NO. A14-____

In the
Supreme Court of the United States

ALAN WILSON, in his official Capacity as Attorney General,

Applicant,

v.

COLLEEN THERESE CONDON and ANNE NICHOLS BLECKLEY,

Respondents.

Emergency Application to Stay United States District Court Order

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

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November 18, 2014

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To the Honorable John Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Applicant Attorney General Alan Wilson hereby moves pursuant to Rule 23, Rules of the Supreme Court, for an emergency stay of the United States District Court of the District Court for the District of South Carolina dated November 12, 2014 granting summary judgment to the Plaintiffs-Respondents in this same-sex marriage case, issuing injunctions and denying the Attorney General's Motion to Dismiss. *Condon v. Haley*, No. CIV.A. 2:14-4010-RMG, 2014 WL 5897175 (D.S.C. Nov. 12, 2014). Appendix, Attachment A, p. 24, *infra*.[1] He respectfully requests that this stay last while the appellate process is completed in this case at the Court of Appeals and while any Petition for Writ of Certiorari is considered by this Court. Time is of the essence in that a temporary stay issued by the District Court expires at Noon on November 20, 2014.

CASE STATUS AND PRIOR MOTIONS FOR STAY

The above Order of November 12, 2014, of the Honorable Richard M. Gergel, United States District Court Judge granted summary judgment to Plaintiffs-Respondent against South Carolina laws banning same-sex marriage, dismissed the Governor but not the Attorney General on grounds of Eleventh Amendment immunity issued injunctions and denied as moot the Attorney General's Motion to

[1] Governor Haley was dismissed as a Defendant pursuant to the Eleventh Amendment by the Order of November 12. Defendant, Judge Irwin Condon was also a defendant in the proceedings in the District Court.

Dismiss. S.C. Code Ann §§20-1-10 and 20-1-15; S.C. Const art. XVII, §15. Judge Gergel's Order also denied the request for a stay of his ruling pending an appeal Order at App. pp. 35 and 36, *infra*; however, the Court granted a temporary stay to last until Noon on November 20, 2014 to allow time for the Court of Appeals to consider a motion for a stay on appeal, and possibly for the United States Supreme Court to address the matter. Order at App. pp. 35 & 36, *infra*.

The Attorney General filed a Notice of Appeal to the Court of Appeals and an Emergency Motion for Stay with that Court on November 13. The Court denied that request by Order dated November 18, 2014. Appendix, Attachment B, p. 40, *infra*.

INTRODUCTION

This case is significantly different from other same-sex marriage cases that have been brought to the attention of this Court by petitions for writ of certiorari or applications for stay. *See, eg., Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)(cert. denied)[2], *Moser v. Marie*, No. 14A503, 574 U.S. — (Nov. 12, 2014) (denial of stay). It presents an issue argued but not addressed below, and it follows the filings of petitions for writ of certiorari in *DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). *Obergefell v. Hodges*, No. 14-556, November 14, 2014; *DeBoer v. Snyder,* No. 14-571, November 18, 2014; *Bourke v v. Beshear,* No. 14-574, November 18, 2014.

[2] Cert. denied sub nom. *Rainey v. Bostic*, No. 14-153, 2014 WL 3924685 (U.S. Oct. 6, 2014) and cert. denied, No. 14-225, 2014 WL 4230092 (U.S. Oct. 6, 2014) and cert. denied sub nom. *McQuigg v. Bostic*, No. 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014)

As more fully discussed below, this case presents the question of whether the long-recognized "domestic relations exception" applies to federal question jurisdiction and, if so, the scope of that exception. The State[3] has argued this question throughout this litigation, but the courts below have not addressed the issue directly. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) did not settle this issue properly in that it failed to honor earlier precedent of that Court which required the *Bostic* Panel to follow summary decisions such as *Baker v. Nelson,* 409 U.S. 810 (1972), 409 U.S. 810 (1972). *Baker* found no substantial Federal question in a same-sex marriage case and upheld the domestic relations exception in that case. The *Bostic* panel was required to follow *Baker* under existing Fourth Circuit precedent and failed to do so.

This case is different, too, because it follows *DeBoer v. Snyder, supra,* which upheld same-sex marriage bans of four states. Now, Petitions for Writ of Certiorari has just been filed in that case, *Obergefell, et al, supra,* bringing to this Court a split among the Sixth Circuit, the Fourth Circuit, and other Circuits on same-sex marriage issues. Although this Court denied an application for stay from the State of Kansas post *DeBoer* (*Moser v. Marie,* No. 14A503, 574 U.S. — (Nov. 12, 2014)), that decision preceded the *Obergefell* Petitions presenting this Court with a split of authority among the Circuits on the issue of same-sex marriage.

The Court needs to clarify the applicability of the domestic relations exception to federal question jurisdiction. This issue goes well beyond same sex

[3] References herein to the interests and arguments of the State are made by the Attorney General on behalf of State interests in this case.

marriage and is a question of fundamental federalism and state sovereignty. Courts and commentators alike are confused as to whether the issue is jurisdictional or jurisprudential. *Baker* seems to suggest it is jurisdictional because the exception was argued to the Supreme Court and the case was dismissed "for want of a substantial federal question." The Court needs to protect state sovereignty in this crucial area. Thus a stay is warranted.

JURISDICTION

This Court has jurisdiction to grant a stay of a District Court Order pending appeal in a Court of Appeals. Rule 23, *supra, See, e.g., San Diegans for the Mt. Soledad Nat'l War Memorial v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *Heckler v. Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers).

APPLICABLE STANDARDS FOR GRANTING A STAY

"[A]n applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also, San Diegans For Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006). (" In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must try to predict whether four Justices would

vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called stay equities. ")(internal quotation marks omitted).

THE SOUTH CAROLINA ATTORNEY GENERAL SATISFIES THE STANDARDS FOR GRANTING A STAY

1

Four Justices are Likely to Grant Certiorari Should the Fourth Circuit Affirm

A split of the Circuits now exists as to the constitutionality of bars to same-sex marriage and the tests to be applied. *DeBoer, supra; Bostic v. Schaefer,* 760 F .3d 352 (4th Cir.2014) (fundamental rights); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir.2014) (rational basis); *Latta v. Otter,* No. 14–35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (heightened scrutiny as to sexual orientation); *Bishop v. Smith,* 760 F.3d 1070 (10th Cir.2014) (fundamental rights); *Kitchen v. Herbert,* 755 F.3d 1193 (10th Cir.2014) (fundamental rights)), With this split and with the filing on November 14, 2014 of the *DeBoer* Petition, a likelihood exists that at least four Justices will grant certiorari of not only the Petitions as to *DeBoer,* but also in the instant case on the the applicability of the domestic relations exception to federal question jurisdiction as well as the substantive issue of the validity of same-sex marriage bans.

2

A fair prospect exists that a majority of the Court will vote to reverse the judgment below

a

The domestic relations exception to federal jurisdiction should be clarified by this court

This case raises a fundamental question regarding federalism -- one which is applicable well beyond the issue of the constitutionality of a ban of same-sex marriage. That question is whether the long-recognized "domestic relations exception" applies to federal question jurisdiction and, if so, the scope of that exception. The State has argued this question throughout this litigation, but the courts below have not addressed the issue directly. We ask this Court to do so and order a stay.

This issue has long confused federal courts and commentators alike, who have for years "debated the validity and scope of a domestic relations exception," and who "disagree not only about the merits of continuing to recognize such an exception, but also as to whether the exception is a jurisdictional or jurisprudential bar to hearing cases." Stein, "*The Domestic Relations Exception to Federal Jurisdiction: Rethinking the Unsettled Federal Court Doctrine*," 36 *Boston College L. Rev.* 669 (July 1995). Despite several efforts, this Court has never resolved this important question of federalism fully and finally.

As far back as the 19th Century, this Court stated in *In re Burrus*, 136 U.S.

586, 593-594 (1890), that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belong to the laws of the States and not to the laws of the United States." And, in *Williams v. North Carolina*, 317 U.S. 287, 298 (1942), the Court noted that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."

More recently, in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), the Court acknowledged that *In re Burrus* did not "involve a construction of the diversity statutes," but that the domestic relations exception "has been interpreted by the federal courts to apply with equal vigor to suits brought pursuant to diversity jurisdiction." 504 U.S. at 703 (emphasis added). However, the Court seemed to limit the exception to depriving the federal courts of jurisdiction with respect to "divorce, alimony and child custody decrees." *Id.* Scholars conclude that *Ankenbrandt* "both reaffirmed and narrowed an exception of certain core cases from federal jurisdiction, but declined . . . to explicate the jurisdictional boundaries of core enforcement. . . ." Stein, *supra* at 671. Moreover, the Court in *Ankenbrandt* "failed to address whether domestic federal question claims are exempt from district court review. As a result, lower federal courts have been left without clear guidance on how to resolve their inconsistent and often conflicting approaches to the domestic relations exception – if indeed such exception is to be recognized and applied at all." *Id.*[4]

Subsequently, however, the Court in *Elk Grove United School Dist. v.*

[4] In *Ankenbrandt,* Justice Blackmun, concurring therein, labelled "declarations of status, e.g. marriage, annulment, divorce, custody, and paternity" as lying at the "core" of domestic relations issues for purposes of jurisdiction. *Ankenbrandt,* 504 U.S. at 716 (Blackmun, J. concurring).

Newdow, 542 U.S. 1 (2004), abrogated on other grounds, *Lexmark Inter., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014), appeared to apply the "domestic relations exception" to federal questions. *Newdow* was decided in the context of a constitutional attack upon the Pledge of Allegiance as purportedly violative of the Establishment Clause. Yet, the Court did not decide that issue, applying instead the domestic relations exception, and concluding that "[w]hen the hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than to reach out to resolve a weighty question of constitutional law." 542 U.S. at 17. According to the *Newdow* majority, "while rare instances arise in which it is necessary to answer a substantial question that transcends or exists apart from the family law issue, . . . in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the State courts." *Id.* at 13.[5] Of course, South Carolina's constitutional provision defining marriage has never been interpreted by the South Carolina courts, particularly with respect to the unique provision therein preserving the right to contract and create other legal instruments.

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[5] Notably, the District Court in this case, rather than addressing the State's domestic relations exception argument, instead, in a footnote, found that, because *Newdow* was abrogated on other grounds in *Lexmark Int'l v. Static Controls, Inc., supra,* the State's reliance on *Newdow* was necessarily "misplaced." *Condon v. Haley,* 2014 WL 5897175 (D.S.C. Nov. 12, 2014) at 16, n. 12. However, as this Court is well aware, *Lexmark* neither addressed the domestic relations exception, subject matter jurisdiction, nor the Court's exercise of jurisdiction, but instead answered the question of whether *Newdow's* prudential standing analysis applied to the interpretation of a statutory cause of action. See *Lexmark,* 134 S.Ct. at 1387 (noting *Newdow's* application of prudential standing to the zone of interests' test, which is used for statutory interpretation, "does not belong."). Indeed, as noted by the Court in *Lexmark,* certiorari was granted to "decide 'the appropriate analytical framework for determining a party's standing to maintain an action for fake advertising under the Lanham Act.'" *Lexmark,* 134 S.Ct. at 1385 (Internal citations omitted). Thus, it is clear that *Lexmark* did not abrogate *Newdow's* application of the domestic relations exception.

Just last year, in *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Court reaffirmed the domestic relations exception, striking down Section 3 of DOMA, which attempted to impose a national definition of marriage for federal purposes, "because of its reach and extent [which] departs from [the] . . . history and tradition of reliance on state law to define marriage." 133 S.Ct. at 2692. The *Windsor* Court recognized once again that domestic relations is "'an area that has long been regarded as a virtually exclusive province of the States.'" *Id.* at 2691, (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). According to the Court in *Windsor*, the "definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations. . . ." 133 S.Ct. at 2691.

As noted above, confusion regarding the scope of the domestic relations exception, as applied to federal question jurisdiction, reigns supreme. Two examples are intra-circuit conflicts regarding this understanding in the Seventh and Fourth Circuits. Judge Posner, a noted scholar, authored the decision in *Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006) in which it was concluded that the domestic relations exception applied not only to diversity cases, but was intended to encompass "federal-question cases too," thereby depriving the federal court of subject matter jurisdiction with respect to federal claims. Judge Posner explained that "[t]here is no good reason to strain to give a different meaning to the identical language in the diversity and federal question statutes." *Id.* at 307. However, Judge Posner also wrote for the Seventh Circuit in the same-sex marriage case, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), but did not refer to the domestic

relations exception at all.

In the Fourth Circuit, the State in this case relied upon *Wilkins v. Rogers*, 581 F.2d 399, 403-404 (4th Cir. 1978), which applied the domestic relations exception to a federal claim of sex discrimination against the South Carolina court system, concluding that such a claim "does not present a federal question," and thus "original jurisdiction over Wilkins' claims does not lie." However, a different Fourth Circuit panel subsequently found that the domestic relations exception is limited to diversity cases and is inapplicable to federal question jurisdiction. *U.S. v. Johnson*, 114 F.3d 476 (4th Cir. 1997) (citing *Ankenbrandt*). In this case, the State argued below that the Fourth Circuit's "prior panel rule" was applicable, requiring that the *Wilkins* decision prevail over the *Johnson* case. *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) ["one panel cannot overrule a decision by another panel."]. As can be seen from these two examples, the case law regarding the domestic relations exception is like the shifting sands – depending upon which circuit panel is hearing the matter, or even which case is being heard.

With respect to *Windsor*, the Chief Justice correctly concluded that the majority opinion in that case "is based on federalism," i.e. the "'historic and essential authority [of the State] to define the marital relation. . . .'" 133 S.Ct. at 2697 (Roberts, C.J., dissenting). Indeed, as *amicus curiae* in *Windsor*, "the Federalism Scholars asserted to the Court that there is one particular area of family law that is solely within the purview of the states: the power to make determinations of family status, including marital status and status as a child." *See*

Jaslin, "*Windsor, Federalism and Family Equality*," 113 *Cola. L. Rev. Sidebar*, 156, 161 (Oct. 14, 2013). South Carolina agrees with this assessment, based upon the decisions of this Court, as we read them. Yet, in this case below, the District Court stated that "[c]iting to *Loving* [*v. Virginia*, 388 U.S. 1 (1967)] and *Windsor*, the *Bostic* Court [760 F.3d 352 (4th Cir. 2014)] concluded that states must exercise their authority over marital relations 'without trampling constitutional guarantees' of same sex couples and rejected Virginia's claim that principles of federalism required a different outcome." *Condon, supra,* at 8, referencing *Bostic* at 378-380. *Windsor* cannot be read to support both points of view. Either the Chief Justice's interpretation -- that principles of federalism support the State's prerogative in the area of domestic relations is correct -- or the District Court -- relying upon *Bostic* and *Windsor* to support the contention that a ban upon same-sex marriage is unconstitutional -- is right. If the latter, the domestic relations exception has no real meaning.

Scholars continue to decry the confusion over the domestic relations exception. Many argue that the exception is jurisdictional with respect to federal question jurisdiction. As one leading scholar has recently opined, there is no federal question jurisdiction to hear domestic relations matters. Professor Calabresi, in a groundbreaking paper, soon to become a law review article, has written that

> [t]he federal courts simply do not have the statutory federal question jurisdiction that would enable them to hear cases challenging the definition of marriage, divorce, alimony, child custody, or probate. These cases raised religious questions, which is why in England they were heard by the Ecclesiastical Courts and not by the common law courts or the courts of equity.

Calabresi, *"The Gay Marriage Cases and Federal Jurisdiction"* (October 2, 2014), Northwestern Law and Econ. Research Paper No. 14-18; Northwestern Public Law Research Paper No. 14-50, at 47. Available at SSRN: http://ssm.com/abstract=2505514 or http://dx.doi.org/10.2139/ssm.2505515 . His analysis is entirely consistent with Judge Posner's view, expressed in *Jones v. Brennan*, *supra*, and with that of the Fourth Circuit's in *Wilkins v. Rogers*, *supra*. And, it is in accord with the finding of Professor Harbach, who has stated that "[n]ot infrequently, courts have dismissed federal question cases for lack of subject matter jurisdiction, citing the domestic relations exception." Harbach, *"Is The Family a Federal Question?"* 660 *Washington and Lee L.Rev.*, 131, 146 (2009) and cases collected at n. 59.

Professor Harbach also noted in her article that *Newdow* confuses the issue even more because it may be read to allow federal courts to invoke abstention doctrines with respect to family law issues. She notes that "[t]he [Newdow] opinion seems to apply the domestic relations exception to federal questions and create a new default rule deferring to state courts on all domestic relations issues." Citing a wealth of cases, she adds that litigators, relying upon *Newdow*, can now "argue that federal question jurisdiction is inappropriate in cases that involve 'elements of the domestic relationship' even on constitutional claims." *Id.* at 157-158 (and cases collected therein). The State believes that Professor Harbach correctly reads *Newdow*. But only this Court may reconcile the conflict between *Newdow,* -- relying upon an abstention approach -- and subject matter jurisdictional cases, such as

Jones v. Brennan, and *Wilkins v. Rogers. See also, Catalano, Comments, "Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy,"* 34 Cal. U. L. rev. 601, 635 (2006) [stating that the *Newdow* majority extended the domestic relations exception to include all cases involving "delicate issues of domestic relations."].

Regardless of whether this Court would resolve the question of the applicability of the domestic relations exception to federal questions jurisdictionally or jurisprudentially, surely, *Windsor* reaffirms that such exception encompasses the "core" issue of the State's power to define marriage, even as to constitutional challenges to that definition. This Court emphasized in *Windsor* that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted, the common understanding was that domestic relations of husband and wife and parent and child were matters reserved to the States.'" 133 S.Ct. at 2691, quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 384 (1930). As *Windsor* also recounted, the "'states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.'" *Id., (*quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)). (emphasis added). If the core question of defining marriage was not delegated to the federal government, but was reserved to the States by the Constitution, then the Tenth Amendment protects such reservation. The Fourteenth Amendment most clearly

did not alter that balance.

Scholars read *Windsor* as supporting this point of view and as a reaffirmation of the Framers' intent that the State, pursuant to its sovereign authority, may define marriage as it deems appropriate. DOMA was held unconstitutional, not only because it discriminated against a class of persons within the State of New York, but also "because it intruded on the States' sovereign authority to define marriage for themselves." Young and Blondel, "*Federalism, Liberty, and Equality in United States v. Windsor*," 2013 *Cato Supreme Court Review*, 117, 118 (2013-2014). As one scholar has observed, "as a Federalism-in-family law decision, *Windsor* can be linked with a long line of decisions stressing federal deference to state authority to regulate family matters such as *Elk Grove v. Newdow [supra]* . . . *United States v. Morrison* [529 U.S. 848 (2000)] . . . *Jones v. United States*, [529 U.S. 549 (1995)] . . . *United States v. Lopez* [514 U.S. 549 (1995)] . . . and *United States v. Yazell*, [382 U.S. 341 (1966)," Wardle, *Reflection on Equality in Family Law*," *Mich. St. L. Rev.*, 1385, 1422 (2013).

The one decision of this Court, which has addressed the merits of the constitutionality a State's defining marriage traditionally -- as the union of one man and one woman -- appears to have taken the jurisdictional approach to the domestic relations exception. That, of course, is the summary dismissal of the decision by the Minnesota Supreme Court in *Baker v. Nelson*, upholding the constitutionality of a ban on same-sex marriage, for "want of a substantial federal question." This Court is well aware that *Baker* has been argued as a binding precedent extensively in the

various cases arguing same sex marriage. *Compare, e.g. Bostic v. Schaefer*, 760 F.3d, *supra* at 375 [refusing to hold that *Baker* is a binding precedent because the Fourth Circuit deemed that "doctrinal developments" of the Supreme Court rendered *Baker* to have been "abandoned" by the Court] with *DeBoer v. Snyder*, *supra* at 5 ["It matters not whether we think (Baker) . . . was right in its time, remains right today, or will be followed in the future. Only the Supreme Court may overrule its own precedent, and we remain bound even by its summary decisions 'until such time as the Court informs [us] that we are not.'" (citing *Hicks v. Miranda*, 422 U.S. 332, 345 (1975)). The State has also argued the binding force of *Baker* extensively below, contending not only that *Hicks* required the lower courts to follow *Baker* until overruled, but also that the "prior panel" rule of the Fourth Circuit required *Baker* to be followed in light of the *Hogge v. Johnson*, 526 F.2d 833, 835 (4th Cir. 1975) [*Hicks* requires summary disposition of the Supreme Court to be followed].

We recognize, however, that this Court considers a summary dismissal for want of a substantial federal question as not binding upon it. As was said in *Boggs v. Boggs*, 520 U.S. 833, 849 (1997) such dismissals ". . .although not entitled to full precedential weight . . . [nevertheless] constitutes a decision on the merits."

The State has every confidence that this Court will give the *Baker* decision due consideration as a precedent on the merits of this issue as to whether a ban upon same-sex marriage violates the federal Constitution. However, what is important about *Baker* is not so much whether it is binding upon this Court

(although precedential, it is not binding), but the fact that, in *Baker*, the Appellee sought dismissal of the appeal based upon the domestic relations exception. In its Brief on the appeal to this Court (Appendix C, *infra, p.* 43), Appellee argued that "[i]t is well established that each state under its own power of sovereignty has the power, and I submit, duty to carefully regulate its citizens in their domestic relationships." Reference was made in Appellee's Brief to the "landmark" case of *Williams v. North Carolina,* 325 U.S. 226 (1945). The Appellee quoted the language from *Williams* concerning "another most important aspect of our federalism whereby 'the domestic relations of husband and wife . . . were matters reserved to the states,' *State ex rel.* [*Popovici v. Agler supra*] . . . and do not belong to the United States. . . ." *Appellee's Brief in Baker v. Nelson* No. 71-1027, at 3-4. This is the very same language quoted by the Court in *Windsor.* 133 S.Ct. at 2691. Appellee contended the Tenth Amendment preserved this area of state sovereignty.

Thus, a powerful argument can be made that the Court dismissed the appeal in *Baker* "for want of a substantial federal question," based upon the domestic relations exception. It appears that such dismissal was founded upon jurisdictional grounds. *See Wilkins, supra* [where the Fourth Circuit dismissed on jurisdictional grounds, concluding that, as a result of the domestic relations exception, the claim of sex discrimination did not raise a federal question]. However, whether the domestic relations exception at the time of *Baker's* dismissal was considered jurisdictional or jurisprudential is not altogether clear. But this is another reason that this Court should clarify the scope of the exception. Accordingly, a stay in this

case is warranted.

Only last Term, the Court emphasized that "'[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'". *U.S. v. Bond*, 134 S.Ct. 2077, 2091 (2014). As was stated recently by the Sixth Circuit in *DeBoer*, ". . . one of the key insights of federalism is that it permits laboratories of experimentation . . . allowing the State to innovate one way, another State another and a third State to assess the trial and error over time." *Supra* at 11. Fourth Circuit, Judge J. Harvie Wilkinson has recently echoed this view, observing that it is "[f]ar better for Americans to recognize through their many votes and voices that marriage between loving souls is right and just than for judges to decree the same under the we-they political process theory." J. Harvie Wilkinson III, *Cosmic Constitutional Theory,* at 76-77 (Oxford Univ. Press, 2012).

The State contends this is precisely the purpose of the domestic relations exception: to allow each State to decide for itself, based upon its own timetable, how to define marriage. However, as *DeBoer* concluded, "a decision premised on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally . . . would divest the States of their traditional authority over this issue. . . ." *DeBoer, supra* at 20. Underlying disagreement over the applicability and scope of the domestic relations exception "is a complex and unresolved debate over the proper role of federal courts in adjudicating a substantive area of law traditionally considered within the exclusive purview of State courts." *Stein, supra* at 670.

South Carolina thus urges this Court to clarify the domestic relations exception so that federalism is preserved in this crucial area of State sovereignty. The State meets the three requirements for a stay in this regard. *See Hollingsworth v. Perry*, 130 S.Ct. 705 (2010).

b

***Bostic* was wrongly decided**

This Court has been presented with arguments on the merits of the constitutional issues in other applications and petitions for writs of certiorari. We do not seek to argue those issues in this Application except to emphasize that the Fourth Circuit's Opinion in *Bostic, supra,* should not be binding in the Court of Appeals in the instant case because of its failure to follow precedent of that Circuit regarding the treatment of summary Opinions such as *Baker.* Instead, *Baker* is binding unless overruled by this Court. Even if, *arguendo,* the Court of Appeals could avoid *Baker,* the Court of Appeals Panel wrongly decided the merits of the constitutional issues. We submit that the dissent of Judge Niemeyer in that case correctly addressed the constitutional issues as did the majority opinion in *DeBoer.* With the strong legal analysis of *DeBoer* and Judge Niemeyer, at least a fair prospect exists that a majority of the Court would vote to reverse an unfavorable decision of the Court of Appeals as to South Carolina law.

3

The State will suffer irreparable injury if the stay is denied

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury" *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, (1977)(Rehnquist, J., in chambers, granting a stay); accord *Maryland v. King*, 133 S. Ct. 1, 3(2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). Absent a stay, the State of South Carolina suffers an irreparable injury for this reason, also, because under the Order of the District Court, it cannot enforce its statutes and the Constitutional amendment adopted by its people or observe the centuries of common law recognizing only a marriage of a man and a woman. This injury is to the interest of the State and its people in their right of self-government. *Schuette v. Coalition to Defend Affirmative Action,* 134 S. Ct. 1623, 1636–37 (2014)("Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.") This injury is also to the right of the State and its people to determine marital law. As stated in *Windsor*, "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Windsor*, 133 S. Ct. at 2691. "The recognition of civil marriages is central

to state domestic relations law applicable to its residents and citizens." *Id.* (emphasis added). To allow the Order of the District Court to take affect absent review by the Court of Appeals, would greatly harm these interests of the State.

The State will also suffer irreparable injury if the stay is denied because same-sex marriages will be allowed pending a decision by the Court of Appeals and by this Court on a petition for certiorari if the Fourth Circuit's decision is unfavorable. If the State prevails on appeal or on certiorari, same-sex marriages will end creating legal confusion as to the status of those married in the interim. With the *DeBoer* Petition now pending, South Carolina law should be left in place by a stay of the District Court's declaring those laws unconstitutional and enjoining their application and enforcement.

4

Balancing Equities - Issuance of the Stay will not Substantially Injure the other Parties Interested in the Proceeding

Although Respondents want their marriage license issued immediately if they otherwise satisfy State legal requirement for marriage, they will get their wish for a license if they ultimately prevail in the appeal and on certiorari as well as meet other State requirements. They are seeking recognition of a new constitutional right contrary to South Carolina law which has not been heretofore recognized by this Court. *See, Baker* and *Windsor, supra.* The public interest lies in a full consideration of the validity of South Carolina laws regarding same-sex marriage by the Court of Appeals, and time for the United States Supreme Court to determine the constitutional issues involved, pursuant to the *DeBoer* Petition and

any other that may be filed while that case is pending including the instant case. The State's laws and State authority over marital law pursuant to the Federalism principles discussed above warrant a stay to preserve the status quo until the legal issues are resolved., At this stage, the injury to the State and its people from allowing marriages to go forward in the interim outweighs any perception of harm to the Plaintiffs-Respondents . The scales tip solidly in favor of granting a stay.

CONCLUSION

This case presents a significant issue of whether the "domestic relations exception" applies to federal question jurisdiction. That question should ultimately be addressed by this Court. With the Petition for Certiorari now pending as to the Sixth Circuit's Opinion in *DeBoer,* and the failure of the Fourth Circuit Court of Appeals to follow its own precedent as to decisions such as *Baker v. Nelson,* the Order of the District Court in this case should be stayed until such time as the process is completed for consideration of the appeal of that Order by the Court of Appeals and, if granted, review by this Court.

Respectfully submitted,

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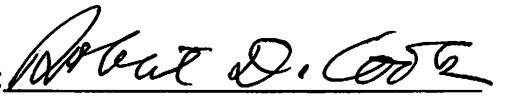
By: 
Counsel for Applicant
Attorney General

November 18, 2014

APPENDIX

A

Order of the District Court, November 12, 2014

2014 WL 5897175

2014 WL 5897175
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Charleston Division.

Colleen Therese **CONDON** and
Ann Nichols **Bleckley**, Plaintiffs,
v.
Nimrata (Nikki) Randhawa HALEY, in her official capacity as Governor of South Carolina; Alan Wilson, in his official capacity as Attorney General; and Irvin G. **Condon**, in his official capacity as Probate Judge of Charleston County, Defendants.

Civil Action No. 2:14–4010–RMG. | Signed Nov. 12, 2014.

Synopsis

Background: Same-sex couple brought action against South Carolina's Governor and Attorney General and a county probate judge, challenging the constitutionality of South Carolina's statutory and constitutional provisions prohibiting same-sex marriages. Couple filed motion for summary judgment and for declaratory and injunctive relief.

Holdings: The District Court, Richard Mark Gergel, J., held that:

[1] Governor had Eleventh Amendment immunity;

[2] suit was not barred under *Rooker-Feldman* doctrine;

[3] challenged South Carolina laws violated due process and equal protection; and

[4] district court's order would be temporarily stayed.

Summary judgment for plaintiffs; motion for stay granted in part and denied in part; motion for appeal stay denied.

West Headnotes (27)

[1] **Federal Civil Procedure**
⇦ In General; Injury or Interest

A threshold question in every federal case is whether the plaintiff has standing to bring the action.

Cases that cite this headnote

[2] **Federal Civil Procedure**
⇦ In General; Injury or Interest

To establish standing, the plaintiff bears the burden of demonstrating a personal stake in the outcome of the controversy that will be sufficient to warrant the party's invocation of federal-court jurisdiction.

Cases that cite this headnote

[3] **Federal Civil Procedure**
⇦ In General; Injury or Interest

Federal Civil Procedure
⇦ Causation; Redressability

To establish standing, the plaintiff must show: (1) she is under threat of suffering injury in fact that is concrete and particularized; (2) the threat is actual and imminent, not conjectural or hypothetical; (3) the threatened injury is fairly traceable to the challenged action of the defendant; and (4) it is likely that a favorable judicial decision will prevent or redress the injury.

Cases that cite this headnote

[4] **Constitutional Law**
⇦ Family Law; Marriage

South Carolina same-sex couple established an injury in fact that was concrete and actual, as required for standing to bring action challenging the constitutionality of South Carolina's statutory and constitutional provisions prohibiting same-sex marriages; couple's application for a marriage license had been denied under South Carolina's laws prohibiting same-sex marriages. Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[5] **Federal Courts**
⇐ Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine

Federal Courts
⇐ Agencies, Officers, and Public Employees

The Eleventh Amendment does not bar suits against officers of the state where a plaintiff: (1) has sued a state officer for ongoing violations of federal law; (2) seeks only injunctive and declaratory relief; and (3) the state officer is clothed with some duty in regard to the enforcement of the laws of the state, and the state officer threatens and is about to commence proceedings to enforce against parties affected by an unconstitutional act. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[6] **Federal Courts**
⇐ Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine

Federal Courts
⇐ Judges and Court Personnel

Eleventh Amendment immunity did not bar same-sex couple's action for declaratory and injunctive relief against South Carolina county probate judge, challenging the constitutionality of South Carolina's statutory and constitutional provisions prohibiting same-sex marriages; judge was vested with statutory authority under South Carolina law to take applications for and to issue marriage licenses to eligible couples, same-sex couple had applied to judge for marriage license, and challenged state statutory and constitutional provisions barred issuance of marriage license to same-sex couple. U.S.C.A. Const.Amend. 11; Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15, 20–1–220, 20–1–260, 20–1–270.

Cases that cite this headnote

[7] **Federal Courts**
⇐ Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine

Federal Courts
⇐ Prosecutors and Attorneys General

Eleventh Amendment immunity did not bar same-sex couple's action for declaratory and injunctive relief against South Carolina's Attorney General, challenging the constitutionality of South Carolina's statutory and constitutional provisions prohibiting same-sex marriages; Attorney General had duty as state's chief prosecutor and attorney to enforce state's laws, he had recently initiated litigation within original jurisdiction of South Carolina Supreme Court in regard to the challenged same-sex marriage laws, and in court filings he had indicated an intention to vigorously enforce these laws and to challenge efforts by the same-sex couple to vindicate their claimed fundamental right to marry under United States Constitution. U.S.C.A. Const.Amend. 11; Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[8] **Federal Courts**
⇐ Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine

Federal Courts
⇐ Agencies, Officers, and Public Employees

To invoke the *Ex parte Young* exception to a state officer's Eleventh Amendment immunity, there must be a meaningful nexus between the named defendant and the asserted injury of the plaintiff; by itself, a generalized duty of a named defendant to uphold the laws is not sufficient. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[9] **Federal Courts**
⇐ Suits for Injunctive or Other Prospective or Equitable Relief; Ex Parte Young Doctrine

Federal Courts
⇐ Agencies, Officers, and Public Employees

South Carolina's Governor had Eleventh Amendment immunity as to same-sex couple's action for declaratory and injunctive relief, challenging the constitutionality of South Carolina's statutory and constitutional provisions prohibiting same-sex marriages, in absence of

evidence that Governor had taken enforcement action or engaged in other affirmative acts to obstruct same-sex couple's asserted fundamental right to marry. U.S.C.A. Const.Amend. 11; Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[10] **Courts**

⇐ Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine

The "*Rooker–Feldman* doctrine" provides that a losing party in a state court proceeding may not file an action in federal district court to review and reject a state court judgment.

Cases that cite this headnote

[11] **Courts**

⇐ Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine

The *Rooker–Feldman* doctrine is narrow and it applies only when a federal court is asked to review the final decisions of a state court.

Cases that cite this headnote

[12] **Courts**

⇐ Constitutional Questions, Civil Rights, and Discrimination in General

In action challenging South Carolina's statutory and constitutional ban on same-sex marriage, requirement of final decision of state court, for invoking *Rooker-Feldman* doctrine as bar to action in federal district court, was not satisfied as to South Carolina Supreme Court's grant of stay, in action under that court's original jurisdiction seeking to prevent a South Carolina county probate judge from issuing a marriage license to a same-sex couple, to maintain the status quo pending another federal district court's resolution of a challenge to South Carolina's refusal to recognize an out-of-state same-sex marriage; South Carolina Supreme Court intended for federal court to rule on constitutionality of state's same-sex marriage ban and for state courts to abstain from doing so. Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[13] **Federal Courts**

⇐ Younger Abstention

The *Younger* abstention doctrine applies only in three exceptional circumstances: interference with state criminal prosecutions, interference with civil enforcement proceeds akin to criminal prosecutions, and interference with civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.

Cases that cite this headnote

[14] **Courts**

⇐ Scope and Effect of Proceedings Pending in State Court

As a general rule, the pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction.

Cases that cite this headnote

[15] **Federal Courts**

⇐ Constitutional Rights, Civil Rights, and Discrimination in General

District court would decline to invoke first-to-file rule as basis for postponing consideration of same-sex couple's challenge to constitutionality of South Carolina's statutory and constitutional provisions prohibiting same-sex marriages, during pendency of earlier-filed action in another district court challenging South Carolina's refusal to recognize out-of-state same-sex marriage; cases had different factual scenarios, case at bar involved a fundamental right, and in earlier-filed case the district court had ruled that plaintiffs' right to marry as same- sex couple was not before the court because the couple had already married. Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[16] **Federal Courts**
⇦ Pendency and Scope of Prior Proceedings; First-Filed Rule

The most basic aspect of the first-to-file rule is that it is discretionary, and the decision and the discretion belong to the district court.

Cases that cite this headnote

[17] **Courts**
⇦ Conclusiveness of Decisions of Court of Appeals Within Its Circuit

A decision of a circuit court of appeals, not overruled by the United States Supreme Court, is controlling precedent for the district courts within the circuit.

Cases that cite this headnote

[18] **Courts**
⇦ Supreme Court Decisions

A circuit court of appeals or a district court is at liberty to decide that a summary decision by the Supreme Court has been abandoned or superseded by doctrinal developments.

Cases that cite this headnote

[19] **Courts**
⇦ Decisions of Higher Court or Court of Last Resort

The predictability and stability of judicial decisionmaking is dependent upon lower courts respecting and enforcing the decisions of higher appellate courts.

Cases that cite this headnote

[20] **Courts**
⇦ Conclusiveness of Decisions of Court of Appeals Within Its Circuit

Lower federal courts are not free to disregard clear holdings of the circuit courts of appeal simply because a party believes them poorly reasoned or inappropriately inattentive to alternative legal arguments.

Cases that cite this headnote

[21] **Courts**
⇦ Previous Decisions as Controlling or as Precedents

Courts
⇦ Conclusiveness of Decisions of Court of Appeals Within Its Circuit

Coherent and consistent adjudication requires respect for the principle of stare decisis and the basic rule that the decision of a federal circuit court of appeals left undisturbed by United States Supreme Court review is controlling on the lower courts within the circuit.

Cases that cite this headnote

[22] **Constitutional Law**
⇦ Constitution as Supreme, Paramount, or Highest Law

States
⇦ Operation Within States of Constitution and Laws of United States

United States Constitution is the supreme law of the land, and state laws that run contrary to constitutionally protected rights of individuals cannot be allowed to stand.

Cases that cite this headnote

[23] **Constitutional Law**
⇦ Marriage and Civil Unions

Constitutional Law
⇦ Same-Sex Marriage

Marriage
⇦ Power to Regulate and Control

Marriage
⇦ Same-Sex and Other Non-Traditional Unions

South Carolina statutory and constitutional provisions, to the extent they sought to prohibit the marriage of same-sex couples who otherwise met all other legal requirements for marriage in South Carolina, unconstitutionally infringed on the rights of same-sex couples under the Due Process Clause and Equal Protection Clause.

U.S.C.A. Const.Amend. 14; Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[24] **Federal Courts**
⇐ Supersedeas or Stay of Proceedings

A stay pending appeal is not a matter of right, and the party seeking a stay bears the burden of demonstrating the presence of the exacting standards for the granting of such relief.

Cases that cite this headnote

[25] **Federal Courts**
⇐ Supersedeas or Stay of Proceedings

The standards for granting a stay pending appeal closely resemble the standards for the grant of a preliminary injunction, including: (1) a strong showing that the party requesting the stay will succeed on the merits; (2) the presence of irreparable injury by the party seeking the stay; (3) whether the stay will substantially injure other parties to the litigation; and (4) whether the public interest is served by the grant of the stay.

Cases that cite this headnote

[26] **Federal Courts**
⇐ Injunction and Temporary Restraining Order Cases

District court would not stay, pending appeal, its order declaring that South Carolina statutory and constitutional provisions barring same-sex marriages violated due process and equal protection, which order also granted permanent injunctive relief; in light of controlling authority from circuit court of appeals, South Carolina Attorney General could not show strong likelihood of success as defender of challenged laws, Attorney General did not set forth any meaningful evidence of irreparable injury, same-sex couples put forward evidence of irreparable injury, and public interest was best served by denying a stay that would allow continued enforcement of state laws found to be unconstitutional. U.S.C.A. Const.Amend. 14; Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15.

Cases that cite this headnote

[27] **Federal Courts**
⇐ Injunction and Temporary Restraining Order Cases

District court would temporarily stay, for one week, its order declaring that South Carolina statutory and constitutional provisions barring same-sex marriages violated due process and equal protection, which order also granted permanent injunctive relief; brief stay of enforcement of the injunction was appropriate to allow court of appeals to receive a petition for an appeal stay and to consider that request in an orderly fashion. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

West Codenotes

Held Unconstitutional
S.C.Const. Art. 17, § 15; S.C.Code 1976, §§ 20–1–10(B, C), 20–1–15

Recognized as Unconstitutional
V.C.A. Const. 1, § 15-A; West's V.C.A. § 20–45.2

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Ian Parks Weschler, Office of Attorney General, James Emory Smith, Jr., Robert Dewayne Cook, SC Attorney General's Office, John Shannon Nichols, Bluestein and Nichols, Columbia, SC, Richard S. Rosen, Rosen Rosen and Hagood, Charleston, SC, for Defendants.

ORDER

RICHARD MARK GERGEL, District Judge.

*1 Plaintiffs, a same sex couple seeking to marry, challenge South Carolina's statutory and constitutional provisions prohibiting marriage between persons of the same sex. S.C.Code Ann. §§ 20–1–10, 20–1–15; S.C. Constitution Art. XVII § 15.[1] Plaintiffs assert such provisions of South Carolina law infringe upon their fundamental right to marry, a liberty interest protected by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (Dkt. No. 1). Plaintiffs argue that the Fourth Circuit's recent decision in *Bostic v. Schaefer,* 760 F.3d 352 (4th Cir.2014), *cert. denied, Schaefer v. Bostic,* ——U.S. ——, 135 S.Ct. 308, —— L.Ed.2d —— (2014), is controlling. (Dkt. No. 13). Defendants Nikki Haley and Alan Wilson, sued in their official capacities as the Governor and Attorney General of South Carolina, assert that matters related to marital status are reserved exclusively to the states. (Dkt. No, 29 at 11–29; Dkt. No. 33–1 at 8–26).[2] These two defendants further argue that the Fourth Circuit's recent decision in *Bostic* is wrongly decided because that court improperly disregarded the controlling law of *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *summarily dismissed,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), and the Fourth Circuit's own precedent in finding that the Due Process Clause of the Fourteenth Amendment created a fundamental right of same sex couples to marry. (Dkt. No. 29 at 5–11; Dkt. No. 33–1 at 2–8; Dkt. No. 34 at 2–3). Defendant Condon, who began accepting same sex marriage applications on October 8, 2014, in compliance with *Bostic,* presently "takes no position regarding the merits of the Plaintiffs' claims for relief." (Dkt. No. 35 at 6).

Plaintiffs have now moved for summary judgment and seek declaratory and injunctive relief. (Dkt. No. 13). Defendants Haley and Wilson oppose that motion. As further set forth below, the Court finds that *Bostic* provides clear and controlling legal authority in this Circuit and that Plaintiffs are entitled to judgment as a matter of law.

Legal Standard

A party seeking summary judgment bears the burden of showing that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). All facts and inferences from those facts must be viewed in a light most favorable to the non-moving party. *Shealy v. Winston,* 929 F.2d 1009, 1011 (4th Cir.1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *See, Baber v. Hosp. Corp. of Am.,* 977 F.2d 872, 874–75 (4th Cir.1992).

Factual Background

The essential facts involved in this litigation are not contested. Plaintiffs applied for a marriage license in the office of Defendant Condon, the duly elected Probate Judge of Charleston County, on October 8, 2014, and he accepted the Plaintiffs' application and filing fee. Defendant Condon indicated at that time that he was prepared to issue Plaintiffs a marriage license upon the expiration of the mandatory 24–hour waiting period. Later that same day, Defendant Wilson, acting in his official capacity as Attorney General of South Carolina, initiated an action in the original jurisdiction of the South Carolina Supreme Court seeking an injunction prohibiting Defendant Condon from granting a marriage license to Plaintiffs until a pending federal constitutional challenge had been heard and decided. (Dkt.Nos.13–4, 13–8, 13–10, 13–11).

*2 In response to the Attorney General's petition, the South Carolina Supreme Court accepted the matter in its original jurisdiction for the sole purpose of entering an order enjoining any probate judge from issuing a marriage license to a same sex couple pending disposition of the legal challenge to South Carolina's same sex marriage ban in the United States District Court for the District of South Carolina. *State ex rel. Wilson v. Condon,* —— S.E.2d ——, 2014 WL 5038396, at *2 (S.C. Oct.9, 2014). Thereafter, on October 15, 2014, Plaintiffs initiated this action in the Charleston Division of the United States District Court for the District of South Carolina.[3]

Discussion

A. *Standing*

[1] [2] [3] A threshold question in every federal case is whether the plaintiff has standing to bring the action. *Worth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The plaintiff bears the burden of demonstrating a "personal stake in the outcome of the controversy" that will be sufficient to warrant the party's "invocation of federal-court jurisdiction," *Summers v. Earth Island Inst.,* 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (citation omitted). This requires the plaintiff to show; (1) she is "under threat of

suffering 'injury in fact' that is concrete and particularized"; (2) "the threat [is] actual and imminent, not conjectural or hypothetical"; (3) the threatened injury is "fairly traceable to the challenged action of the defendant"; and (4) it is likely that "a favorable judicial decision will prevent or redress the injury." *Id.*

The *Bostic* Court found that two of the plaintiffs, a same sex couple seeking to marry under Virginia law, had standing because the state's same sex marriage ban had prevented the couple from obtaining a marriage license. *Bostic,* 760 F.3d at 372. The Fourth Circuit found that "this license denial constitutes an injury" to these plaintiffs sufficient to provide them standing. *Id.*

[4] In light of the uncontested facts set forth above, it is clear that Plaintiffs have the type and degree of injury to have standing to assert their claims. Plaintiffs' application for a marriage license, and the denial of that license under South Carolina's laws prohibiting same sex marriage, make their injury "concrete" and "actual" and that injury is "fairly traceable to the challenged action," *Id.* Further, Plaintiffs' injuries are fairly traceable to the action and/or inaction of Defendants Wilson and Condon, as explained below, and a favorable judicial decision could redress Plaintiffs' injuries.

B. *Eleventh Amendment Immunity*

[5] Defendants Haley and Wilson have further argued that an action against them is barred by the Eleventh Amendment. (Dkt. No. 29 at 29–32). It is well settled that the Eleventh Amendment does not bar suits against officers of the state where a plaintiff has (1) sued a state officer for ongoing violations of federal law; (2) seeks only injunctive and declaratory relief; and (3) the state officer is "clothed with some duty in regard to the enforcement of the laws of the state and who threaten and are about to commence proceedings ... to enforce against parties affected [by] an unconstitutional act." *Ex parte Young,* 209 U.S. 123, 155–156, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

*3 [6] No party challenges the naming of Defendant Condon as a proper party defendant to this action. As the duly elected probate judge of Charleston County, Defendant Condon is vested with the authority to take applications for and to issue marriage licenses to eligible couples. S.C.Code Ann. §§ 20–1–220, 20–1–260, 20–1–270. Further, it is uncontested that Plaintiffs applied to Defendant Condon for a marriage license and that the state statutory and constitutional provisions under challenge in this action barred the issuance of the license.

The *Bostic* Court specifically addressed this issue in regard to the clerk of the circuit court for the city of Norfolk who had the responsibility under Virginia law to issue and record marriage licenses. *Bostic v. Schaefer,* 760 F.3d at 371. The Fourth Circuit concluded that the Eleventh Amendment did not bar an action against the defendant clerk of court because he "bears the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." *Id.* at n. 3. Similarly, Defendant Condon's role under the South Carolina statutory scheme for the issuance of marriage licenses makes him an appropriate defendant in this constitutional challenge, and the action against him is not barred by the Eleventh Amendment.

[7] [8] Defendant Wilson and Haley argue that they are not appropriate defendants because the Eleventh Amendment bars claims against them. They are correct that there must be a meaningful nexus between the named defendant and the asserted injury of the plaintiff. By itself, a generalized duty of a named defendant to uphold the laws is not sufficient. *E.g. McBurney v. Cuccinelli,* 616 F.3d 393, 401 (4th Cir.2010).

Defendant Wilson has a duty as the state's chief prosecutor and attorney to enforce the laws of the state. He has recently initiated litigation in the original jurisdiction of the South Carolina Supreme Court in regard to the same sex marriage laws under challenge, specifically seeking to enjoin Judge Condon from issuing marriage licenses to Plaintiffs and other same sex couples. *See Wilson v. Condon,* 2014 WL 5038396. He has also indicated an intention in filings in this Court to vigorously enforce the state law provisions at issue in this litigation and to challenge efforts by Plaintiffs to vindicate their claimed fundamental right to marry under the United States Constitution. Thus, like the Attorney General in *Ex parte Young,* Defendant Wilson is "clothed with some duty in regard to the enforcement of the laws of the state" and has in fact threatened and commenced actions "to enforce against parties" provisions of state law allegedly violating the Federal Constitution. 129 U.S. at 155–56. As such, Defendant Wilson is a proper defendant in this action, and the claims against him are not barred by the Eleventh Amendment. [4] *See id; Kitchen v. Herbert,* 755 F.3d 1193, 1201–1203 (10th Cir.2014); *cf. McBurney v. Cuccinelli,* 616 F.3d 393, 402 (4th Cir.2010) (holding *Ex parte Young* exception did not apply because the state Attorney General "ha[d] not enforced, threatened to

enforce, or advised other agencies to enforce" the statutory provision at issue).

*4 [9] Plaintiffs' claims against Defendant Haley are not nearly so straightforward. It is clear that simply being the state's chief executive sworn to uphold the laws is not sufficient to invoke *Ex parte Young*. The Court has before it little evidence to support an argument that Defendant Haley has taken enforcement action or engaged in other affirmative acts to obstruct Plaintiffs' asserted fundamental right to marry. *Cf. Bowling v. Pence*, 2014 WL 4104814 at *3–4 (S.D.Ind. Aug.19, 2014) (reversing a prior order dismissing the Governor of Indiana as a defendant after he took "affirmative action to enforce the statute"). Therefore, the Court finds that Plaintiffs' claims against Defendant Haley are barred by the Eleventh Amendment, and she is, therefore, dismissed as a defendant in this action. [5]

C. *Rooker–Feldman Doctrine*

[10] [11] Defendant Wilson argues that Plaintiffs' constitutional challenge to South Carolina's ban on same sex marriage is barred by the *Rooker–Feldman* doctrine because the South Carolina Supreme Court recently granted a stay in *Wilson v. Condon*, 2014 WL 5038396. (Dkt. No. 29 at 3–5). Defendant misapprehends the nature and scope of this doctrine. The *Rooker–Feldman* doctrine provides that a losing party in a state court proceeding may not file an action in federal district court to review and reject a state court judgment. *Lance v. Dennis*, 546 U.S. 459, 464, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)). *Rooker–Feldman* is a "narrow" doctrine and "applies only when a federal court is asked to review *the final* decisions of a state court." *Morkel v. Davis*, 513 F. App'x 724, 727 (10th Cir .2013) (emphasis in original); *Exxon Mobil*, 544 U.S. at 292 ("This Court has repeatedly held that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.") (internal quotations omitted); *David Vincent, Inc. v. Broward Cty., Fla.*, 200 F.3d 1325, 1332 (11th Cir.2000) (holding *Rooker–Feldman* doctrine did not apply because the state court's "denial of the temporary injunction is not a final or conclusive judgment on the merits").

The state court proceeding relied on by Defendant Wilson was an action brought by him, in his capacity as Attorney General of South Carolina, in the original jurisdiction of the South Carolina Supreme Court against Defendant Condon, the probate judge of Charleston County, after Condon announced his intention to issue marriage licences in adherence to the Fourth Circuit's decision in *Bostic*. At the time, the only case pending in United States District Court for the District of South Carolina relating to the State's refusal to recognize same sex marriage was *Bradacs v. Haley*, C.A. No. 3:13–2351, an action by a same sex couple married in the District of Columbia who sought to have their marriage recognized under South Carolina law. The South Carolina Supreme Court accepted the *Wilson v. Condon* case in its original jurisdiction and stayed any issuance of marriage licenses to same sex couples by South Carolina Probate Judges pending the disposition of the constitutional questions in federal district court "for the limited purpose of maintaining the status quo until the Federal District Court can resolve the case pending before it." *Wilson v. Condon*, 2014 WL 5038396, at *2.

*5 [12] Subsequent to the South Carolina Supreme Court's grant of the stay in *Wilson*, Plaintiffs initiated this action in the Charleston Division of the United States District Court challenging state statutes and constitutional provisions prohibiting same sex marriage and seeking the issuance of a marriage license. The stay granted by the South Carolina Supreme Court is hardly a final judgment on the merits but simply an understandable effort by the South Carolina Supreme Court to maintain the status quo while the federal district courts addressed the constitutionality of the State's same sex marriage ban. The South Carolina Supreme Court clearly intended the federal court to rule on the constitutionality of the same sex marriage ban and for the *state courts* to abstain from doing so, as it ordered that "unless otherwise ordered by this Court, the issue of the constitutionality of the foregoing state law provisions shall not be considered by any court in the South Carolina Unified Judicial System while that issue remains pending before the Federal District Court." 2014 WL 5038396, at *2. The South Carolina Supreme Court's grant of a stay to temporarily maintain the status quo did not (and could not) interfere with or impair the Plaintiffs' right to seek protection of what they assert is a fundamental right to marry in the United States District Court or this Court's ability to exercise its jurisdiction and to provide Plaintiffs, if vindicated, appropriate declaratory and injunctive relief. [6]

D. *Absentia Doctrines*

[13] [14] Defendant Wilson argues that this Court should abstain under *Younger*. However, the *Younger* doctrine only applies in three "exceptional" circumstances: interference with state criminal prosecutions, interference with civil enforcement proceeds akin to criminal prosecutions, and interference with "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'n, Inc. v. Jacobs,* 134 S.Ct. 588, 587, (2013) (holding these three categories "define *Younger's* scope"). However, Defendants have not argued that this case presents any of these exceptional circumstances. "Because this case presents none of the circumstances the [Supreme] Court has ranked as 'exceptional,' the general rule governs: The pendency of an action in a state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id.* at 588 (internal quotations omitted).

[15] [16] Defendant Wilson also argues that this Court should decline to consider this case until a decision is reached in *Bradacs* under the first-to-file rule. (Dkt. No. 29 at 35–37). However, Defendants acknowledge that "the most basic aspect of the first to file rule is that it is discretionary," and that "[t]he decision and the discretion belong to the district court." (*Id.* at 36 (quoting *Plating Res., Inc. v. UTI Corp.,* 47 F.Supp.2d 899, 903 (N.D.Ohio 1999)). Further, Judge Childs has already ruled that the issue central to this action—Plaintiffs' right to marry as a same sex couple—is not before her because the plaintiffs in *Bradacs* are already married and, thus, do not have standing to assert the claim. Given the differing factual scenarios at issue in *Bradacs* and the case *sub judice* as well as the fundamental nature of the right at issue, the Court declines to wait until a judgment is entered in *Bradacs* to address Plaintiffs' claims.

D. *Merits of the Constitutional Claims*

***6** In addressing Plaintiffs' constitutional claim to a fundamental right to marry, this Court does not write on a blank canvas. In *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), the United States Supreme Court struck certain provisions of the Defense of Marriage Act ("DOMA"). Those provisions denied the surviving spouse of a state-sanctioned same sex marriage under New York law the benefits of a federal estate tax deduction available to surviving spouses of opposite sex marriages. Writing for the majority, Justice Kennedy stated that DOMA "writes inequality into the entire United States Code" by identifying "a subset of state-sanctioned marriages" and making "them unequal." *Id.* at 2694. The Court reasoned that by denying certain federal benefits to members of same sex marriages, DOMA imposed "a disability on the class" that violated their "personhood and dignity" in violation of their liberty interest protected by the Due Process Clause of the Fifth Amendment of the United States Constitution. *Id.* at 2695–96. Although the *Windsor* holding dealt only with the validity of certain provisions of federal statutory law, Justice Scalia, writing in dissent, correctly predicted that an assault on state same sex marriage bans would follow *Windsor. Id.* at 2710.

In the approximately 17 months since the *Windsor* decision, federal courts in virtually every circuit and in every state with a same sex marriage ban have heard lawsuits challenging the constitutionality of such state law provisions. These suits commonly involve challenges by same sex couples seeking marriage licenses and/or same sex couples validly married in another state attempting to obtain home state recognition of their marital status. Four Federal Courts of Appeal have held that state law bans on same sex marriage violate the constitutional rights of same sex couples: the Seventh, Ninth, Tenth and, most importantly for our purposes, the Fourth Circuit. Further, the United States Supreme Court, on October 6, 2014, declined to grant review of the decisions of the Fourth, Seventh and Tenth Circuits, leaving their judgments in place. *See Latta v. Otter,* —— F.3d ——, 2014 WL 4977682 (9th Cir. Oct.7, 2014); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir.2014), *cert. denied,* —— U.S. ——, 135 S.Ct. 316, —— L.Ed.2d ——, 2014 WL 4425162 (Oct. 6, 2014); *Bostic v. Schaefer,* 760 F.3d 352 (4th Cir.2014), *cert. denied, Schaefer v. Bostic,* —— U.S. ——, 135 S.Ct. 308, —— L.Ed.2d —— (2014); *Bishop v. Smith,* 760 F.3d 1070 (10th Cir. July 18, 2014), *cert. denied,* —— U.S. ——, 135 S.Ct. 271, —— L.Ed.2d ——, 2014 WL 3854318 (Oct. 6, 2014); *Kitchen v. Herbert,* 755 F.3d 1193 (10th Cir.2014), *cert. denied,* —— U.S. ——, 135 S.Ct. 265, —— L.Ed.2d ——, 2014 WL 3841263 (Oct. 6, 2014). One appellate court, the Sixth Circuit, recently held there is no constitutional right to same sex marriage, overturning lower court decisions in Kentucky, Michigan, Ohio and Tennessee.[7] Additionally, a clear majority of federal district courts that have addressed this issue have found state same sex marriage bans unconstitutional.[8]

***7** [17] Plaintiffs accurately note that four out of five appellate court decisions and the overwhelming majority of the district court decisions favor their position. On the other hand, Defendants, while acknowledging the body of recent case law going mostly against them, argue that at least one

appellate court and a few district courts have adopted their arguments and the United States Supreme Court has yet to squarely address the issue. While this debate over precedent and constitutional principle is interesting, this Court finds most persuasive the clearly stated authority of the Fourth Circuit's seminal decision in *Bostic*. It is axiomatic that a decision of a circuit court, not overruled by the United States Supreme Court, is controlling precedent for the district courts within the circuit. *E.g., United States v. Brown*, 74 F.Supp.2d 648, 652 (N.D.W.Va.1998).

The *Bostic* plaintiffs included a same sex couple who had unsuccessfully sought a marriage license under Virginia law. The Virginia same sex marriage ban prohibited "marriage between persons of the same sex." Va.Code Ann. § 20–45.2. Judge Henry Floyd, writing for the *Bostic* majority, noted that the Virginia statute was "similar" to the ban imposed under South Carolina law found in S.C. Constitution Art. XVII, § 15 and S.C.Code Ann. §§ 20–1–10 and 20–1–15. *Bostic*, 760 F.3d at 368 n. 1. The issues before the *Bostic* court were exhaustively briefed by the parties as well as by numerous amicus briefs, including an amicus brief joined by the State of South Carolina and submitted by Defendant Wilson. (Dkt. No. 13–12).

[18] As a preliminary matter, the *Bostic* Court addressed Virginia's argument that the United States Supreme Court's summary dismissal of a 1971 Minnesota Supreme Court decision upholding the state's same sex marriage ban in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn.1971), *summarily dismissed* for "want of a substantial federal question," 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), was controlling. The *Bostic* Court rejected that argument, concluding that "doctrinal developments" [9] in the more than forty years since *Baker* undermined any remaining force of the Supreme Court's summary dismissal in *Baker*. [10] 760 F.3d at 373.

The *Bostic* Court next turned its attention to the substantive claims of Plaintiffs, concluding that they had a "fundamental right" to marry, which is protected by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. *Id.* at 375–78. In reaching that conclusion, the *Bostic* Court traced the Supreme Court's recognition of the "expansive liberty interest" in the "right to marry." *Id.* at 376. The Court discussed Supreme Court decisions invalidating Virginia's interracial marriage ban in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), striking a Wisconsin statute that required a person with child support obligations to obtain a court order to marry in *Zablocki v. Redhail*, 434 U.S. 375, 383–84 (1978), and overturning a Missouri statute that prohibited prisoners from marrying in *Turner v. Safley*, 482 U.S. 78, 94–97, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The Fourth Circuit held that these authorities established a liberty interest in "a broad right to marry" and that the previous Supreme Court decisions in *Windsor* and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), "firmly position same-sex relationships within the ambit of the Due Process Clauses' protection." 760 F.3d at 374.

***8** Since the *Bostic* Plaintiffs had a fundamental right to marry, the Fourth Circuit held that Virginia's effort to bar their marriage was subject to strict scrutiny under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment and, as such, could be justified only by a compelling state interest. *Id.* at 375–77. *Bostic* then examined Virginia's various asserted state interests in maintaining its same sex marriage ban [11] and found that none constituted a compelling state interest. *Id.* at 377–384.

Defendant Wilson argues that the "domestic relations exception" deprives federal courts of jurisdiction over this case, and this Court is mandated to abstain from addressing Plaintiff's federal constitutional right to marry their same sex partner. (Dkt. No. 33–1 at 5–8). Contrary to Defendant Wilson's contention, the *Bostic* Court did address the state asserted right to control marital relations. The Fourth Circuit carefully analyzed the competing constitutional principles of state control of marital relations and the federal protection under the Fourteenth Amendment of the fundamental right of liberty, including the "intensely personal choice" of "whom to marry." *Id.* at 378–80. Citing to *Loving* and *Windsor*, the *Bostic* Court concluded that states must exercise their authority over marital relations "without trampling constitutional guarantees" of same sex couples and rejected Virginia's claim that principles of federalism required a different outcome. *Id.* at 378–80. It held that while states have the authority to regulate domestic relations and marriage, "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id.* at 379 (quoting *Windsor*, 133 S.Ct. at 2691). [12]

Defendant Wilson also points to the recent Sixth Circuit decision in *DeBoer* for the proposition that federalism and respect for state and voter prerogatives should trump Plaintiffs' liberty claims under the Fourteenth Amendment. (Dkt. No. 34). *DeBoer* concluded that same sex couples should not look to the courts to protect their individual

rights but to the "usually reliable state democratic processes" for relief. 2014 WL 5748990, at * 1. The *Bostic* Court rejected that argument, observing that the "very purpose of the Bill of Rights [13] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Bostic,* 760 F.3d at 379 (quoting *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)) (footnote in original).

After discussing all of these arguments, the *Bostic* Court concluded:

> ***9** We recognize that same-sex marriage makes some people deeply uncomfortable. However, inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.

Id. at 384.

The defendants in *Bostic,* as well as the unsuccessful defendants in the Seventh and Tenth Circuit decisions, sought certiorari in the United States Supreme Court. The parties seeking certiorari asserted essentially every argument advanced below and in this action, including the contention that *Baker v. Nelson* constituted controlling authority and was inconsistent with the appellate court decisions finding a fundamental right of same sex couples to marry. 2014 WL 4351585 (*Bostic* petition for certiorari); 2014 WL 4418688 (*Bogan* petition for certiorari); 2014 WL 3867714 (*Bishop* petition for certiorari); 2014 WL 3867706 (*Kitc hen* petition for certorari). On October 6, 2014, the United States Supreme Court declined to review the Fourth Circuit's decision in *Bostic,* as well as the decisions in the Seventh and Tenth Circuits, and the stay that had been granted the state of Virginia pending appeal was promptly lifted. — U.S. ——, 135 S.Ct. 308, —L.Ed.2d ——, 2014 WL 4230092 (U.S. Oct. 6, 2014); 2014 WL 4960335 (4th Cir. Oct.6, 2014).

Within days of the Supreme Court's denial of certiorari in *Bostic,* Judge Max Cogburn of the Western District of North Carolina issued a terse two-page order declaring North Carolina's same sex marriage ban "unconstitutional as a matter of law." *General Synod of the United Church of Christ v. Resinger,* — F.Supp.3d ——, 2014 WL 5092288 (W.D.N.C. Oct.10, 2014). Judge Cogburn observed that the issue before him was "neither a political issue nor a moral issue" but simply a "*legal* issue" on what is "now settled law in the Fourth Circuit," *Id.* at * 1 (emphasis in original). He then issued a permanent injunction against enforcement of all applicable state statutory and constitutional provisions relating to the North Carolina ban on same sex marriage. *Id.*

A few days later, Judge William Osteen of the Middle District of North Carolina also issued an order declaring the North Carolina same sex marriage ban unconstitutional in light of *Bostic. Fisher–Borne v. Smith,* —F.Supp.3d ——, 2014 WL 5138914 (M.D.N.C. Oct.14, 2014). Judge Osteen observed that a "decision by a circuit court is binding on this court" and that he could not discern any meaningful difference between the North Carolina same sex marriage ban statute and the Virginia statute declared unconstitutional in *Bostic, Id.* at *2.

***10** Soon after the Supreme Court's denial of certiorari in *Bostic,* West Virginia state officials announced they would no longer enforce the state's same sex marriage ban in light of the Fourth Circuit's decision. Maryland, by legislation, had authorized same sex marriage in 2013. Thus, at the time Plaintiffs filed this action, South Carolina was the only state within the Fourth Circuit that continued to prohibit same sex marriage.

This Court has carefully reviewed the language of South Carolina's constitutional and statutory ban on same sex marriage and now finds that there is no meaningful distinction between the existing South Carolina provisions and those of Virginia declared unconstitutional in *Bostic.* The South

Carolina statutory ban on same sex marriage provides that "marriage between persons of the same sex is void ab initio and against the public policy of the State" and explicitly bans marriage between two men and two women. S.C.Code Ann. §§ 20–1–10, 20–1–15. The Virginia statute declared unconstitutional in *Bostic* stated that "[a] marriage between persons of the same sex is prohibited." Va.Code Ann. § 20–45.2. The South Carolina constitutional provision under challenge states that "[a] marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State," and the Virginia constitutional provision declared unconstitutional in *Bostic* stated that "only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions," S.C. Constitution Art. XVII, § 15; Va. Constitution Art. I, § 15–A.

[19] [20] [21] [22] Defendant Wilson argues that this Court should not follow *Bostic* because the Fourth Circuit disregarded its own precedents and should have considered the United States Supreme Court's 1972 decision in *Baker v. Nelson* (finding that same sex marriage did not present a substantial federal question) binding despite the more recent Supreme Court language from *Windsor* (finding that a federal law failing to recognize same sex marriages violated the Fifth Amendment and failing to cite *Baker*). (Dkt. No. 29 at 5–11), While a party is certainly free to argue against precedent, even very recent precedent, the Fourth Circuit has exhaustively addressed the issues raised by Defendants and firmly and unambiguously recognized a fundamental right of same sex couples to marry and the power of the federal courts to address and vindicate that right. *Bostic*, 760 F.3d at 377–84. Regardless of the passion of *Bostic's* opponents, the predictability and stability of our judicial decisionmaking is dependent upon lower courts respecting and enforcing the decisions of higher appellate courts. Not every decision is heard and decided by the United States Supreme Court (in fact very few are), and lower federal courts are not free to disregard clear holdings of the circuit courts of appeal simply because a party believes them poorly reasoned or inappropriately inattentive to alternative legal arguments. Coherent and consistent adjudication requires respect for the principle of stare decisis and the basic rale that the decision of a federal circuit court of appeals left undisturbed by United States Supreme Court review is controlling on the lower courts within the circuit. This principle, along with the foundational rule that the United States Constitution is the supreme law of the land and state laws that run contrary to constitutionally protected rights of individuals cannot be allowed to stand, are among the body of doctrines that make up what we commonly refer to as the rule of law.

*11 The Court finds that *Bostic* controls the disposition of the issues before this Court and establishes, without question, the right of Plaintiffs to marry as same sex partners. The arguments of Defendant Wilson simply attempt to relitigate matters already addressed and resolved in *Bostic*. Any effort by Defendant Wilson or others to overrule *Bostic* should be addressed to the Fourth Circuit and/or the United States Supreme Court.

[23] Based upon the foregoing, the Court hereby declares that S.C.Code Ann. § 20–1–10(B)–(C), S.C.Code Ann. § 20–1–15 and S.C. Constitution Art XVII, § 15, to the extent they seek to prohibit the marriage of same sex couples who otherwise meet all other legal requirements for marriage in South Carolina, unconstitutionally infringe on the rights of Plaintiffs under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and are invalid as a matter of law. In order to protect and vindicate Plaintiffs' rights under the United States Constitution, this Court hereby issues the following permanent injunction and enjoins Defendant Wilson and Condon, their officers, agents, servants and employees, from:

1. Enforcing S.C. Constitution Art. XVII, § 15, S.C.Code Ann. §§ 20–1–10 and 20–1–15 or any other state law or policy to the extent they seek to prohibit the marriage of same sex couples;

2. Interfering in any manner with Plaintiffs' fundamental right to marry or in the issuance of a marriage license to Plaintiffs; and/or

3. Refusing to issue to Plaintiffs a marriage license if, but for their sex, they are otherwise qualified to marry under the laws of South Carolina.

E. *Request for Stay*

[24] [25] Defendant Wilson urges this Court, in the event it grants Plaintiffs' motion for summary judgment and request for permanent injunctive relief, to stay the effect of its order pending appeal or, in the alternative, to grant a temporary stay pending the Fourth Circuit's review of a request for an appeal stay. (Dkt. No. 36). A stay "is not a matter of right" and the party seeking a stay bears the burden of demonstrating the presence of the exacting standards for the granting of such relief. *Nken v. Holder*, 556 U.S. 418, 433–34, 129 S.Ct. 1749.

173 L.Ed.2d 550 (2009). The standards for granting a stay closely resemble the standards for the grant of a preliminary injunction, including (1) "a strong showing" that the party requesting the stay will succeed on the merits; (2) the presence of irreparable injury by the party seeking the stay; (3) whether the stay will substantially injure other parties to the litigation; and (4) whether the public interest is served by the grant of the stay. *Id.* at 434.

[26] In light of the Court's analysis set forth above and its conclusion that *Bostic* is controlling authority, it is quite evident that Defendant Wilson cannot carry his burden of showing a likelihood of success on the merits. Further, the Defendant Wilson has not set forth any meaningful evidence of irreparable injury should the petition for a stay be denied. On the other hand, Plaintiffs, who seek to exercise their fundamental right to marry, have put forward evidence of irreparable injury should a stay be granted. It is well settled that any deprivation of constitutional rights "for even minimal periods of time" constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); 11A Charles Alan Wright, Federal Practice & Procedure § 2948.1 (3d ed. 2014) ("Where there is an alleged deprivation of constitutional right[s] ... most courts hold no further showing of irreparable injury is necessary."). Moreover, same sex marriage bans have been found to impose on same sex couples "profound legal, financial, social and psychic harms" that are "considerable." *Latta,* — F.3d ——, 2014 WL 4977682, at *11; *Baskin v. Bogan,* 766 F.3d at 658. Finally, the public interest is best served by the denial of a stay that would allow the continued enforcement of a state law found to be unconstitutional.

*12 Having denied Defendant Wilson's motion to stay this Court's injunction pending appeal, the Court must consider whether a temporary stay is appropriate to allow the Fourth Circuit an opportunity to consider the Defendant's petition to stay pending appeal in an orderly and reasonable fashion. This factual scenario is similar to the situation presented to the district court in *Marie v. Moser,* No. 2:14–2518, 2014 WL 5800151 (D.Kan. Nov.4, 2014). The Tenth Circuit, of which the District of Kansas is a part, had previously ruled that same sex bans in Oklahoma and Utah were unconstitutional in *Bishop v. Smith* and *Kitc hen v. Herbert,* and the United States Supreme Court had denied review in both cases. The district court in *Marie* observed that while it was unwilling to issue a stay pending appeal because the defendant could not meet the legal standard for the grant of an appeal stay, the issue of a temporary stay of one week (until November 11, 2014) to allow the Tenth Circuit to consider the defendant's request was the "safer and wiser course." *Id.* at 37–38. The Tenth Circuit denied the request for a stay on November 7, 2014, and the defendant then petitioned the United States Supreme Court for a stay. On November 10, 2014, Justice Sotomayor stayed the district court's order in *Marie* pending a response from the plaintiffs and further order of the Court. *Moser v. Marie,* — S.Ct. ——, 2014 WL 5816952 (Nov. 10, 2014).

[27] This Court finds that a brief one-week stay in the enforcement of this Court's injunction is appropriate to allow the Fourth Circuit to receive Defendant's Wilson's petition for an appeal stay and to consider that request in an orderly fashion. This may also allow the pending request for an appeal stay in *Marie* to be addressed by Justice Sotomayor or the full United States Supreme Court. [14] Therefore, the Court grants a temporary stay of the Court's injunction in this matter until November 20, 2014, at 12:00 noon. [15]

Conclusion

Therefore, Plaintiffs' motion for summary judgment (Dkt. No. 13) is **GRANTED.** This Court hereby issues the following permanent injunction and enjoins Defendant Wilson and Condon, their officers, agents, servants and employees, from;

1. Enforcing S.C. Constitution Art. XVII, § 15, S.C.Code Ann. §§ 20–1–10 and 20–1–15 or any other state law or policy to the extent they seek to prohibit the marriage of same sex couples;

2. Interfering in any manner with Plaintiffs' fundamental right to many or in the issuance of a marriage license to Plaintiffs; and/or

3. Refusing to issue to Plaintiffs a marriage license if, but for their sex, they are otherwise qualified to marry under the laws of South Carolina. [16]

Defendant Wilson's motion for a stay (Dkt. No. 36) is **GRANTED IN PART AND DENIED IN PART.** Defendant Wilson's motion for an appeal stay is **DENIED.** Defendant Wilson's motion for a temporary stay is **GRANTED** until November 20, 2014, at 12:00 noon. Plaintiffs' motion for a preliminary injunction (Dkt. No. 12) and Defendants' motion to dismiss (Dkt. No. 33) are **DENIED** as moot. Defendant Haley is dismissed as a party pursuant to the Eleventh Amendment. Any motion by Plaintiffs for an

award of attorney fees pursuant to 42 U.S.C. § 1988 will be considered upon appropriate motions of the parties.

*13 AND IT IS SO ORDERED.

Footnotes

1 S.C. Constitution Art. XVII, § 15 provides that a "marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State." S.C.Code Ann. § 20–1–10(B)–(C) prohibit marriage between two men or two women and § 20–1–15 provides that "[a] marriage between persons of the same sex is void ab initio and against the public policy of the State."

2 Defendants Wilson and Haley incorporated into their memorandum in opposition to Plaintiffs' motion for summary judgment (Dkt. No. 34) their briefs in support of their motion to dismiss (Dkt. No. 33–1) and in opposition to Plaintiffs' motion for a preliminary injunction. (Dkt. No. 29). Therefore, the Court has considered and cited to Defendants Haley and Wilson's other memoranda in passing upon Plaintiffs' motion for summary judgment.

3 When the South Carolina Supreme Court issued its order in *Wilson v. Condon* on October 9, 2014, the sole pending challenge to South Carolina's statutory and constitutional provisions relating to same sex marriage involved a same sex couple that had been lawfully married in the District of Columbia and sought recognition of their marital status by the State of South Carolina. *Bradacs v. Haley,* C.A. No. 3:13–2351 (D.S.C.). This action, brought by Plaintiffs Condon and Bleckley, represents the first legal effort by a same sex couple to challenge the denial of an application for a South Carolina marriage license. The *Bradacs* case is presently pending before Judge Michelle Childs in the Columbia Division of the United States District Court for the District of South Carolina. Judge Childs recently ruled that the plaintiffs in *Bradacs,* because they were legally married in the District of Columbia, had no standing to assert a challenge to South Carolina's ban on same sex marriage. *Bradacs v. Haley,* C.A. No. 3:13–2351, Dkt. No. 89 at 13 n.7 (D.S.C. November 10, 2014).

4 Judge Childs reached the same conclusion in the *Bradacs* case. No. 3:13–2351, Dkt. No. 89 at 20 ("Defendant Wilson cannot take such action to specifically enforce the laws at issue and then hope to invoke Eleventh Amendment immunity under a theory that he simply has only 'general authority.' ").

5 Again, Judge Childs reached the same conclusion. *Bradacs,* No. 3:13–2351, Dkt. No. 89 at 18.

6 Defendants Wilson and Haley also argue that this Court should decline to consider this case until a decision is reached in *Bradacs* under the first-to-file rule. (Dkt. No. 29 at 35–37). However, Defendants acknowledge that "[t]he most basic aspect of the first to file rule is that it is discretionary," and that "[t]he decision and the discretion belong to the district court." *Id.* at 36 (quoting *Plating Res., Inc. v. UTI Corp.,* 47 F.Supp.2d 899, 903 (N.D.Ohio 1999). Further, Judge Childs has already ruled that the issue central to this action, Plaintiffs' right to marry as a same sex couple, is not before her because the plaintiffs in *Bradacs* have no standing to assert the claim because they are already legally married. Given the differing factual scenarios at issue in *Bradacs* and the case *sub judice* as well as the fundamental nature of the right at issue, the Court declines to wait until a judgment is entered in *Bradacs* to address Plaintiffs' claims.

7 *DeBoer v. Snydner,* — F.3d ——, 2014 WL 5748990 (6th Cir. Nov.6, 2014), overturning lower court decisions in *Love v. Beshear,* 989 F.Supp.2d 536 (W.D.Ky.2014); *Henry v. Himes,* — F.Supp.2d ——, 2014 WL 1418395 (S.D.Ohio Apr.14, 2014); *DeBoer v. Snyder,* 973 F.Supp.2d 757 (E.D.Mich.2014); *Lee v. Orr,* No. 13–cv–8719, 2014 WL 684680 (N.D.Ill. Feb. 21, 2014); *Bourke v. Beshear,* 996 F.Supp.2d 542 (W.D.Ky.2014); *Obergefell v. Wymyslo,* 962 F.Supp.2d 968 (S.D.Ohio 2013).

8 *See Lawson v. Kelly,* No. 14–cv–0622 (W.D.Mo. Nov. 7, 2014); *Marie v. Moser,* No. 14–cv–2518, 2014 WL 5598128 (D.Kan. Nov.4, 2014); *Connolly v. Jeanes,* No. 2:14–cv–00024, 2014 WL 5320642 (D.Ariz. Oct.17, 2014); *Majors v. Horne,* — F.Supp. —— 3d, 2014 WL 5286743 (D.Ariz. Oct.16, 2014); *Fisher–Borne v. Smith,* — F.Supp.3d ——, 2014 WL 5138914 (M.D.N.C. Oct.14, 2014); *Hamby v. Parnell,* — F.Supp.3d ——, 2014 WL 5089399 (D.Alaska Oct.12, 2014); *Gen. Synod of the United Church of Christ v. Resinger,* 12 F.Supp.3d 790 (W.D.N.C.2014); *Brenner v. Scott,* 999 F.Supp.2d 1278 (N.D.Fla.2014); *Bowling v. Pence,* —F.Supp.2d ——, 2014 WL 4104814 (S.D.Ind. Aug.19, 2014); *Burns v. Hickenlooper,* No. 14–cv–1817, 2014 WL 3634834 (D.Colo. July 23, 2014) (preliminary injunction), *made permanent by* 2014 WL 5312541 (D.Colo. Oct.17, 2014); *Baskin v. Bogan,* 12 F.Supp.3d 1144 (S.D.Ind.2014), *aff'd,* 766 F.3d 649 (7th Cir.2014); *Wolf v. Walker,* 986 F.Supp.2d 982 (W.D.Wis.2014), *aff'd,* 766 F.3d 648 (7th Cir.2014); *Whitewood v. Wolf,* 992 F.Supp.2d 410 (M.D.Pa. May 20, 2014); *Geiger v. Kitzhaber,* 994 F.Supp.2d 1128 (D.Or. May 19, 2014); *Latta v. Otter,* — F.Supp.2d ——, 2014 WL 1909999 (D.Idaho May 13, 2014), *aff'd,* 2014 WL 4977682 (9th Cir.2014); *Bostic v. Rainey,* 970 F.Supp.2d 456 (E.D.Va.2014), *aff'd* 760 F.3d 352 (4th Cir.2014); *Bishop v. U.S. ex rel. Holder,* 962 F.Supp.2d 1252 (N.D.Okla.2014), *aff'd,* 760 F.3d 1070 (10th Cir.2014); *Kitchen v. Herbert,* 961 F.Supp.2d 1181 (D.Utah 2013), *aff'd,* 755 F.3d 1193 (10th Cir.2014). *But see Conde–Vidal v. Garcia–Padilla,* —F.Supp.3d ——, 2014 WL 5361987 (D.P.R. Oct.21, 2014); *Robicheaux v. Caldwell,* 2 F.Supp.3d 910 (E.D.La.2014).

9 Defendant Wilson argues that Fourth Circuit decisions do not "recognize that a Circuit Court or a District Court is at liberty to decide that a summary decision by the Supreme Court has been abandoned or superseded by 'doctrinal developments.' " (Dkt. No. 29 at 7). However, the United States Supreme Court recognized this very point in *Hicks*. *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (holding that where the Supreme Court "has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise* ") (internal quotations omitted) (emphasis added).

10 Such doctrinal developments include equal protection decisions that hold sex-based classifications are quasi-suspect and warrant intermediate scrutiny and the Supreme Court's decisions in *Windsor* and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), which recognize that same sex couples have a constitutional right to make their own "moral and sexual choices." *Bostic*, 760 F.3d at 374.

11 These interests included the State's interest in maintaining control over the definition of marriage, the history and tradition of opposite sex marriage, protection of the institution of marriage, encouragement of responsible procreation, and promotion of the optimal child rearing environment. *Bostic*, 760 F.3d at 378.

12 Defendant Wilson's reliance on *Elk Grove v. United Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) is misplaced, as *Newdow's* prudential standing analysis was explicitly abrogated in *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, — U.S. ——, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). In *Lexmark*, the Supreme Court held that "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, ... it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* at 1388.

13 The Fourteenth Amendment is not part of the Bill of Rights, but the excerpt from *Barnette* is relevant here due to the Fourteenth Amendment's similar goal of protecting unpopular minorities from government overreaching, *see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 293, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and its role in rendering the Bill of Rights applicable to the states, *see Duncan v. Louisiana*, 391 U.S. 145, 147–48, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

14 On October 8, 2014, Justice Kennedy issued a temporary stay of the Ninth Circuit order in *Latta v. Otter*, which declared the Idaho same sex ban unconstitutional. Two days later, on October 10, 2014, the full Court denied the stay, and the previously issued temporary stay by Justice Kennedy was vacated. 135 S.Ct. 345 (2014).

15 The Court is mindful that the strict application of the four part test for the granting of a stay would result in the denial of even this one-week temporary stay. However, sometimes the rigid application of legal doctrines must give way to practicalities that promote the interest of justice. Providing this Court's colleagues on the Fourth Circuit a reasonable opportunity to receive and consider Defendant Wilson's anticipated petition for an appeal stay justifies this brief stay of the Court's injunctive relief in this matter.

16 Counsel for Defendant Condon has raised with the Court a potential dilemma Defendant Condon might confront if this Court granted Plaintiffs injunctive relief effectively requiring him to issue to them a marriage license and the South Carolina Supreme Court failed to dissolve the stay in *Wilson v. Condon* (as it has pledged to do) once the constitutionality of South Carolina's same sex marriage ban was determined by a federal district court. 2014 WL 5038396 at *2. It is without question true that the South Carolina Supreme Court could not properly issue orders to a defendant in federal litigation that would have the purpose or effect of limiting the injunctive powers of the federal district court or direct him not to comply with a federal court order. *See* 28 U.S.C. § 2283 (allowing a federal court to enjoin state court proceedings "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment"); *Mitchum v. Foster*, 407 U.S. 225, 242–43, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) (holding § 1983 "is an Act of Congress that falls within the 'expressly authorized' exception" of the Anti-injunction Act). This Court reads *Wilson v. Condon* as having no such purpose and was designed simply to maintain the status quo regarding the issuance of same sex marriage licenses by South Carolina probate judges until a federal district court had the opportunity to address the constitutional challenge to the same sex marriage ban. Any decision to stay the effect of a decision of a federal district court judgment would be the responsibility of the federal trial or appellate courts, and no state court could properly issue any order interfering with that judgment or directing federal court litigants to act contrary to the federal court judgment. Therefore, this Court anticipates that the South Carolina Supreme Court's stay will be dissolved upon notice of this Court's decision, as it has previously indicated its intention to do so. Should this assumption prove incorrect, the parties should promptly advise this Court.?

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APPENDIX

B

Order of the Court of Appeals denying stay, November 18, 2014

FILED: November 18, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-2241
(2:14-cv-04010-RMG)

ANNE NICHOLS BLECKLEY; COLLEEN THERESE CONDON,

Plaintiffs – Appellees,

v.

ALAN WILSON, in his official capacity as Attorney General,

Defendant – Appellant,

and

IRVIN G. CONDON, in his official capacity as Probate Judge of Charleston County,

Defendant.

O R D E R

Upon consideration of submissions relative to appellant's motion for stay pending appeal, the court denies the motion and denies the alternate request for a

temporary stay.

Entered at the direction of the panel: Judge Traxler, Judge Motz, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX

C

***Baker v. Nelson,* 409 U.S. 810 (1972)**
Appellee's Motion To Dismiss Appeal and Brief
Supreme Court of the United States

(Attachments to Brief omitted: *Baker v. Nelson,*
291 Minn. 310, 191 N.W.2d 185 (1971) and County Attorney letter)

In The

Supreme Court of the United States

October Term, 1972

No. 71-1027

RICHARD JOHN BAKER, ET AL.,

Appellants,

VS.

GERALD R. NELSON,

Appellee.

On Appeal from the Supreme Court of Minnesota

APPELLEE'S MOTION TO DISMISS APPEAL AND BRIEF

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Appellee.

On Appeal from the Supreme Court of Minnesota

APPELLEE'S MOTION TO DISMISS APPEAL AND BRIEF

The Appellee in the above captioned matter respectfully moves the Supreme Court of the United States, pursuant to Rule 16 of the Supreme Court Rules, to dismiss the appeal of Richard John Baker and James Michael McConnell, Appellants. Such motion is made on the following grounds:

1. The appeal does not present a substantial federal question, and the power to regulate marriages within a state belongs exclusively to that state.

2. That the questions raised by this appeal are moot.

In support of such motion it is respectfully suggested that the following cases and arguments, while not intended to be exhaustive of the subject at this time, are relevant and

hopefully of some assistance to the Court in its deliberations concerning the motion of the Appellee to dismiss the appeal.

STATEMENT OF THE CASE

The factual situation involved in the instant case is fundamentally simple and, stated most briefly, is as follows: Two males, of marriageable age and in all other respects qualified to marry under Minnesota law, were denied a marriage license based upon the fact that they were both of the same sex and sought to marry each other. The matter proceeded to trial before the Court without a jury, upon an alternative writ of mandamus. The Trial Court upheld the denial of the issuance of such marriage license and quashed the writ. On appeal to the Supreme Court of the State of Minnesota, the Trial Court was affirmed and it was held that Minnesota Statutes, Chapter 517, dealing with marriage, did not authorize marriages between persons of the same sex and that such marriages are prohibited.

The Minnesota Supreme Court also held that the denial of the issuance of a marriage license to persons of the same sex was not in violation of the rights of the appellants under the 1st, 8th, 9th or 14th Amendments to the United States Constitution.

QUESTION

Are Minnesota Statutes, Chapter 517, which govern marriages within the State of Minnesota, and having been construed by the Supreme Court of Minnesota so as to prohibit marriages between persons of the same sex, unconstitutional as being in violation of the 1st, 8th, 9th and 14th Amendments to the United States Constitution?

ARGUMENT

It would be difficult indeed to improve upon the opinion of the Minnesota Supreme Court, which was written by the Honorable C. Donald Peterson, Associate Justice of said Court, concerning the instant case and which is set forth in the Appendix to this brief. Accordingly, it is respectfully urged that there be a most deliberate reading of such opinion.

The Appeal Does Not Present a Substantial Federal Question; and the Power to Regulate Marriages Within a State Belongs Exclusively to That State.

Each state has enacted its own laws concerning the domestic relations of its citizens. While there are great similarities between them, there are also many basic differences. In the area of state laws governing marriage, there are differing requirements between the states such as: age, medical examinations may or may not be required, the degree of consanguinity allowed, the property and other rights arising out of the legal relationship of marriage, and many others.

It is well established that each state under its own power of sovereignty has the power, and, I submit, duty to carefully regulate its citizens in their domestic relationships.

In this area of law regulating the domestic relationships of its citizens, the sovereignty of each state is well supported in the landmark case of *Williams v. North Carolina* (1944), 65 S.Ct. 1092, where we find at page 1096 the following language:

> "* * * The problem is to reconcile the reciprocal respect to be accorded by the members of the union to their adjudications with due regard to another *most important aspect of our federalism* whereby *'the domestic relations of husband and wife * * * were matters reserved to the states'*, State of Ohio ex rel. Popobici v.

> Alger, 280 U.S. 379, 383, 384, 50 S.Ct. 154, 155, 74 L.Ed. 489, *and do not belong to the United States.* * * *" (Emphasis supplied)

In the Minnesota case of *Warner v. Warner* (1945), 219 Minn. 59, 17 N.W.2d 58, we find the principle of exclusivity of the states in the area of laws governing domestic relations set forth in volume 17 N.W.2d on page 62 as follows:

> "* * * 'In the United States, all divorce jurisdiction is statutory.' Our district court has in such matters only the powers 'delegated to it by statute.' Ostrander v. Ostrander, 190 Minn. 547, 549, 252 N.W. 449, 450; Sivertsen v. Sivertsen, 198 Minn. 207, 210, 269 N.W. 413, 415. As a corollary thereto, we may add what this court said in State v. Armington, 25 Minn. 29, 37: '* * * *To each state belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce.* * * *.' So likewise, in Cheely v. Clayton, 110 U.S. 701, 705, 4 S.Ct. 328, 330, 28 L.Ed. 298, 299, it was held: *'The courts of the State of the domicil of the parties doubtless have jurisdiction to decree a divorce, in accordance with its laws,* * * *." (Emphasis supplied)

It is submitted that this principle is further supported by the Tenth Amendment to the United States Constitution which provides:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

As has been aptly pointed out in the Minnesota Supreme Court opinion from which an appeal has been taken in the instant case, the United States Supreme Court cases, where state statutes regarding the marital relationship have been held to be unconstitutional as in violation of the Fourteenth Amendment, turn on the basis of "race discrimination" in *Loving v. Virginia,* 1967, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.

2d 1010; and on the protection of "privacy in the marriage relationship already established" in *Griswold v. Connecticut*, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; and on the basis of "protecting the inherent right of procreation and rearing children" in *Skinner v. Oklahoma ex rel. Williamson*, 1942, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655, 1660.

Obviously, the facts in such cases must be distinguished from the facts in the instant case wherein the alleged unconstitutionality is based upon a claim of discrimination in prohibiting marriage of two persons of the same sex.

Appellant argues in its jurisdictional statement (at page 11) that the "right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the fourteenth amendment". This point is conceded, and in no way are the "rights to marry" being withheld from either of the appellants except that they may not marry each other or another of the same sex.

Appellants also argue in the jurisdictional statement (at page 12) that "marriage comprises a bundle of rights and interests, * * *". Again it is agreed with appellants that marriage does "comprise a bundle of rights and interests".

In *Meredith v. Meredith*, 226 Fed.2d 257, 96 U.S. App. D.C. 355, we find the following:

> "A marriage contract is not a single indivisible entity, but embodies a bundle of indivisible rights, including rights to consortium, maintenance, alimony, and children's custody."

When one considers just how deeply imbedded and woven into the fabric of our laws this so-called bundle of rights and interests have become, it is patently obvious that to permit same sex marriages would create absolute chaos in our system of jurisprudence, government and culture.

The institution of marriage and family is most certainly one of the fundamental precepts which was designed to be absolutely protected by our federal Constitution. Now, appellants would have this very same Constitution so construed as to defeat and destroy this basic principle of human life.

Again I would like to refer to a most pertinent statement of the Minnesota Supreme Court in its opinion rendered in the instant case which is as follows:

> "The due process cause of the fourteenth amendment is not a charter for restructuring it by judicial legislation."

If persons of the same sex were to be permitted to marry as a constitutional right guaranteed them under our United States Constitution, consider closely then the effect this would have upon our laws concerning property, taxes (income, inheritance and estate), contracts, and even criminal laws and evidence (husband may not testify against his wife, et seq.).

Consider also the following language found in the recent case of *Bodie v. Connecticut* (1969), 401 U.S. 371, 91 S.Ct. 780:

> "In view of the *basic position of the marriage relationship in our society* and the *state monopolization* of the means of dissolving that relationship, due process of law prohibits a state from denying, *solely* because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage." (Emphasis supplied)

Surely, the *Bodie* case applies the protection of the due process clause and provides access to the Courts where such access has been denied based upon indigency. More importantly, for our consideration here, the *Bodie* case reiterates the basic position of the marriage relationship in our society. This case also recognizes that the states do in fact control

the institution of marriage within each state. This control is not absolute but most assuredly extends to the capacity of the parties to enter into marriage within each state.

In the case *In Re Flowers,* 292 Fed. Supp. 390, we find the following:

> "Marriage is a social relation subject to the police power of the state and is not considered a contract within the constitutional protection against impairment."

In *Headen v. Pope and Talbot, Inc.,* 252 Fed.2d 739, we find the following:

> "Matters such as capacity of the parties to enter into the marriage are governed by the law of the state of the marriage."

The Questions Raised by This Appeal Are Moot.

It is most difficult for the undersigned to accept the premise of appellants' appeal where on the one hand they argue that they are deprived of their constitutional rights by virtue of the fact that they are prohibited from marrying each other, and at the same time disclose that they did in fact allegedly marry each other on September 3, 1971. (See Appellants' Jurisdictional Statement, page 5, footnote 3.)

Assuming the appellants' allegation of marriage to be true, would that not render the question raised in this appeal moot?

CONCLUSION

In conclusion, I would respectfully suggest that what we are confronted with in this case is what must be considered as an attack upon the very foundation itself of the institution of marriage and family as we know it today and as it has been since the beginning of recorded history. The framers of our Constitution and the statesmen of the States of the Union ratifying the same, would have never conceived that the protections which were afforded the people under this historic document would ever be utilized in such a way as to bring about the result sought by the appellants herein.

Review briefly the Preamble to the United States Constitution which is as follows:

> "We, the people of the United States, in order to form a more perfect union, establish justice, insure *domestic tranquility*, provide for the common defense, *promote the general welfare*, and secure the blessings of liberty to ourselves and *our posterity*, do ordain and establish this Constitution for the United States of America." (Emphasis supplied)

Our country, and our Constitution, were founded upon basic religious principles and one of the most basic of such principles is that marriage is an institution ordained by God and that such institution is to be entered into by a man and a woman as husband and wife.

Respectfully submitted,

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