No. 14A503

In the
Supreme Court of the United States

ROBERT MOSER, SECRETARY OF THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT, ET AL.,

Applicants,

v.

KAIL MARIE, ET AL.,

Respondents.

Response In Opposition to Emergency Application to Stay Preliminary Injunction Pending Appeal

DIRECTED TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

Mark P. Johnson,
DENTONS US, LLP
4520 Main Street
Suite 1100
Kansas City, MO 64111
(816) 460-2400

Stephen Douglas Bonney
ACLU FOUNDATION OF KANSAS
3601 Main Street
Kansas City, MO 64111
(816) 994-3311

Joshua A. Block
Counsel of Record
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
jblock@aclu.org

Counsel for Respondents

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To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Plaintiffs-Respondents Kail Marie and Michelle L. Brown and Kerry Wilks and Donna DiTrani (collectively, the "Plaintiffs") respectfully oppose the Application to Stay Preliminary Injunction Pending Appeal filed by Robert Moser, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; Douglas A. Hamilton, in his official capacity as Clerk of the District Court for the 7th Judicial District (Douglas County); and Bernie Lumbreras, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County) (collectively, the "Defendants").

INTRODUCTION

In accordance with final and binding Tenth Circuit precedent in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014), and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert denied,* 135 S. Ct. 271 (2014), the district court issued a preliminary injunction to stop Kansas officials from enforcing State laws that unconstitutionally prohibit same-sex couples from marrying. One month ago, this Court denied similar stay applications from state officials in Idaho and Alaska in, respectively, *Otter v. Latta*, 14A374, 135 S. Ct. 345 (2014), and *Parnell v. Hamby*, 14A413, --- S. Ct. ---, 2014 WL 5311581 (U.S. Oct. 17, 2014). This stay application should be denied, as well.

In asking this Court to reverse course and stay a lower court ruling that followed binding circuit precedent, Applicants rely heavily on a recent decision by the Sixth Circuit, which became the first federal circuit since *United States v. Windsor*, 133 S. Ct. 2675 (2013), to uphold state marriage bans as constitutional, after four circuits (the Fourth, Seventh, Ninth, and Tenth) had ruled otherwise. *See DeBoer v. Snyder*, Nos. 14-1341, 14-5291, 14-3057, 14-5297, 14-3464, 14-5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). Respondents agree that the emergence of a circuit split creates a reasonable probability that this Court will ultimately grant a petition for *certiorari* to resolve the right of same-sex couples to marriage equality under the United States Constitution. But Applicants' burden is to show more than the likelihood that *certiorari* will be granted. They must demonstrate a fair prospect that a majority of the Court will vote to reverse the judgment below. Applicants have not, and cannot, make that showing.

The emergence of a circuit split also does not change the fact that granting a stay would impose severe and irreparable harms on same-sex couples and their children. Those harms far outweigh any governmental interest in continuing to enforce marriage bans that have been declared unconstitutional by the lower courts. Defendants in this case are no different than governmental officials in Arizona, Alaska, Colorado, Idaho, Indiana, North Carolina, Oklahoma, Utah, Virginia, West Virginia, Wisconsin, and Wyoming, who have all ceased enforcing their States' marriage bans despite the theoretical possibility that this Court may eventually uphold such bans as constitutional. The public interest would be best served by this

Court adhering to the consistent practice it has followed since it denied the petitions for *certiorari* on October 6, 2014, and denying the application for a stay pending appeal.

STATEMENT OF THE CASE

A. Implementation of *Kitchen*, *Bishop*, *Bostic*, *Baskin*, and *Latta*.

On October 6, 2014, this Court denied petitions for *certiorari* to review decisions from the Fourth, Seventh, and Tenth Circuits holding that laws prohibiting same sex couples from marrying or denying recognition to their legal marriages from other jurisdictions violate the Fourteenth Amendment. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied and cert denied sub nom.*, 135 S. Ct. 32, 286, 308, 314 (2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied and cert denied sub nom.*, 135 S. Ct. 316 (2014), *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert denied,* 135 S. Ct. 271 (2014).

The following day, the Ninth Circuit struck down Idaho and Nevada's marriage bans as facially unconstitutional and joined the Fourth, Seventh, and Tenth Circuits in holding that prohibiting same-sex couples from marrying and denying their marriages legal recognition violates the Fourteenth Amendment. *Latta v. Otter*, Nos. 14–35420, 14–35421, 12–17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014). The Idaho defendants requested a stay from this Court pending the Ninth Circuit's disposition of a petition for rehearing en banc or, in the alternative, a stay

pending disposition of a petition for *certiorari* to this Court, which this Court denied on October 10, 2014, with no recorded dissents. *See Otter v. Latta*, 14A374, 135 S. Ct. 345 (2014).

Pursuant to binding circuit precedent in *Kitchen*, *Bishop*, *Bostic*, *Baskin*, and *Latta*, district courts have enjoined enforcement of similar marriage bans in Alaska,[1] Arizona,[2] Colorado,[3] North Carolina,[4] West Virginia,[5] and Wyoming.[6] On October 16, 2014, defendants in Alaska requested a stay from this Court pending disposition of an appeal before the Ninth Circuit and a petition for initial hearing en banc, or in the alternative, a stay pending disposition of petition for *certiorari*. In support of that stay request, the Alaska defendants argued:

> [T]here is a reasonable likelihood that there will be a clear post-*Windsor* circuit split over whether the Fourteenth Amendment requires States to license and recognize same-sex marriages. There was no such post-Windsor split when this Court recently denied review in five cases presenting that question, but such a split is likely to develop in the coming months. On August 6, 2014, the Sixth Circuit

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[1] *Hamby v. Parnell*, No. 3:14-cv-00089-TMB, 2014 WL 5089399, at *23 (D. Alaska Oct. 12, 2014).

[2] *Majors v. Horne*, No. 2:14–cv–00518 JWS, 2014 WL 5286743 (D. Ariz. Oct. 17, 2014); *Connolly v. Jeanes*, No. 2:14–cv–00024, 2014 WL 5320642 (D. Ariz. Oct. 17, 2014).

[3] *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 5312541 (D. Colo. Oct. 17, 2014).

[4] *Gen. Synod of the United Church of Christ v. Resinger*, No. 3:14-cv-00213-MOC-DLH, 2014 WL 5092288 (W.D.N.C. Oct. 10, 2014); *Fisher-Borne v. Smith*, Nos. 1:12CV589, 1:14CV299, 2014 WL 5138914 (M.D.N.C. Oct. 14, 2014).

[5] Final Judgment, *McGee v. Cole*, No. 3:13–24068 (S.D.W.V), ECF No. 140,

[6] *Guzzo v. Mead*, No. 14–CV–200–SWS, 2014 WL 317797 (D. Wyo. Oct. 17, 2014).

> heard argument on that question in cases from Michigan, Ohio, Tennessee, and Kentucky, and could soon issue a decision creating a split with the Tenth, Fourth, Seventh, and Ninth Circuits.

Stay Application at 6, *Parnell v. Hamby*, 14A413 (U.S.). This Court nevertheless denied the stay request on October 17, 2014, with no recorded dissents. *See Parnell v. Hamby*, 14A413, --- S. Ct. ---, 2014 WL 5311581 (U.S. Oct. 17, 2014).

In total, as a result of this Court's denial of the petitions for certiorari in *Kitchen*, *Bishop*, *Bostic*, and *Baskin* and its subsequent denial of stay requests in *Latta* and *Hamby*, thirteen states have ceased enforcing their marriage bans, in accordance with lower court injunctions. Aside from Kansas, the only remaining States in the Fourth, Seventh, Ninth, and Tenth Circuits that continue to enforce their marriage bans are Montana and South Carolina, and there is active litigation in both States with pending motions to bar enforcement of those marriage bans as well.[7]

B. Proceedings Below

Since 1980, Kansas has enacted a series of laws that explicitly prohibit same-sex couples from exercising the right to marry. These efforts culminated in 2005 with the adoption of a state constitutional amendment, which (1) declared that "[m]arriage shall be constituted by one man and one woman" and that "[a]ll other marriages are . . . contrary to public policy" and (2) prohibited the state from recognizing any "relationship, other than marriage, . . . as entitling the parties to

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[7] *See Condon v. Haley*, No. 2:14-cv-04010-RMG (D.S.C.); *Rolando v. State*, CV-14-40-GF-BMM (D. Mt.).

the rights or incidents of marriage." Kan. Const. art. 15, § 16. As a result, lesbians and gay men in Kansas who are in long-term, committed relationships are barred from marrying and are also prohibited from any other legal status that might simulate marriage or provide any of marriage's legal rights and protections.

Plaintiffs are two same-sex couples in committed, loving relationships who reside in Kansas. Kail Marie and Michelle Brown live in Douglas County and recently celebrated their twenty-first anniversary together as a committed, loving couple. Kerry Wilks and Donna DiTrani live in Sedgwick County and have been a committed, loving couple for about five years. Both couples are unmarried but wish to marry in their home state of Kansas.

On October 10, 2014, just four days after this Court denied *certiorari* in *Kitchen*, *Bishop*, *Bostic*, and *Baskin*, Plaintiffs filed suit in the U.S. District Court for the District of Kansas challenging Kansas' prohibition on the issuance of marriage licenses to same-sex couples. Plaintiffs also filed a motion for preliminary injunction seeking to enjoin Defendants – the district court clerks in Douglas and Sedgwick Counties and the Secretary of the Kansas Department of Health and Environment (the vital records custodian and registrar for Kansas marriage licenses) – from enforcing the Kansas laws that prohibit same-sex couples from obtaining marriage licenses and from marrying in Kansas.

On the same day that Plaintiffs filed this action, Kansas Attorney General Eric Schmidt filed a mandamus action with the Kansas Supreme Court. *In re Moriarty*, Case No. 112,590 (Kan. Oct. 10, 2014). App. B to Stay Application at 20.

The mandamus action sought to enjoin an administrative order from Chief Judge Kevin P. Moriarty of the District Court of Johnson County, Kansas, issued Amended Administrative Order 14-11, which directed the clerk of the Johnson County District Court to issue marriage licenses to all individuals, including same-sex individuals, provided they are otherwise qualified to marry. App. A to Stay Application at 1. Also on that same day, the Kansas Supreme Court entered an order denying the Attorney General's request for immediate or peremptory relief or an *ex parte* grant of relief because "the Attorney General's right to relief on the merits is not clear, nor is it apparent under [Kansas Supreme Court] Rule [9.01(c)(2)] 'that no valid defense to the petition can be offered,' given the interpretation and application of the United States Constitution by panels of the United States Tenth Circuit Court of Appeals." *Id.* at 2. The Kansas Supreme Court did, however, "in the interest of statewide consistency" grant a "temporary stay" of the trial judge's order directing the Johnson County clerk to issue marriage licenses to same-sex couples. *Id.*[8] The Kansas Supreme Court's order also established a briefing schedule and set oral argument on the mandamus petition for November 6, 2014. *Id.* at 3.

On October 31, 2014, the federal district court held a hearing on Plaintiffs' motion for a preliminary injunction. In opposition to the preliminary injunction, Defendants raised a wide-range of procedural and other defenses. Among other

[8] The Kansas Supreme Court also specifically permitted the Johnson County District Court clerk to continue to accept marriage license applications from same-sex couples. *Id.*

things, Defendants argued that, because of the pending mandamus petition before the Kansas Supreme Court, Plaintiffs' federal litigation was barred by the Anti-Injunction Act, *Younger v. Harris*, 401 U.S. 37 (1971), *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), *Burford v. Sun Oil Co*, 319 U.S. 315 (1943), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). A few hours before the preliminary injunction hearing on October 31, Defendants filed a supplemental brief raising new arguments based on the *Rooker-Feldman* doctrine.

On November 4, 2014, the court entered a Memorandum and Order granting Plaintiffs' motion for preliminary injunction in an opinion that carefully and thoroughly considered each of Defendants' arguments and explained why each one was meritless. App. B. to Stay Application. The court accordingly held that "Defendants are enjoined from enforcing or applying Article 15, § 16 of the Kansas Constitution, K.S.A. § 23-2501 and any other Kansas statute, law, policy or practice that prohibits issuance of marriage licenses to same-sex couples in Kansas. Defendants may not refuse to issue marriage licenses on the basis that applicants are members of the same sex." *Id.* at 38. The district court stayed its injunction for one week – until 5:00 p.m. on November 11, 2014 – so that Defendants could appeal.

On November 5, 2014, the Kansas Supreme Court issued an order postponing oral argument in the mandamus proceeding between the Attorney General and Chief Judge Moriarty in light of the federal court's ruling. App. C to Stay Application at 3. The Kansas Supreme Court called for supplemental briefing from the parties to address whether the court should vacate its previous order or stay the

mandamus proceedings entirely in the interest of comity to the federal court proceedings. *Id.*

Also on November 5, 2014, Defendants filed a Notice of Appeal of the order granting the preliminary injunction. On November 6, Defendants/Appellants filed an Emergency Motion for Stay of Preliminary Injunction asking the Tenth Circuit to stay the district court's injunction pending appeal. On November 7, a panel of the Tenth Circuit denied that Emergency Motion, concluding that "defendants have failed to make the showings necessary to obtain a stay." *See* App. D to Stay Application at 2.

C. The Sixth Circuit's Decision in *DeBoer*

On November 7, 2014, a divided panel of the Sixth Circuit became the first U.S. Court of Appeals since *Windsor* to uphold state marriage bans as constitutional. *DeBoer v. Snyder*, Nos. 14-1341, 14-5291, 14-3057, 14-5297, 14-3464, 14-5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). In doing so, the Sixth Circuit created a 4-1 split, with the Fourth, Seventh, Ninth, and Tenth Circuits holding that such bans are unconstitutional and the Sixth Circuit as the lone dissent from that consensus.

ARGUMENT

I. Standard for Granting a Stay Pending Appeal.

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review," and "[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). Accordingly, a stay pending appeal "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Id.* at 437 (Kennedy, J., concurring). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34; *accord Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam) (applying *Nken* standard to requests for a stay by this Court).

Three conditions must be met before the Court issues a stay pursuant to 28 U.S.C. § 2101: "(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." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). However, the three conditions "*necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis in original). The Court also must "'balance the equities'—to explore the relative harms to applicant

and respondent, as well as the interests of the public at large," an inquiry that requires consideration of not only "the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also [of] the relative likelihood that the merits disposition one way or the other is correct." *Id.* at 1305 (internal quotation marks omitted).

II. Defendants Cannot Show a Fair Prospect of Reversal

Defendants have not carried the burden necessary to secure a stay pending appeal. This Court recently denied a virtually identical request for a stay in *Parnell v. Hamby*, 14A413, 2014 WL 5311581 (U.S. Oct. 17, 2014). Just as the district court in this case followed binding Tenth Circuit precedent in holding that Kansas's marriage ban is unconstitutional, the district court in *Parnell* followed binding Ninth Circuit precedent in holding that Alaska's marriage ban is unconstitutional. *See Hamby v. Parnell*, 2014 WL 5089399 (D. Alaska Oct 12, 2014). Indeed, the case against a stay is even stronger here because the Ninth Circuit precedent in *Latta*, which dictated the result in *Parnell*, had not yet reached this Court by a petition for *certiorari*; in contrast, the Tenth Circuit decisions in *Kitchen* and *Bishop*, which are fully binding in Kansas,have already been denied review.

The only fact that has changed since the denial of a stay in *Parnell* and now is the Sixth Circuit's decision in *DeBoer*, creating a circuit split. But the possibility of such a circuit split was not an unforeseen event. As noted above, the Alaska defendants who sought a stay in *Hamby* argued that "[t]here was no such post-Windsor split when this Court recently denied review in five cases presenting that

question, but such a split is likely to develop in the coming months." Stay Application at 6, *Parnell v. Hamby*, 14A413 (U.S.).

To be sure, the Sixth Circuit's decision in *DeBoer* creates at least a reasonable probability that the Court will grant *certiorari* to decide whether state bans on marriage for same-sex couples violate the Fourteenth Amendment. Stay Application at 10. However, Applicants need to do more than simply cite the Sixth Circuit decision to establish a fair prospect that a majority of this Court will uphold such laws as constitutional, especially in the face of four circuit court decisions (and more than 30 district court decisions) holding to the contrary following *Windsor*. Significantly, even the Sixth Circuit panel in *DeBoer* did not conclude that such marriage bans advance a legitimate governmental objective that justifies the severe harm imposed on same-sex couples and their families. *See Windsor*, 133 S. Ct. at 2696; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Instead, the panel concluded that it was not its responsibility to decide whether laws denying marriage equality to same-sex couples violate the Constitution. This Court has properly rejected such a cramped vision of the judiciary's role in our constitutional scheme. *Cf. Parenthood of SE. Penn. v. Casey*, 505 U.S. 833, 849 (1992) (explaining that Fourteenth Amendment's protection for individual liberty does not make judges "free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to declare what the law is.").

Defendants' other merits arguments also have little prospect of commanding a majority of this Court. Defendants raise the same, broad federalism arguments that were unsuccessfully raised by Alaska and Idaho officials in their stay applications. Stay Application at 11-12. *Windsor* affirmed that state laws restricting who may marry are subject to constitutional limits and "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia,* 388 U.S. 1 (1967)); *id.* at 2692 (marriage laws "may vary, subject to constitutional guarantees, from one State to the next"). As the Fourth Circuit explained, "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d at 379.

Finally, there is neither a fair prospect that this Court will grant *certiorari* nor a significant possibility of reversal based on Defendants' arguments that federal litigation in this case was somehow barred because it would ostensibly interfere with the mandamus proceedings before the Kansas Supreme Court – proceedings in which neither the Plaintiffs nor any other same-sex couples are parties. Stay Application at 5-7, 13. "[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989). Federal and State courts have concurrent jurisdiction over constitutional questions, and "[a]bstention is not in order simply because a pending state-court proceeding

involves the same subject matter." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013). The district court thoroughly and carefully explained why each of Defendants' arguments regarding the mandamus proceeding is meritless, and Defendants have offered no meaningful response to the court's careful analysis. *See* App. B to Stay Application at 16-17 (Anti-Injunction Act); *id.* at 19-20 (*Pullman* abstention); *id.* at 20-24 (*Younger* abstention); *id.* at 24-26 (*Colorado River* abstention); *id.* at 26 (*Burford* abstention); *id.* at 26-28 (*Rooker-Feldman* doctrine).

In short, Applicants have offered no persuasive reason why the stay application in this case should be granted when the stay applications in *Otter* and *Parnell* were denied only a few weeks ago.

III. Defendants Cannot Show Irreparable Harm that Outweighs the Harm that a Stay Would Inflict on Plaintiffs and Other Same-Sex Couples.

In order to grant a stay, "[t]he likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others." *Barnes*, 501 U.S. at 1305. Here, Defendants cannot show that denying a stay would impose any tangible irreparable harm on Defendants or anyone else.[9] The only sort of harm Defendants point to is

[9] Defendants assert they will be irreparably harmed by complying with the federal injunction because it conflicts with Kansas law and Kansas state court orders based on state law. But that is true whenever a state law is declared unconstitutional pursuant to *Ex parte Young*, 209 U.S. 123, (1908). The entire premise of such

the intangible harm that, they claim, occurs whenever a State is enjoined from enforcing a law that is ultimately upheld as constitutional. Stay Application at 14-15. In this respect, however, Defendants are no different than governmental officials in Alaska, Idaho, Indiana, Oklahoma, Utah, Virginia, and Wisconsin, who – as a result of this Court's denials of *certiorari* or requests for a stay – have all ceased enforcing their States' marriage bans despite the theoretical possibility that this Court would ultimately grant *certiorari* and uphold such bans as constitutional. Defendants are also no different than officials in Arizona, Colorado, North Carolina, West Virginia, and Wyoming who have ceased enforcing their States' marriage bans as a result of binding circuit precedent.

In contrast, granting a stay would be guaranteed to impose severe irreparable harm on same-sex couples in Kansas and on their children. While this case remains pending in this Court, children will be born, people will die, and loved ones will fall unexpectedly ill. The substantive legal protections afforded by marriage can be critical, if not life-changing, during such major life events and personal crises. Even the Sixth Circuit panel acknowledged that the marriage bans it upheld as constitutional deprive same-sex couples and their families of "benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns)" and that "[t]hese harms affect not only gay couples but also their children." *See DeBoer*, 2014 WL 5748990,

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litigation is that State laws are preempted when they "come[] into conflict with the superior authority of that Constitution." *Id.* at 159-60.

at *13. The concrete harms that Plaintiffs and other same-sex couples would suffer each day they are denied the freedom to marry far outweigh any theoretical harm that Kansas officials will suffer from complying with the same type of injunction as nearly every other State in the Fourth, Seventh, Ninth, and Tenth Circuits.

IV. Granting a Stay in These Circumstances Would Be Contrary to the Public Interest.

A stay is not in the public interest. Before the Sixth Circuit created a circuit split in *DeBoer*, thirteen different States in the Fourth, Seventh, Ninth, and Tenth Circuits implemented court decisions enjoining them from enforcing their constitutional provisions banning same-sex couples from marrying. The public interest would be best served by adhering to the consistent practice this Court has followed since it denied the petitions for *certiorari* on October 6, 2014. Every State, including Kansas, is entitled to exhaust all available appeals in defense of its laws banning same-sex couples from marriage. A stay from this Court, however, "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Nken*, 556 U.S. at 437 (Kennedy, J., concurring). In contrast, it is always in the public interest to protect constitutional rights. *See City of Riverside v. Rivera*,477 U.S. 561, 574-75 (1986) (plurality); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979).

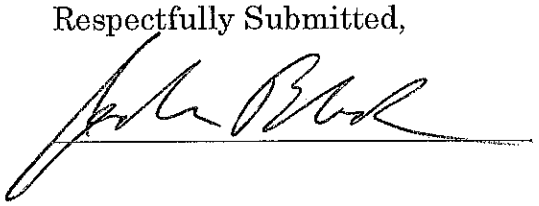
This Court will soon have the opportunity to decide whether the Fourteenth Amendment allows States to deny same-sex couples the freedom to marry. But the theoretical possibility that this Court may disagree with the overwhelming majority

of lower courts and uphold such bans as constitutional does not justify issuing a stay to allow Kansas to continue inflicting irreparable harm on same-sex couples while they await the Court's decision.

CONCLUSION

For the foregoing reasons, Defendants' request for a stay should be denied.

Respectfully Submitted,



Joshua A. Block
Counsel of Record
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, New York, 10004
(212) 549-2500
jblock@aclu.org

Stephen Douglas Bonney
ACLU FOUNDATION OF KANSAS
3601 Main Street
Kansas City, MO 64111
(816) 994-3311

Stephen Douglas Bonney
ACLU FOUNDATION OF KANSAS
3601 Main Street
Kansas City, MO 64111
(816) 994-3311