No. 14A650

In the
Supreme Court of the United States

SECRETARY, FLORIDA DEPARTMENT OF HEALTH,
SECRETARY, FLORIDA DEPARTMENT OF MANAGEMENT SERVICES, AND
CLERK OF THE COURT FOR WASHINGTON COUNTY, FLORIDA,
Applicants,

v.

JAMES BRENNER, ET AL., &
SLOAN GRIMSLEY, ET AL.,
Respondents.

Response In Opposition to Application to Stay Preliminary Injunctions Pending Appeal

DIRECTED TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Respondents Sloan Grimsley, Joyce Albu, Bob Collier, Chuck Hunziker, Lindsay Myers, Sarah Humlie, Robert Loupo, John Fitzgerald, Denise Hueso, Sandra Newson, Juan del Hierro, Thomas Gantt, Jr., Christian Ulvert, Carlos Andrade, Richard Milstein, Eric Hankin, Arlene Goldberg, and SAVE Foundation, Inc. (collectively, the "*Grimsley* Plaintiffs") respectfully oppose the Application to Stay Preliminary Injunctions of the United States District Court for the Northern District of Florida Pending Appeal ("Stay Application") filed by the Secretary of the Florida Department of Health, the Secretary of the Florida Department of Management Services, and the Clerk of Court for Washington County (collectively, the "Applicants" or "Defendants").

INTRODUCTION

Since this Court denied review of decisions from three federal circuit courts striking down laws excluding same-sex couples from marriage,[1] it has denied all applications for stays of injunctions in marriage cases. *See Wilson v. Condon,* No.

[1] *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied,* 135 S. Ct. 316, *and cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 308, *cert. denied sub nom. Rainey v. Bostic,* 135 S. Ct. 286, *and cert denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).

14A533, 83 U.S.L.W. 3311, 2014 WL 6474220 (U.S. Nov. 20, 2014) (denying application for stay pending appeal in South Carolina marriage case); *Moser v. Marie*, 135 S. Ct. 511 (2014) (same in Kansas marriage case); *Parnell v. Hamby*, 135 S. Ct. 399 (2014) (same in Alaska marriage case); *Otter v. Latta*, 135 S. Ct. 345 (2014) (denying Idaho's application for stay pending a petition for *certiorari*). This stay application should be denied as well.

In asking this Court to reverse course and extend the temporary stay of a lower-court ruling invalidating a state ban on marriage for same-sex couples and thereby overturn the decision of the Eleventh Circuit denying a request to extend the stay, Applicants rely heavily on a recent decision by the Sixth Circuit, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), 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. The *Grimsley* Plaintiffs 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 marry under the United States Constitution. But Applicants' burden is not simply to show the likelihood that *certiorari* will be granted. They must also demonstrate a fair prospect that a majority of the Court will vote to reverse the judgment below (in addition to showing irreparable harm that would result absent a stay). Applicants have not, and cannot, make that showing. Indeed, this Court has continued to deny stay applications in marriage cases even after the circuit split created by *DeBoer* on

November 6, 2014, made it likely that this Court would grant review in a marriage case. *See Wilson,* 2014 WL 6474220 (U.S. Nov. 20, 2014); *Moser*, 135 S. Ct. 511 (Nov. 12, 2014). Despite the increased likelihood of a grant of review on the marriage issue, the possibility of reversal was not a sufficient basis to delay implementation of the district courts' injunctions in those cases.

Applicants also suggest this case should be treated differently than the stay applications that this Court denied since October 6 because there is no binding circuit precedent holding that the exclusion of same-sex couples from marriage is unconstitutional. Stay Application at 3-4, 10 n.5. But the fact that the Eleventh Circuit has not yet addressed this constitutional question on the merits does not change the analysis of the stay factors. This Court's standard asks whether Applicants have shown a fair prospect that a majority of *this Court* will vote to reverse, not whether the circuit court will. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Further, the Eleventh Circuit has already denied the Defendants' stay application, which, while not a ruling on the merits, does involve weighing whether the plaintiffs are likely to prevail.

Nor does the fact that there is an Eleventh Circuit ruling on the stay but not on the merits change the fact that granting a stay would impose severe and irreparable harms on same-sex couples and their children and that those harms far outweigh any harms the Applicants claim will result if the stay is denied. The Applicants in this case are in the same position as governmental officials in Kansas, South Carolina, and other states who have all ceased enforcing their States'

marriage bans while their appeals are pending despite the 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

In two consolidated cases, plaintiffs are challenging Florida's exclusion of lesbian and gay couples from marriage as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Florida prohibits same-sex couples from entering into marriages in the State and bars recognition of the marriages that same-sex couples lawfully enter into in other jurisdictions (the "marriage ban"). Fla. Const., art. I, § 27[2]; Fla. Stat. § 741.212.[3]

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[2] Article I, § 27 of the Florida Constitution, enacted through the initiative process in 2008, provides: "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."

[3] Section 741.212, Fla. Stat., enacted in 1997, provides:

> (1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

The *Grimsley* Plaintiffs include eight same-sex couples and a widow who were lawfully married in other states but whose home state of Florida refuses to recognize their marriages.[4] Like different-sex married couples, they have built their lives together, some for many decades, and some are raising children together.

The *Grimsley* Plaintiffs and same-sex couples across Florida are severely harmed by Florida's exclusion of them from the protections of marriage. For example, because Arlene Goldberg's marriage is not recognized by the State of Florida, when her wife, Carol Goldwasser, passed away last March, Arlene was not able to authorize her cremation; she was denied the respect and dignity of being acknowledged as Carol's spouse on her death certificate, which listed Carol's marital status as "NEVER-MARRIED"; and she cannot collect Carol's social security as her widow, which, as a retired senior, seriously affects her ability to get

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> (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
>
> (3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

[4] The *Grimsley* Plaintiffs also include SAVE Foundation, Inc., a non-profit organization with members similarly situated to the individual *Grimsley* Plaintiffs. The *Brenner* Plaintiffs include an additional couple that was married in another state, as well as one couple that is seeking to marry in Florida but is prohibited from doing so.

by. DE 42-1 (Goldberg) at 11, ¶¶ 7-9.[5] For firefighter and paramedic Sloan Grimsley, Florida's refusal to recognize her marriage means she is denied the security and peace of mind of knowing that her family will be provided the financial support afforded to surviving spouses of first responders if she were to fall in the line of duty. *Id.* (Grimsley) at 14, ¶ 7. All of the *Grimsley* Plaintiffs are harmed by the stigmatizing effect of the marriage ban, and those who are parents worry about their children receiving the damaging message that their family is not considered worthy of the same respect as other families. *Id.* (del Hierro) at 6, ¶ 7; *id.* (Gantt) at 1, ¶ 2; *id.* (Hueso) at 17, ¶ 2; *id.* (Newson) at 32, ¶ 12.

The Plaintiffs in each of the consolidated cases moved for preliminary injunctions. On August 21, 2014, the district court granted the motions, holding that "Florida's same-sex marriage provisions violate the Due Process and Equal Protection Clauses"; the Plaintiffs will suffer irreparable harm absent an injunction; the injury to the Plaintiffs outweighs any damage the injunction may cause the Defendants; and the injunction is in the public interest. *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014). The court's order enjoined the Defendants from enforcing the exclusion. The Defendants appealed.

The district court's order included a temporary stay of the injunction (with the exception of a provision in the injunction requiring the State to provide an amended death certificate for Ms. Goldwasser) until stays have been lifted in *Bostic*,

[5] These and subsequent similar citations refer to declarations of the *Grimsley* Plaintiffs (who are identified by last name in the parentheticals) found at Docket Entry ("DE") 42-1 on the District Court's consolidated, *Brenner* docket, Case No. 4:14-cv-107-RH-CAS (N.D. Fla.).

Bishop, and *Kitchen,* and then an additional 90 days. *Brenner*, 999 F. Supp. 2d at 1292. Those stays were lifted on October 6, 2014, when this Court denied petitions for review in those cases. That action set the stays to expire on January 5, 2015.

After this Court's October 6 denials of *certiorari*, the *Grimsley* Plaintiffs asked the district court to lift the stay, and the Defendants sought an extension of the stay for the duration of the appeal. Both motions were denied. The Defendants filed a motion asking the Eleventh Circuit to extend the stay, and that motion was denied by a unanimous panel of the court on December 3, 2014.

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 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 (majority op.); *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 from this Court).

Three conditions must be met before the Court issues a stay: "(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*, 558 U.S. at 190. 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." *Id.* at 1305 (some internal quotation marks omitted).

II. Applicants Cannot Show a Fair Prospect of Reversal.

Applicants have not carried their burden of showing a fair prospect that a majority of the Court would reverse the decision of the district court. The fact that the Sixth Circuit's decision in *DeBoer* created a circuit split establishes a reasonable probability that the Court will grant *certiorari* to decide whether state bans on marriage for same-sex couples violate the Fourteenth Amendment. However, the Sixth Circuit's decision does not establish a fair prospect that a majority of this Court will uphold such laws as constitutional, especially in light of this Court's decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), as well as the four

circuit court decisions (and more than two dozen district court decisions[6]) striking down similar state marriage restrictions.

Applicants' merits arguments have little prospect of commanding a majority of this Court. They raise the same federalism argument that other state officials unsuccessfully raised in their stay applications. *See* Stay Application at 10 (asserting that the Court "will likely reaffirm the States' nearly exclusive authority to define marriage and hold that the Fourteenth Amendment allows states to define marriage as Florida has"); Emergency Application to Stay United States District Court Order, *Wilson v. Condon*, No. 14A533 (U.S.), at 6-18. But *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.

Applicants also argue that the district court's decision conflicts with this Court's summary dismissal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972). Stay Application at 11. But the fact that this Court did

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[6] *See, e.g.*, *Campaign for S. Equality v. Bryant*, --- F.3d ----, No. 3:14-cv-818-CWR-LRA, 2014 WL 6680570, at *1, n.1 (S.D. Miss. Nov. 25, 2014) (collecting cases), *appeal docketed*, No. 14-60837 (5th Cir. Nov. 26, 2014).

not consider a constitutional challenge to a marriage ban to present a substantial federal question in 1972 does not mean that a majority of the Court is likely to uphold such laws more than 40 years later. It merely reflects the fact that in 1972—when laws criminalizing and stigmatizing the relationships of lesbian and gay couples prevented their "relationships [from] surfac[ing] to an open society"—the Court did not yet have the "knowledge of what it means to be gay or lesbian." *Kitchen*, 755 F.3d at 1218, quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013). As this Court said in *Lawrence*:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.

539 U.S. at 578-79.[7]

Applicants' only other attempt to establish a fair prospect of reversal by this Court is to quarrel with the district court's holding that the marriage ban infringes

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[7] Applicants contend that the Court's dismissal of *Baker* for want of a substantial federal question is binding precedent for lower courts. Stay Application at 11. That is irrelevant for purposes of assessing whether a majority of the Court is likely to reverse on the merits in the event the Court grants review. In any case, "if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*[.]" *Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (emphasis added). And as numerous courts have recognized, decisions from this Court since 1972 make clear that constitutional challenges to exclusions of same-sex couples from marriage present a substantial federal question. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 2014 WL 4977682, at *3 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 179 (2d Cir. 2012), *aff'd Windsor*, 133 S. Ct. 2675; *Bostic*, 760 F.3d at 373-75; *Baskin*, 766 F.3d at 656-60; *Kitchen*, 755 F.3d at 1204-08. This Court apparently considered the question to be substantial when it granted *certiorari* to address the same constitutional question in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

on the fundamental right to marry. They argue that "[t]his Court has never held that there is a fundamental right to same-sex marriage." Stay Application at 12. But fundamental rights are not defined based on which groups historically have been given access to the right. The Court recognized this in *Lawrence*, where, in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), it criticized *Bowers*' characterization of the right at issue as an asserted "fundamental right [for] homosexuals to engage in sodomy" as a "failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 558. The *Lawrence* Court recognized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. Similarly here, same-sex couples are not seeking a new right to "same-sex marriage." They merely seek the same fundamental right to marry "just as heterosexual persons do." *Id.*

As the Tenth Circuit explained in *Kitchen*, "the question as stated in *Loving* . . . was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was 'the freedom of choice to marry.'" 755 F.3d at 1210 (quoting *Loving*, 388 U.S. at 12); *see also Bostic*, 760 F.3d at 376 (The Supreme Court's marriage cases "do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.'

Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right.").

Florida cannot continue to deny fundamental rights to certain groups of people simply because it has done so in the past. "Our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. *See Bostic*, 760 F.3d at 376 ("*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," not who may exercise rights that have already been recognized). "[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (quotation marks omitted; alteration in original). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

Applicants do not even attempt to address the alternative grounds on which numerous courts have invalidated marriage bans, including that they are subject to equal-protection heightened scrutiny because they classify based on sexual orientation and cannot survive such scrutiny, and that they fail even rational-basis review. *See, e.g.*, *Baskin*, 766 F.3d 648; *Latta*, 771 F.3d 456.

In short, Applicants have failed to show a fair prospect that a majority of this Court will reverse the district court's decision. In denying all post-October 6 stay

applications pending appeals in marriage cases—even after the *DeBoer* decision created a reasonable probability of a grant of *certiorari*—this Court did not deem the possibility of reversal to be a basis to stay implementation of the lower courts' injunctions. Applicants offer no basis to conclude the prospect of reversal by this Court is greater in this case than in the Kansas and South Carolina cases (*Moser* and *Wilson*).

III. The Balance of Equities Weighs Against a Stay.

The *Grimsley* Plaintiffs and other same-sex couples throughout Florida are subjected to irreparable harm every day they are forced to live without the security and protections that marriage provides. While this case remains pending on appeal, children will be born, spouses and partners will get sick, and some will die. 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 in *DeBoer* 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)." *See DeBoer*, 772 F.3d at 407-08.

If a stay is granted, each day that passes while the appeal is pending, some people will pass away without ever having been able to marry the person they love or to have their marriage recognized in their home state, depriving their surviving spouse of important protections, as plaintiff Arlene Goldberg continues to experience.

The concrete harms that same-sex couples suffer, along with the significant stigma that flows from being branded "second-tier" families (*Windsor*, 133 S.Ct. at 2694) each day they are excluded from marriage, far outweigh any harm the Applicants claim will befall them or the public if they are required to comply with the injunction.

The only tangible harm the Applicants claim they will suffer if the stay is denied is that they will have to "reconfigure" the State's public employee health insurance, retirement, pension, and vital records systems, as well as recognize the marriages of same-sex couples performed in other States in a range of public employment circumstances. Stay Application at 15. If the stay is denied, it is true that the State will need to make some administrative changes to implement the injunction. Even if any of those administrative changes would have to be reversed in the event the district court decision is reversed,[8] the administrative burden to the State pales in comparison to the harm inflicted on same-sex couples as a result of being denied the protections and dignity of marriage. And that burden is no different than the administrative burden to state officials in Kansas, South Carolina, and other states, who are subject to an injunction against enforcing marriage bans in those states while the States' appeals are pending.

[8] If the district court's decision were reversed, the State would not have to reverse those administrative changes since the couples who got married in the interim would remain married, including for purposes of State programs. *See infra* note 9. A reversal on appeal would simply mean that no further marriages of same-sex couples could take place, not that the existing marriages would disappear.

Applicants assert that a stay is warranted because it is in the public interest to have "stable marriage laws" (as opposed to "on-again, off-again marriage laws"). Stay Application at 13. But this Court has denied stays of injunctions in other marriage cases that were pending on appeal and, thus, there was a possibility of reversal. Indeed, South Carolina made the same argument in its stay application:

> The State will 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.

Emergency Application to Stay United States District Court Order, *Wilson v. Condon*, No. 14A533 (U.S.), at 20. This Court did not view the risk of reversal, which would mean a restoration of the marriage exclusion for same-sex couples, to be a basis to stay the injunctions in those cases.[9] The situation here is no different.

Applicants also say a stay is needed to maintain uniformity of law throughout the state and to avoid "confusion about the law" given that only one of the 67 county clerks is a party to the litigation. Stay Application at 14. But, again, Florida is in the same position as other states whose applications for stays were denied. Kansas

[9] Moreover, contrary to Applicants' suggestion, even if the district court's decision were reversed, there would be no "uncertainty" regarding the marital status of any couples who married while the injunction was in effect. Any marriages entered into in reliance on the district court's injunction would be valid regardless of the outcome of the appeal. *See Evans v. Utah*, --- F. Supp. 2d ----, No. 2:14CV55DAK, 2014 WL 2048343, at *17 (D. Utah May 19, 2014) (holding that plaintiffs had vested interest in the marriages they entered into in Utah after district court entered injunction and prior to stay issued by Supreme Court; thus, state's refusal to recognize the marriages violated the Due Process Clause), *appeal withdrawn*.

made precisely the same arguments that Applicants make here. *See* Emergency Application to Stay Preliminary Injunction Pending Appeal, *Moser v. Marie*, No. 14A503 (U.S.), at 18 ("Issuing a stay would also serve the public's interest in certainty and clarity in the law" and "failure to issue a stay will result in public confusion because only two of the one hundred five Kansas district court clerks are being ordered to issue marriage licenses.").[10]

The only other alleged harm the Applicants point to is the intangible harm that, they claim, occurs whenever a State is enjoined from enforcing a state law. Stay Application at 16. In this respect, again, Applicants are no different than governmental officials in Kansas and South Carolina and other states, who—as a result of this Court's denials of requests for stays—have ceased enforcing their States' marriage bans while their appeals are pending.

All of the arguments Applicants have raised here in support of a stay were argued at the district court and the Eleventh Circuit and both courts concluded that the extension of the stay was not warranted. *See Buchanan v. Evans*, 439 U.S. 1360, 1365 (1978) (The judgments of the lower courts in weighing the equities for purposes of determining whether to grant a stay pending appeal "are entitled to great deference.").

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[10] Any purported concern about same-sex couples rushing into marriages without due deliberation before a possible reversal are no different here than in the other states where appeals were pending. This paternalistic concern is wholly illusory with respect to Respondents who were *already* married outside of Florida.

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 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 individual 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).[11]

This Court will soon have the opportunity to decide whether the Fourteenth Amendment allows states to deny same-sex couples the protections of marriage. But the possibility that this Court may disagree with the overwhelming majority of lower courts and uphold such bans as constitutional has not led this Court to grant stays in other marriage cases since October 6 and does not justify issuing a stay here to allow Florida to continue inflicting irreparable harm on same-sex couples and their children while they await the Court's decision.

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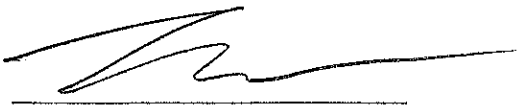
[11] Applicants' reliance on a decision from the Fifth Circuit granting a stay in a marriage case is misplaced. Stay Application at 3. There, a circuit court granted a stay of the district court's injunction pending the appeal before it after noting that the harm to the plaintiffs is "attenuated by the imminent consideration of their case" by the court, which was scheduled to hear oral argument in one month and had granted the plaintiffs' application to expedite the appeal. *Campaign for S. Equality v. Bryant*, No. 14-60837 (5th Cir. Dec. 10, 2014) (mem. order), at 4. Here, the Eleventh Circuit denied the Defendants' request for a stay. Moreover, the Defendants are asking this Court to grant a stay for an indefinite period of time.

CONCLUSION

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

Respectfully submitted,



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