No. 14-153

IN THE
Supreme Court of the United States

JANET M. RAINEY,
Petitioner,
v.
TIMOTHY B. BOSTIC, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE HARRIS RESPONDENTS

REBECCA K. GLENBERG
CLAIRE GASTAÑAGA
AMERICAN CIVIL LIBERTIES
UNION OF VIRGINIA
FOUNDATION, INC.
701 E. Franklin Street
Suite 1412
Richmond, VA 23219
(804) 644-8080

PAUL M. SMITH
Counsel of Record
LUKE C. PLATZER
MARK P. GABER
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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Additional counsel on inside cover

GREGORY R. NEVINS
TARA L. BORELLI
LAMBDA LEGAL DEFENSE
and EDUCATION FUND, INC.
730 Peachtree Street, NE
Suite 1070
Atlanta, GA 30308
(404) 897-1880

JON W. DAVIDSON
LAMBDA LEGAL DEFENSE
and EDUCATION FUND, INC.
4421 Wilshire Blvd.
Suite 280
Los Angeles, CA 90010
(213) 382-7600

JAMES D. ESSEKS
JOSHUA A. BLOCK
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

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Respondents Joanne Harris, Jessica Duff, Christy Berghoff, and Victoria Kidd ("Harris Class Respondents"), who represent a certified class of all Virginia same-sex couples except the four Bostic Respondents,[1] file this brief in response to the petition for certiorari filed by petitioner Janet Rainey, the State Registrar of Vital Records of the Commonwealth of Virginia.[2] As discussed *infra*, the Fourth Circuit was clearly correct in holding that it is unconstitutional for the Commonwealth of Virginia to refuse to marry same-sex couples or to recognize marriages of such couples from other states. Moreover, that ruling is consistent with all of the more than two dozen other rulings of federal courts addressing the same issues that have been handed down since this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

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[1] As discussed *infra*, the Harris Class Respondents filed a suit separate from the *Bostic* case in the Western District of Virginia. After a class was certified and after the *Bostic* district court ruled that the Virginia marriage bans are unconstitutional, the Harris Class Respondents successfully moved to intervene in the Fourth Circuit and have participated as full parties ever since.

[2] Petitioner Rainey is a state official, represented by the Attorney General of Virginia, who has taken the position that Virginia's refusal to marry same-sex couples is unconstitutional. The contrary position was argued below by two County Clerk defendants, represented by separate counsel. At least one of these Clerks represented below that she "intends to file a petition for certiorari" seeking review of the Fourth Circuit's ruling. *See* Motion of Appellant McQuigg for a Stay of Mandate Pending Filing of Petition for a Writ of Certiorari, at 1, *Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. Aug. 1, 2014) (No. 14-1167), ECF No. 238.

Nevertheless, given the Court's entry of a stay in this case, Virginia's same-sex couples apparently will be unable to benefit from the Fourth Circuit's mandate vindicating their freedom to marry unless and until this Court has addressed the merits of the constitutional question presented here. Accordingly, the Harris Class Respondents support a grant of certiorari in this matter in order to resolve the case as expeditiously as possible.[3]

STATEMENT

As the Fourth Circuit described, Pet. App. 32-34, Virginia has enacted a series of laws withholding marriage rights from same-sex couples. These culminated in a 2006 state constitutional amendment, approved by popular vote, that (1) bars celebration or

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[3] Prince William County Clerk Michèle McQuigg filed a request to stay the Fourth Circuit's mandate on August 14, 2014. On August 18, 2014, the Harris Class Respondents requested that if the stay request is granted, the Court should treat the stay application as a petition for *certiorari* in which the Harris Class Respondents acquiesce. And on August 19, 2014, Applicant McQuigg stated that, should the Court agree that the nature of this case calls for expedition — as it does, given the serious ongoing harms to Virginia same-sex couples and their children — she does not oppose converting the stay application into a petition for *certiorari*. On August 20, the Court issued a stay order providing that the Fourth Circuit mandate "is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court." *McQuigg v. Bostic*, No. 14A196, 2014 WL 4096232, at *1 (U.S. Aug. 20, 2014).

recognition of any marriage not involving one man and one woman, and (2) also bars creation or recognition of any other legal status for unmarried couples intended to provide the "design, qualities, significance, or effects of marriage" or to provide any of the "rights, benefits, obligations, qualities, or effects of marriage." Va. Const. art. I, § 15-A; *see* Pet. App. 33-34. As a result, lesbians and gay men in the Commonwealth who are in long-term committed relationships not only cannot marry but also are unable to obtain any other legal status that will be respected if a court later determines that that status was designed to simulate marriage or that it provides any of marriage's protections.

The Harris Class Respondents are two same-sex couples in committed, loving relationships who reside in Virginia. Each couple is raising a child. Joanne Harris and Jessica Duff are unmarried but wish to marry in their home state. Christy Berghoff and Victoria Kidd were married in the District of Columbia but their marriage is not recognized in their home state. They filed a challenge to the Virginia marriage bans in the U.S. District Court for the Western District of Virginia on August 1, 2013, two weeks after the Bostic respondents filed suit in the Eastern District of Virginia. *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.). The *Harris* case was the first to include a claim for recognition of out-of-state marriages. It also sought certification of a plaintiff class. On January 31, 2014, the *Harris* district court granted respondents' motion for class certification under Federal Rule of Civil Procedure 23(b)(2), defining the class as including all same-sex couples in the Commonwealth except the

four *Bostic* respondents who had requested exclusion. *Harris v. Rainey*, Civ. A. No. 5:13-cv 00077, ___ F.R.D. ___, 2014 WL 352188 (W.D. Va. Jan. 31, 2014). After the *Bostic* district court granted summary judgment for the plaintiffs in that case, the Harris plaintiffs moved to intervene in the resulting appeal and their motion was granted by the Fourth Circuit on March 10, 2014.

The *Bostic* district court's summary judgment ruling was issued on February 13, 2014. Pet. App. 127-185. The court ruled in favor of the plaintiffs on their claims that the Virginia marriage bans violate the due process and equal protection clauses of the Fourteenth Amendment. Turning first to due process, the court held that the ban burdened the fundamental interest in marriage and thus had to satisfy strict scrutiny, citing numerous decisions of this Court including *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Loving v. Virginia*, 388 U.S. 1 (1967). Pet. App. 152-59.

The court then rejected each of the proffered rationales for the ban as insufficient to satisfy strict scrutiny. Pet. App. 158-74. It recognized that the Clerk's reliance on "tradition" was essentially a restatement of the argument that the Commonwealth could discriminate against lesbian and gay couples based on judgments about their moral worth. *Id.* at 159-63. Such an argument, the court held, cannot prevail in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003). The court similarly rejected reliance on principles of federalism, noting that states must adhere to the Constitution even when exercising their core

functions like establishing domestic relations laws. Pet App. at 163-68. Finally, the court rejected the argument that excluding same-sex couples from marriage serves to enhance the well-being of children. It found this justification illogical because the marriage bans needlessly harm and stigmatize the children being raised by same-sex couples while not bearing any rational relationship to the interests of children being raised by different-sex couples. *Id.* at 168-74.

Turning next to equal protection, the district court held there was no need to determine the level of scrutiny applicable to laws discriminating based on sexual orientation, because the marriage bans fail even rational-basis scrutiny. *Id.* at 178. Taking into account the strong evidence that Virginia's public policy toward lesbian and gay couples is based primarily on moral disapproval and prejudice, the court determined that the proffered justifications just discussed fail to supply a legitimate and rational basis supporting the discrimination at issue. *Id.* at 179-80.

The Fourth Circuit affirmed. The majority agreed with the district court that the Virginia marriage bans interfere with the exercise of the fundamental right of marriage. *Id.* at 50-56. In so doing, it rejected the notion that this fundamental right may be defined as applying only to different-sex couples. *Id.* The court of appeals accordingly held that Virginia's discriminatory law must satisfy strict constitutional scrutiny.

Applying that scrutiny, the court had little trouble rejecting the proffered justifications of (1) federalism, (2) history and tradition, (3) safeguarding the institution of marriage, (4) "responsible procreation,"

and (5) optimal childrearing. With regard to the procreation issue, the court found unpersuasive the argument that the Commonwealth could rightfully limit marriage to couples capable of unplanned pregnancies. It noted that the exclusion of same-sex couples left far more infertile couples still able to marry — those different-sex couples who cannot conceive accidentally due to age or medical conditions. *Id.* at 65. It cited *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985), for the proposition that, even under rational-basis review, such "extreme underinclusivity" leads to an inescapable conclusion that the differential treatment of same-sex couples rests on "an irrational prejudice." Pet. App. 67 (quotation marks omitted).

The court went on to observe that the marriage bans do not promote an interest in responsible procreation. After all, "[p]rohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births." *Id.* To the contrary, since many same-sex couples do raise children, the bans actually "increase[s] the number of children raised by unmarried parents." *Id.*

Finally, turning to the issue of "optimal childrearing," the Fourth Circuit rejected the argument that marriage may be banned for same-sex couples on the theory that children do better when raised by a mother and a father. *Id.* at 70. The court expressed great skepticism about this assertion, citing the consensus of mental health professionals that children of same-sex parents do as well as children of different-sex parents, all other factors being equal, and

that barring equal marriage rights *harms* children of same-sex couples by stigmatizing them and their families. *Id.* at 70-71. It then said it need not rely on these scientific insights because the proffered justification fails for at least two other reasons. First, the "optimal childrearing" argument rests on the same "overbroad generalizations about the different talents, capacities, or preferences" of mothers and fathers that this Court has rejected under heightened scrutiny. *Id.* at 71-72 (quotation marks omitted). Second, there is "no link" between barring same-sex couples from marrying and the purported goal of increasing the number of children being raised by different-sex parents. It neither deters same-sex couples from having children nor increases the number of children born to different-sex couples. *Id.* Accordingly this final state interest was insufficient to satisfy strict scrutiny.

On August 14, a motion for a stay of the mandate was filed by one of the County Clerks defending the Virginia marriage bans, Michele McQuigg. On August 20, 2014, the Court issued an order staying the mandate pending consideration of the case in this Court. *See* note 3 *supra*.

ARGUMENT

Given this Court's issuance of a stay of the Fourth Circuit's mandate, the Harris Class Respondents do not oppose a grant of review in this case. Although we believe that the Fourth Circuit was entirely correct in its decision, it is now evident that no same-sex couple in Virginia is going to be able to marry or have an out-of-state marriage recognized until this Court addresses the constitutional issue of marriage equality on the

merits. Because of that reality, the Harris Class Respondents urge the Court to grant review as soon as possible in a case or cases allowing such a final resolution. And because this case would be an excellent vehicle to review this important constitutional issue, the Harris Class Respondents support a grant of review in this case.

I. Although the Decision Below Was Entirely Correct, the Court Should Grant Review in Order to Address the Question Presented on the Merits so that the Constitutional Rights of Same-Sex Couples in Virginia and Elsewhere May Be Enforced Without Delay.

Despite the avalanche of decisions in the lower federal courts all recognizing that the U.S. Constitution's guarantee of a right to marry equally belongs to same-sex couples, the Court has evidently concluded that states should not be forced by federal decrees to begin marrying same-sex couples, or recognizing their out-of-state marriages, unless and until the Court has addressed that question on the merits. That means that 14,000 Virginia same-sex couples, and many others in other states, are still waiting to be able to exercise their constitutional rights in this area. For many, this wait entails serious and concrete harms, relating to illnesses and death, childbirth, adoptions, and inability to access health insurance and other potential benefits of marriage. For that reason, the Harris Class Respondents urge the Court to address the merits of the question presented here as expeditiously as possible.

In so doing, the Harris Class Respondents do not mean to express any doubt about the correctness of the ruling below. To the contrary, the Fourth Circuit's decision was fully consistent with this Court's teachings about the proper application of the Fourteenth Amendment.

More specifically, the court of appeals was correct in holding that strict constitutional scrutiny applies to all laws, like the ones at issue here, that significantly burden the fundamental right to marry. That principle is firmly established in this Court's jurisprudence. *E.g.*, *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12. Moreover, same-sex couples cannot be excluded from the fundamental right to marry by characterizing the claimed right at issue as a "new" right to "same-sex marriage." Such an effort to recharacterize the fundamental right at issue would repeat the mistake made by this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), when it erroneously framed the question as whether the Constitution protects a "fundamental right [for] homosexuals to engage in sodomy" and thereby "fail[ed] to appreciate the extent of the liberty at stake," *Lawrence*, 539 U.S. at 566-67. As *Lawrence* explained, "[o]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. Same-sex couples form loving, committed relationships, often raising children together as well, and denying such couples the

opportunity to marry inflicts the same harms as it would for any other group and requires the same degree of constitutional justification. As the Court previously has explained, marriage is of "fundamental importance for *all* individuals." *Zablocki*, 434 U.S. at 384 (emphasis added).

In addition to unconstitutionally infringing on the fundamental right to marry, the marriage bans in Virginia and other states also violate the Equal Protection Clause of the Fourteenth Amendment. The Fourth Circuit did not reach the question whether discrimination based on sexual orientation itself requires heightened scrutiny. But if one undertakes that inquiry, the answer is clear. The factors that this Court applies in determining whether a particular form of discrimination involves a suspect classification all point in the same direction. *See generally Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne*, 473 U.S. at 442-47. Lesbians and gay men as a class have historically been subjected to massive amounts of discrimination. Their sexual orientation bears no relation to their ability to contribute to society. Sexual orientation is a distinguishing characteristic that is either immutable or so fundamental to personal identity that people should not be required to try to change it to avoid discrimination. And lesbians and gay men are a minority and are not sufficiently powerful, politically, to protect themselves through the political process — as evidenced by the absence of basic anti-discrimination protection in federal law and the law of many states.

Moreover, Virginia's marriage bans are subject to heightened scrutiny for the simple reason that an explicit gender classification appears on the face of those laws. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citing "the core instruction of this Court's pathmarking decision[] in *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136-37" n. 6 (1994) that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action"). Heightened scrutiny is proper also because the marriage bans discriminate based on sex stereotypes regarding gender roles of mothers and fathers. *Id.* at 533 (justification for a classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

There is no state interest that can justify continuing to exclude same-sex couples from equal access to civil marriage under heightened scrutiny — or any standard of scrutiny. Certainly the defendant clerks did not offer any such interest in the in the courts below.

"Tradition" is no reason to uphold a discriminatory law that cannot otherwise be defended. The fact that some forms of discrimination have been longstanding does not explain or justify them or exempt them from the same constitutional scrutiny applicable to newer forms of discrimination.

Nor can *Windsor* properly be cited for the proposition that states have *carte blanche* to decide whom to marry and whom not to marry. That case did emphasize the greater role played by states, as compared to the federal government, in setting

marriage policy. But it also emphasized that, in doing so, states "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1).

The Fourth Circuit also properly rejected reliance on two other justifications: (1) that only different-sex couples can accidentally procreate and need to be channeled into marriage, and (2) that children supposedly do better with two different-sex parents. Banning same-sex couples from marrying and refusing to recognize their marriages from other jurisdictions does not have even a rational connection to either of these claimed interests — let alone a connection that could withstand heightened scrutiny.

The fact that same-sex couples do not "accidentally" procreate is not a rational reason to exclude them from marriage. While it is true that same-sex couples do not procreate accidentally, they do bear and raise children. Thus, even assuming the purpose of civil marriage could possibly be limited to avoiding raising children out-of-wedlock (a dubious proposition), preventing same-sex couples from marrying *increases* the number of children being raised by unmarried parents. This argument could approach minimal rationality only if this harm were counter-balanced by some benefit in terms of encouraging different-sex couples to marry before or after they conceive. But there is no reason to think that excluding same-sex couples from marriage will have that effect. Indeed, as the Fourth Circuit observed, because Virginia does not impose an "accidental procreation" requirement on any different-sex couple — including couples who are elderly or

infertile — excluding same-sex couples from marriage based on an "accidental procreation" rationale is so extremely underinclusive that it leads to an inescapable conclusion that the differential treatment of same-sex couples rests on "'an irrational prejudice.'" Pet. App. 67 (quoting *City of Cleburne*, 473 U.S. at 450).

Similarly, the argument that same-sex parents do not provide an "optimal" environment for raising children cannot rationally explain a law precluding same-sex couples from marrying. Even accepting the faulty premise that same-sex couples and their children are "inferior families," Pet. App. 70, "[t]here is absolutely no reason to suspect that prohibiting same-sex couples from marrying and refusing to recognize their out-of-state marriages will cause same-sex couples to raise fewer children or impel married opposite-sex couples to raise more children," *id.* at 72. Instead, the only effect of the marriage bans is to deny the children who already are being raised by same-sex couples the stability, financial support and recognition that comes with having married parents.

In addition to failing as a matter of logic, the assertion that same-sex couples are inferior parents is simply false. The overwhelming professional consensus, based on substantial research, is that what matters for child welfare is having a stable, loving two-parent family along with sufficient economic resources, not the genders of the two parents. *See id.* at 70-71. Recent efforts to cast doubt on that consensus have been thoroughly debunked as biased or severely methodologically flawed. *See DeBoer v. Snyder*, 973 F.

Supp. 2d 755, 766 (E.D. Mich. 2014) (ruling after a full bench trial).

In sum, it should not be surprising that the lower federal courts are in agreement on this question. Indeed, even under rational basis scrutiny, a law barring same-sex couples from obtaining a civil marriage still would be unconstitutional. Once one recognizes, as the Court did in *Lawrence*, that same-sex couples form meaningful committed relationships and families, and that morality cannot be invoked by the state as a justification to interfere with these personal choices, *see Lawrence v. Texas*, 539 U.S. at 577-78, there is *no* remaining rational justification for denying equal legal status to same-sex couples who wish to marry or have their out-of-state marriages recognized.

II. This Case Would Be an Excellent Vehicle to Decide the Question Presented.

The Harris Class Respondents agree with Petitioner Rainey that this case would provide an excellent vehicle, for all the reasons set forth in the petition. The case presents the issue of marriage equality in both of the relevant forms — as a question of the right to marry and as a question of the right to have an out-of-state marriage recognized. Moreover the case has been litigated thoroughly and adversarially by two sets of challengers to Virginia's marriage bans who collectively represent *all* same-sex couples in the Commonwealth and by two County Clerks, who are independent constitutional officers entitled, under Virginia law, to defend the constitutionality of the Commonwealth's marriage bans regardless of the legal position adopted by the

Attorney General and Petitioner Rainey. And as named parties bound by the judgment below, the County Clerks unquestionably have standing to litigate these important constitutional questions before this Court. *See Horne v. Flores*, 557 U.S. 433, 445-46 (2009).

In addition, Petitioner Rainey independently has Article III and prudential standing to seek review even though she agrees with the ruling below. *See Windsor*, 133 S. Ct. at 2686; *INS v. Chadha*, 462 U.S. 919 (1983). That standing is bolstered by the participation of Clerk McQuigg, who is "prepared to defend with vigor the constitutionality" of Virginia's marriage bans. *Windsor*, 133 S. Ct. at 2687.[4] At the same time, the Attorney General has participated actively, explaining in clear terms the reason why Virginia's longstanding opposition to marriage equality is no longer constitutionally defensible. The Attorney General's participation in the case provides valuable added perspective from the Commonwealth "on the historical roots of the institution of marriage and its evolving

[4] Any prudential standing issues that might be raised regarding the Rainey petition will disappear with the filing of McQuigg's petition. There is no doubt that McQuigg intends to file a petition; she has publicly announced that fact. And, now that a stay has been granted on her motion, the Harris and Bostic Respondents made equally clear in their responses to the McQuigg stay application that they will not oppose that petition, just as they are not opposing the Rainey petition. Given the respective positions of the parties, and in the interest of expedition, the Harris Respondents renew their request to have the Court treat McQuigg's stay application as a petition for certiorari, *see* note 3 *supra*.

understanding of the meaning of equality." *Id.* at 2692-93

The Court already has some familiarity with this case. The full Court addressed the McQuigg stay application just a few days ago.

Finally, granting *certiorari* would provide the Court with briefing and oral argument reflecting the collective experience of counsel for the Bostic and Harris Class Respondents, whose organizations have litigated every major gay rights case decided by this Court from *Romer v. Evans*, 517 U.S. 620 (1996), to *Lawrence* to *Windsor* and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Similarly, Clerk McQuigg is represented by counsel from the Alliance Defending Freedom, which has significant experience defending marriage bans, including as counsel for defendants or intervenors in *Bishop v. Smith*, No. 14-5003, ___ F.3d ___, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012); and *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), and as counsel for *amici* in *Windsor* and numerous other marriage cases. The collective experience of counsel on both sides of the case will aid the Court in resolving the momentous constitutional questions at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

REBECCA K. GLENBERG
CLAIRE GASTAÑAGA
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street
Suite 1412
Richmond, VA 23219
(804) 644-8080

PAUL M. SMITH
Counsel of Record
LUKE C. PLATZER
MARK P. GABER
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

GREGORY R. NEVINS
TARA L. BORELLI
LAMBDA LEGAL DEFENSE and EDUCATION FUND, INC.
730 Peachtree Street, NE
Suite 1070
Atlanta, GA 30308
(404) 897-1880

JAMES D. ESSEKS
JOSHUA A. BLOCK
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

JON W. DAVIDSON
LAMBDA LEGAL DEFENSE and EDUCATION FUND, INC.
4421 Wilshire Blvd.
Suite 280
Los Angeles, CA 90010
(213) 382-7600

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