was subject to strict scrutiny. Because no compelling state interest supported the ban, it was held to be unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹³

The judgment entered by the district court in *Bostic*, which the Fourth Circuit affirmed, affects only the rights of same-sex couples. The judgment struck down Virginia’s marriage laws only “to the extent they deny the rights of marriage to same-sex couples or recognition of lawful marriages between

⁴ VA. CODE ANN. §§ 20-28.1(1) (2008); 20-43 (2008); see *Kelderhaus v. Kelderhaus*, 21 Va. App. 721, 725, 467 S.E.2d 303, 304 (1996) (citing *Kleinfeld v. Veruki*, 7 Va. App. 183, 190, 372 S.E.2d 407, 411 (1988)).

⁵ VA. CODE ANN §§ 18.2-362 (2014), 20-40 (2008); see *Cole v. Commonwealth*, 58 Va. App. 642, 651, 712 S.E.2d 759, 764 (2011).

⁶ See *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (citing *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

⁷ *Reynolds*, 98 U.S. at 166.

⁸ *Id.* at 166.

⁹ See *Turner v. Safley*, 482 U.S. 78 (1987) (striking down a Missouri law barring prisoners from marrying); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a Wisconsin law prohibiting people owing child support from marrying); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a Virginia law banning interracial marriages).

¹⁰ See *Emp’t Div. v. Smith*, 494 U.S. 872, 899 (1990); *Braunfeld v. Brown*, 366 U.S. 599, 603-05 (1961); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

¹¹ See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1068, 1070 (10th Cir. 1985) (“the state is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship”); *Utah v. Green*, 99 P.3d 820, 826 (Utah 2004).

¹² *Bostic*, 760 F.3d 352.

¹³ *Id.* at 384.

same-sex *couples* that are validly entered into in other jurisdictions.”¹⁴ The ruling further enjoins state and local officials from enforcing a Virginia marriage law only “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*.”¹⁵ By its plain terms, then, the judgment in *Bostic* applies only to marriages between two persons. Bigamy entails a serial marriage process that ultimately encompasses more than two persons.

Moreover, nothing in the Fourth Circuit’s *Bostic* opinion questions the authority of the Commonwealth to limit state-recognized marriages to monogamous relationships. Rather, the Fourth Circuit found that the right to monogamous marriage could not be limited to “opposite-sex couples.”¹⁶ The court described civil marriage as “one of the cornerstones of our way of life,” because it “allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships”¹⁷ The court worried that if it “limited the right to marry to certain *couplings*, [it] would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.”¹⁸ The court’s use of the word “couples” and “couplings” indicates that the court was concerned specifically with restrictions on the choice of partners within a monogamous-marriage regime.

In your request, you reference the District Court of Utah’s decision in *Brown v. Buhman*.¹⁹ The relevant part of that lengthy decision expressly upheld the section of Utah’s law that, like Virginia’s law, criminalizes the state-sanctioned marriage of one person to more than one spouse.²⁰

The United States Supreme Court has described marriage as a “fundamental freedom”²¹ and “the most important relation in life.”²² The fundamental right to marry “is of fundamental importance for all individuals.”²³ When describing this right, the Court describes marriage as between *two* individuals.²⁴ And as *Bostic* now makes clear, the Constitution protects the right to a state-recognized marriage between two consenting and legally competent persons, regardless of gender.²⁵ Because *Bostic* is distinguishable from the issue you present, because *Reynolds* remains good law, and in light of the presumption of constitutionality afforded to all enactments by the General Assembly,²⁶ I conclude that the

¹⁴ Judgment at 1, *Bostic v. Rainey*, Case No. 2:13-cv-00395-AWA-LRL (E.D.Va. Feb. 24, 2014), ECF No. 139 (emphasis added).

¹⁵ *Id.* at 2

¹⁶ *Bostic*, 760 F.3d at 377.

¹⁷ *Id.* at 384 (emphasis added).

¹⁸ *Id.* at 377 (emphasis added).

¹⁹ 947 F. Supp. 2d 1170 (D. Utah 2013).

²⁰ *Id.* at 1190 (“the broader Statute survives in prohibiting bigamy”).

²¹ *Loving*, 388 U.S. at 12.

²² *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

²³ *Zablocki*, 434 U.S. at 384.

²⁴ See, e.g., *Turner*, 482 U.S. at 78; *Zablocki*, 434 U.S. at 374; *Loving*, 388 U.S. at 1 (describing marriage rights of “couples”); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (describing marriage as involving “couples”).

²⁵ *Bostic*, 760 F.3d at 384.

²⁶ “[E]very reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity.” *Marshall*, 275 Va. at 428, 657 S.E.2d at 75 (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)). See *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980).

Commonwealth's laws criminalizing bigamy and voiding bigamous marriages and are constitutional and enforceable.

II. Marriage of Bisexual and Transgender Individuals

The Commonwealth does not now, and never has, prevented bisexual and transgender Virginians from marrying. Beginning in 1975, however, Virginia explicitly prohibited any person from marrying another person of the same sex in the Commonwealth.²⁷ Until Virginia's ban on marriages between same-sex couples was overturned in *Bostic*, all Virginians, including bisexual and transgender Virginians, could marry only a spouse of the opposite sex.

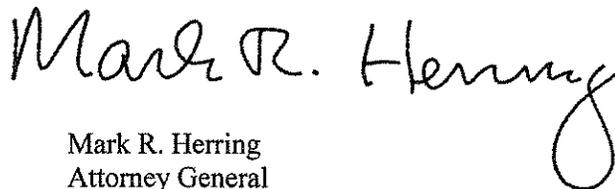
As noted above, *Bostic* invalidated that ban under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁸ The Fourth Circuit characterized the right to marriage as "a broad right . . . that is not circumscribed based on the characteristics of individuals seeking to exercise that right."²⁹ Accordingly, individuals' right to marry is not limited by their own sexual orientation or gender identity, or by that of the person they marry. Like all Virginians, bisexual and transgender individuals have a fundamental constitutional right to marry the person they choose, so long as the marriage is otherwise lawful.

Conclusion

Accordingly, it is my opinion that Virginia's laws voiding bigamous marriages and criminalizing bigamy are constitutional and that the Fourth Circuit's decision in *Bostic v. Schaefer* does not invalidate §§ 18.2-362, 18.2-363, 20-38.1, 20-40, and 20-45.1 of the *Code of Virginia*, which prohibit bigamy by all persons, regardless of sexual orientation or gender identity. I also conclude that bisexual and transgender Virginians, like all Virginians, have the right to marry the person they choose, so long as the marriage is otherwise lawful.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

²⁷ *Bostic*, 760 F.3d at 367-68.

²⁸ *Id.* at 384.

²⁹ *Id.* at 376.