No. 14A650

# In the Supreme Court of the United States

SECRETARY, FLORIDA DEPARTMENT OF HEALTH,
SECRETARY, FLORIDA DEPARTMENT OF MANAGEMENT SERICES AND
CLERK OF THE COURT FOR WASHINGTON COUNTY, FLOIRDA

**Applicants,**

**vs.**

JAMES BRENNER, et al. and
SLOAN GRIMSLEY, et al.,

**Respondents.**

## RESPONSE IN OPPOSITION TO APPLICANTS' EMERGENCY MOTION FOR STAY OF PRELIMINARY INJUNCTIONS PENDING APPEAL


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## INTRODUCTION

Applicants' motion to stay comes before this Court prior to a ruling on the merits of their appeal before the Eleventh Circuit Court of Appeals. Applicants are currently appealing the District Court's opinion, which declared Florida's same-sex marriage laws unconstitutional on due process and equal protection grounds. [Applicant's App. A, at 30]. After the District Court entered its opinion on August 21, 2014, it stayed enforcement for 91 days after lifting of the stays in *Bostic*, *Bishop*, and *Kitchen,* to give Applicants the opportunity to appeal its decision. *Id.* The stays in those cases were lifted on October 6, 2014. *See Schaefer v. Bostic,* ___ U.S. ___, 135 S.Ct. 308 (2014); *Smith v. Bishop,* ___ U.S. ___, 135 S.Ct. 271 (2014); *Herbert v. Kitchen,* ___ U.S. ___,135 S.Ct. 265 (2014). Applicants did appeal, but took no action to expedite their appeal, and in fact, sought and were granted an additional 30 days in which to file their initial brief. [Respondents' App. A; Respondents' App. B]. Four months have passed since the entry of the District Court's opinion.

Because the District Court's stay is set to expire on January 5, 2014, Applicants filed, on November 18, 2014, a motion to stay enforcement in the Eleventh Circuit. [Applicant's App. C, at 2]. Respondents opposed this motion and it was denied, without dissent, by a three-judge panel of that court. *Id.* Applicants have now petitioned this Court to extend the District Court's stay originally entered in *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014).

## SUMMARY OF ARGUMENT

Applicants' motion should be denied for the following reasons. First, in the District Court's order, the court recognized that the State of Florida's prohibition on same-sex marriage irreparably harms the Respondents. Notwithstanding this undisputed harm, Applicants now ask this Court to issue an emergency stay. However, Applicants have not met their burden of showing that they are entitled to an emergency stay. Applicants do not have a likelihood of succeeding on appeal and an emergency stay would not serve the public interest. Respondents would suffer irreparable deprivations of constitutional magnitude if an emergency stay were issued, while the Applicants have not shown how they would suffer in any meaningful way from the denial of the stay they now seek.

Likewise, Applicants have wholly failed to establish that the Eleventh Circuit grossly abused its discretion when the panel below denied, without dissent, their motion to stay the District Court's opinion. Accordingly, the motion for an emergency stay should be denied.

## ARGUMENT

Applicants' motion does not come before this Court in a vacuum. Nor is the issue presented by it one of first impression in this Court. Federal courts in virtually every circuit and every state with a same-sex marriage ban have heard lawsuits challenging the constitutionality of state law provisions. Four Federal Courts of Appeal have held that state law bans on same-sex marriage violate the constitutional rights of same-sex couples: the Fourth, Seventh, Ninth, and Tenth Circuits.[1] One appellate court, the Sixth Circuit held, by a divided panel, that there is no constitutional right to same-sex marriage, overturning lower court decisions in Kentucky, Michigan, Ohio, and Tennessee.[2] This Court, on October 6, 2014, declined to grant review of the decisions of the Fourth, Seventh, and Tenth Circuits, leaving their judgments in place.[3] Same-sex marriages have proceeded in an orderly fashion in states within those Circuits.

On October 8, 2014, Justice Kennedy stayed the decision in the Ninth Circuit. *Otter v. Latta*, ___ U.S. ___, 135 S. Ct. 344, *order vacated in part*, ___ U.S. ___, 135

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[1] *Latta v. Otter*, 771 F.3d 456 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S.Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. July 18, 2014), *cert. denied*, 135 S.Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert denied*, 135 S.Ct. 271 (2014).

[2] *DeBoer v. Snyder*, 772 F.3d 388 (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*, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Lee* v. *Orr*, 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).

[3] *See Bogan v. Baskin*, 135 S.Ct. 316 (2014); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *Smith v. Bishop*, 135 S.Ct. 271 (2014); *Herbert v. Kitchen*, 135 S.Ct. 265 (2014).

S. Ct. 345 (2014) and *vacated in full,* ___ U.S. ___, 135 S. Ct. 345 (2014). Subsequently, on October 10, 2014, upon referral to the entire court, the application for stay was denied. *Otter v. Latta,* ___ U.S. ___, 135 S. Ct. 345 (2014). Similarly, in a case arising out of a same-sex marriage challenge in Alaska, on October 17, 2014, Justice Kennedy referred the application for stay to the entire court and the request was denied. *Parnell v. Hamby,* 135 S.Ct. 399 (2014).

An overwhelming majority of federal district courts that have addressed this issue have found state same sex marriage bans unconstitutional.[4] As a result, this Court has repeatedly been called upon to determine, on the same grounds urged here, the appropriateness of granting stays of the opinions rendered below. Unfortunately for Applicants, this Court has uniformly denied relief sought here by them. On November 10, 2014, in the same-sex marriage case arising out of Kansas, Justice Sotomayor ordered the preliminary injunction stayed. *Moser v. Marie,* ___

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[4] *See Condon v. Haley,* 2014 WL 5897175 (D.S.C. Nov.12, 2014); *Lawson v. Kelly,* 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014); *Marie v. Moser,* 2014 WL 5598128 (D. Kan. Nov. 4, 2014); *Connolly v. Jeanes,* 2014 WL 5320642 (D. Ariz. Oct. 17, 2014); *Majors* v. *Horne,* 2014 WL 5286743 (D. Ariz. Oct. 16, 2014); *Fisher-Borne v. Smith,* 2014 WL 5138914 (M.D.N.C. Oct. 14,2014); *Hamby v. Parnell,* 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*, 999 F. Supp. 2d 1278; *Bowling v. Pence,* 2014 WL 4104814 (S.D. Ind. Aug. 19, 2014); *Burns v. Hickenlooper,* 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,* 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. us. 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,* 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell,* 2 F. Supp. 3d 910 (E.D. La. 2014); *Rolando v. Fox*, 2014 WL 6476196 (D. Mont. Nov. 19, 2014).

U.S. ___, 135 S. Ct. 511 *vacated*, 135 S. Ct. 511 (2014). Two days later, the matter was referred to the entire Court, and the application for stay was denied. *Moser v. Marie*, ___ U.S. ___, 135 S. Ct. 511 (2014). Similarly, on November 20, 2014, in the same-sex marriage case arising out of South Carolina, the application for stay presented to Justice Roberts, was referred to the entire Court, and denied. *Wilson v. Condon*, No. 14A533, ___ U.S. ___, 2014 WL 6474220 at *1 (Nov. 20, 2014).

Four petitions recently arrived at this Court challenging the Sixth Circuit's decision in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. Nov. 6, 2014). *See* Petition for Writ of Certiorari, *Bourke v. Beshear*, No. 14-574 (filed Nov. 18, 2014); Petition for Writ of Certiorari, *DeBoer v. Snyder*, No. 14-571 (filed Nov. 14, 2014); Petition for Writ of Certiorari, *Tanco v. Haslam*, No. 14-1562 (filed Nov. 14, 2014); Petition for Writ of Certiorari, *Obergefell v. Hodges*, No. 14-556 (filed Nov. 14, 2014). A fifth petition is before this Court out of the Fifth Circuit and seeks review of a district court order that upheld Louisiana's marriage laws. *See* Petition for Writ of Certiorari, *Robicheaux v. George*, No. 14-596 (filed Nov. 20, 2014). A month later, the Court has yet to rule on these petitions. These petitions were filed and pending before the Court when *the Court declined to issue a stay in the South Carolina case of Wilson v. Condon.* If this Court were inclined to grant stays in same-sex marriage appeals, it could have done so in the *Wilson* litigation. Applicants have presented no reason for why this Court should make a different decision in this case than it did in the *Wilson* matter.

This case is in an entirely different posture from the cases arising within the Sixth Circuit. The Eleventh Circuit here has yet to rule. Therefore, Applicants have no present ability to seek certiorari review of this Court. Simply, Applicants are in no position to argue that the Eleventh Circuit's decision conflicts with that of the Sixth Circuit because there is no Eleventh Circuit decision in this case. Further, a panel of the Eleventh Circuit has previously denied Applicants' motion to stay, a clear indication that court believes a stay is unnecessary to protect Applicants from irreparable harm during the pendency of this appeal. Thus, the traditional grounds upon which to seek a stay, namely to permit Applicants to seek certiorari review of this Court in the appeal before it, is unavailable to Applicants.

On December 4, 2014, the Fifth Circuit entered an order granting a stay. *Campaign for S. Equal v. Bryant*, Case No. 14-60837, at 4 (5th Cir. Dec. 4, 2014) (mem. order). That decision has no bearing on the instant case. To the contrary, the Fifth Circuit exercised its discretion to grant a stay in the same fashion that the Eleventh Circuit deemed a stay to be unnecessary here. This Court has not disturbed the Fifth Circuit's grant of a stay. Likewise, this Court should defer to the decision of the Eleventh Circuit and decline to an emergency stay in this case.

Applicants are compelled to argue that this Court *might* review the issue now that there is a circuit split. However, not every decision is heard and decided by the United States Supreme Court. In fact, very few are reviewed, even in those instances where the petition for certiorari appears to raise a substantial constitutional issue. *See Maricopa Cnty., Ariz. v. Lopez-Valenzuela*, 135 S.Ct. 428

(2014) (Thomas, J., dissenting) ("There appears to be no reasonably probability that four Justices would consider the issue sufficiently meritorious to grant certiorari...I hope my prediction about whether that petition will be granted proves wrong. Our recent practice, however, gives me little reason to be optimistic.") (quotation marks and citations omitted).

Applicants place much emphasis on the split created by the Sixth Circuit's decision in *DeBoer* as militating in favor of a stay here, arguing such a split was not present when the Court denied stays in similar cases. *See* Application at p.10. This assertion is factually incorrect. As set forth above, the Sixth Circuit issued its opinion in *DeBoer* on *November 6, 2014*. Yet, this Court declined to issue stays in the cases arising out of Kansas (Tenth Circuit) and South Carolina (Fourth Circuit) on *November 12 and 20, 2014*, respectively. This Court was well aware of the circuit split on this issue when it declined stays in those subsequent cases. Applicants' attempt to use the circuit split created by the Sixth Circuit provides no support or reason for the stay Applicants seek here. To the contrary, this Court should, for consistency, deny a stay here as it did in the post-*DeBoer* cases decided by this Court.

## I. Applicants Do Not Satisfy the Requirements for a Stay

Applicants have not come close to satisfying the requirements for 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 care, much less awarded as of right." *Id.* at 437 (Kennedy, J., concurring).

Whether a stay is appropriate depends on "the circumstances of the particular case." *Id.* at 433. 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. *Id.* at 433-34. The four factors to be considered are: (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) and whether the public interest is served by the grant of the stay. *Id.* at 434; *see also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

Although this Court has the power to vacate on motion a stay granted by a lower court, *United States v. Ohio*, 291 U.S. 644 (1934), or by a single Justice, *Rosenberg v. United States*, 346 U.S. 273 (1953), it normally will not overturn a stay order of the lower court absent a gross abuse of discretion. *See Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 434 U.S. 1316 (1977); *Alabama v. United States*, 279 U.S. 229 (1929); *Ohio Oil v. Conway*, 279 U.S. 813 (1929); *Cumberland Tel. Co. v. Louisiana Public Serv. Comm.*, 260 U.S. 212 (1922); *Virginia Ry. v. United States*, 272 U.S. 658, 668-75

(1926). Here, Applicants fall short on all four factors and, likewise, fail to establish the Eleventh Circuit's denial of their motion to stay was a gross abuse of discretion.

### A. Applicants Fail to Strongly Show They Are Likely to Succeed on the Merits

First, Applicants fail to strongly show they are likely to succeed on the merits. Florida's marriage laws are virtually identical to the laws struck down in the Fourth, Seventh, Ninth, and Tenth Circuits. In those cases, the courts held that "[a] state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union." *Kitchen*, 755 F.3d at 1199. In light of such precedent, Applicants have made no showing of a likelihood of prevailing on the merits before this Court.

Nevertheless, Applicants argue that the Court is likely to overturn the District Court's decision. First, Applicants argue that the District Court's decision conflicts with this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972). The opinions out of the Fourth, Seventh, Ninth and Tenth Circuit offer no support to Respondents' argument. *Kitchen*, 755 F.3d at 1204; *Bostic*, 760 F.3d at 373; *Baskin*, 766 F.3d at 659; *Latta*, 771 F.3d at 456.

To the contrary, well-established law of this Court has held that summary actions of this Court have no binding effect on the issue raised by Respondents' appeal. In *Baker,* the Court summarily dismissed, "for want of a substantial federal question," an appeal from a Minnesota Supreme Court decision rejecting federal due process and equal protection challenges to the State's refusal to issue a marriage license to a same-sex couple. Summary dismissals "do not... have the same

precedential value... as does an opinion of [the Supreme] Court after briefing and oral argument on the merits." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The precedential reach of a summary dismissal by this Court is extremely limited. "'A summary disposition *affirms only the judgment of the court below, and no more may be read into [such disposition] than was essential to sustain that judgment.*'" *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (emphasis added)). The Court's summary dismissals are binding on lower courts only "*on the precise issues presented and necessarily decided*," *Mandel v. Bradley,* 432 U.S. 173, 176 (1977) (per curiam), and *only to the extent that they have not been undermined by subsequent, "doctrinal developments" in this Court's case law. Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (internal quotation marks omitted) (emphasis added).

The Court's summary disposition of the due process question in *Baker* is not controlling here because *Baker* cannot be reconciled with the Court's subsequent "doctrinal developments." *Id.* At the time *Baker* was decided, same-sex marriages were not recognized in any jurisdiction. *Baker*, therefore, presented no issue regarding the recognition of marriages entered into in another state. Of equal, if not more significance, "[i]n the forty years after *Baker,* there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States,* 699 F.3d 169, 178-79 (2d Cir. 2012). *Baker* was decided *before* the Court recognized that sex is a quasi-suspect classification, *see Craig v. Boren,* 429 U.S.

190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973), and *before* the Court recognized that the Constitution protects gay men and lesbians from discrimination based on their sexual orientation. *See Romer v. Evans,* 517 U.S. 620, 631-32 (1996); *United States v. Windsor,* 133 S. Ct. 2695-96, 2675.

With respect to due process, at the time *Baker* was decided, the Court had not yet held that same-sex couples have the same protected liberty interests in their relationships as others. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Nor had the Court affirmed that, "the right to marry is of fundamental importance for all individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), or held that incarcerated persons who are unable to procreate nonetheless have a protected right to marry. *Turner v. Safley*, 482 U.S. 78, 94-97. And, of course, the Court had not considered a case involving married same-sex couples or held that, "the injury and indignity" caused by the government's refusal to recognize the lawful marriage of such a couple is, "a deprivation of an essential part of the liberty protected by the Fifth Amendment." *Windsor*, ___ U.S. ___, 133 S. Ct. at 2692-93.

In addition, just last year, during oral argument before the Court concerning California's exclusion of same-sex couples from marriage, the attorney defending California's ban argued that *Baker* was controlling. In response, Justice Ginsburg observed: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny.... I don't think we can extract much in *Baker v. Nelson*." Tr. of Oral Argument at 12, *Hollingsworth v. Perry*, ___ U.S. ___, 133 S. Ct. 2652 (2013). *Baker* was not mentioned by any other

Justice during the argument, and none of the opinions in *Hollingsworth* or in *Windsor* mentioned *Baker*. *See Hollingsworth*, ___ U.S. ___, 133 S. Ct. at 2652; *Windsor*, 133 S. Ct. at 2675. These "manifold changes" in this Court's jurisprudence have nullified *Baker's* precedential force to the extent that it had any precedential significance at all. Thus, *Baker* does not foreclose Respondents' claims and Applicants' arguments to the contrary should be rejected.

**B. Applicants Cannot Show They Will Suffer Irreparable Harm or That the Balance of Equities Tips in their Favor**

Applicants also cannot show they will suffer irreparable harm or that the balance of equities tips in their favor. Respondents are the ones suffering profound irreparable harms, including the denial of important legal protections and the ongoing degradation of their relationships and their families. The District Court agreed that Respondents and other same-sex couples in Florida have been suffering constitutional injury due to Florida's marriage laws. *Brenner*, 999 F. Supp. 2d at 1291; *see also Kitchen*, 755 F.3d at 1226; *Baskin*, 766 F.3d at 656; *Latta*, 771 F.3d at 456. It is well-settled, and Applicants agree, that deprivations of constitutional rights, "for even minimal periods of time" constitute irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 372 (1976). Continuing deprivation of Respondents' (and others') fundamental rights to marriage and equal protection of the law constitutes irreparable harm. Indeed, they are harmed each and every day their constitutional right to marry goes unrecognized in Florida. Here, it bears noting that Applicants sought and received an extension to file their initial brief in the Eleventh Circuit. Applicants' requested extension has further delayed the recognition of Respondents'

constitutional right to marry. Despite this 30-day delay in filing, Applicants are now seeking an emergency stay from this Court.

Because Respondents suffer a deprivation of their constitutional rights which subjects them to degradation and humiliation every day Applicants refuse to recognize the legitimacy of their marriage, they continue to suffer irreparable harm. The right to marry is so deeply rooted in our society that courts have long held it to be fundamental and implicit in the concept of ordered liberty. The deprivation of this right is an even greater humiliation when the state withholds it on the basis of a quality that is so intrinsic to an individual's sense of identity as who they choose as their spouse. Numerous harms flow from such deprivations, including the possibility of dying with a death certificate that does not list the person the plaintiff considers their spouse, the loss of dignity that results from not receiving a marriage license, and the risk of possible separation should their partner fall ill.

Applicants cannot conceivably show any remotely comparable harm should the injunction issue. Their burden, if any, is trivial. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 928, 1003 (N.D. Cal. 2010) (in invalidating California's marriage ban, stating, "California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and *has not suffered any demonstrated harm as a result.*") (emphasis added). The District Court found that Applicants would not suffer irreparable harm by allowing same-sex couples to marry because it found that Applicants failed to show *any* relationship, let alone a rational relationship, between the purported state interests

and allowing same-sex couples to marry. *Brenner*, 999 F.Supp.2d at 1291 ("The proffered justifications have all been uniformly found insufficient. Indeed, the states' asserted interests would fail even intermediate scrutiny, and many courts have said they would fail rational-basis review as well. On these issues the circuit decisions in *Bostic, Bishop*, and *Kitchen* are particularly persuasive.") Since Applicants were unable to articulate any state interest in banning same-sex marriage below, they are now unable to establish any actual harm, much less irreparable harm, if their motion to stay is denied.

For instance, Applicants have failed to explain how allowing same-sex couples to marry, or to recognize same-sex marriages occurring out of another jurisdiction, would cause any harm to the State, or to any other party. They have not pointed to any burden caused by implementation of the District Court's opinion, other than to voice an unsubstantiated and speculative risk of arm from confusion and uncertainty. A speculative risk of confusion does not constitute irreparable harm. The State has at its disposal a wide range of resources to navigate the implementation of new laws. Indeed, state laws are fluid and constantly changing. Such fluidity carries with it some confusion but, in matters of constitutional import, confusion cannot constitute irreparable harm. Currently 35 states permit same-sex couples to marry, or recognize marriages legally celebrated by same-sex couples in other states. Recent experiences in numerous other states illustrate that states can quickly and effectively manage changes to their marriage laws pending and following litigation concerning same-sex couples' access to marriage with little, if

any, difficulty. As demonstrated by the speed with which other states have implemented procedures to recognize same-sex marriages, there is no basis for Applicants' stated need for a stay.

**C. Applicants Cannot Show a Stay is in the Public Interest**

Third, Applicants cannot show that an emergency stay is in the public interest. There is no public interest in allowing an unconstitutional or illegal practice to continue. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d, 1261, 1272 (11th Cir. 2006); *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981). Granting an emergency stay in this case would simply allow the State of Florida to continue to violate the constitutional rights of Respondents and Florida's same-sex couples, which cannot be considered a legitimate public interest. Implementation of the District Court's order below will serve the public interest of protecting the constitutional rights of all citizens of Florida.

Applicants argue that avoiding "confusion" as to the status of same-sex marriage in Florida is a purported public interest. Of more importance to the public interest is the elimination of confusion that hangs each day over a sizable portion of Florida's citizens, who are being denied the right to marry, and who, as a direct result cannot plan for their retirement or their families; that confusion and uncertainty is particularly harmful to children, as noted by this Court in *Windsor*. Respondents are denied access to the array of state-law protections intended to safeguard married couples and their families, especially important because of the

unpredictability of, for example, illnesses, accidents, emergencies and natural disasters.

Applicants' public interest argument must also fail as this precise issue was raised by the cases arising out of Kansas, South Carolina, Alaska, and the Ninth Circuit. *Moser*, ___ U.S. ___, 135 S. Ct. 511; *Wilson*, ___ U.S. ___, 2014 WL 6474220; *Parnell*, ___ U.S. ___, 135 S.Ct. 399; *Latta*, , ___ U.S. ___, 135 S. Ct. 345. Applicants' public interest argument was summarily rejected by all of those cases. *Id.* They now offer no reason why the public interest argument made in their motion differs in any significant fashion form the arguments raised in those cases.

With the exception of *Parnell*, these cases were all decided *after Deboer*. Thus, this Court was well aware of the circuit split on this issue when it declined stays in those subsequent cases. Applicants' attempt to use the circuit split created by the Sixth Circuit provides no support or reason for the stay Applicants seek here. Applicants are no different than governmental officials in other states, who have stopped enforcing their States' marriage bans, despite the theoretical possibility that the Court may eventually uphold such bans as constitutional. Therefore, the Eleventh Circuit's interim decision to deny Applicants' requested stay should not be disturbed and the case should be allowed to take its natural course.

## II. This Motion Should be Referred to the Full Court for Review

A single Justice may set aside the order of a lower court or lower court judge denying a stay. *Johnson v. Stevenson*, 335 U.S. 801 (1948). However, a Circuit Justice should not disturb, "*except upon the weightiest considerations*, interim

determinations of the Court of Appeals in matters pending before it." *O'Rourke v. Levine*, __ U.S. __, 80 S. Ct. 623, 624 (1960) (emphasis added). Gross abuse of discretion is a particularly difficult standard, which Applicants have been wholly unable to meet. For this reason, their motion should be denied.

If Respondents' motion is not dismissed, it should be referred to the full court for consideration. *See* Supreme Court Rule 22.5. That rule permits any Justice to whom a motion for a stay is submitted to refer the motion to the entire Court for determination. Such a referral usually occurs where, as here, important or complex questions are raised by the application. *See,* e.g., *Bush v. Gore*, 531 U.S. 1046 (2000); *Clark v. Roemer*, 498 U.S. 953 (1990); *Rosada v. Wyman*, 396 U.S. 815, 1213 (1969); *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 946 (1967); *Rosenberg v. United States*, 346 U.S. 273, 280 (1953). This procedure was employed by this Court when deciding recent stay motions in cases raising the same issue as that currently on appeal here. *Otter,* __ U.S. __; 135 S.Ct. at 345; *Moser,* __ U.S. __; 135 S.Ct. at 511; *Wilson,* __ U.S. __; 2014 WL 6474220 at *1.

Alternatively, an individual Justice sometimes will grant an interim stay, effective only until the entire Court can consider the application upon referral to it. *See, e.g., National League of Cities v. Brennan*, 419 U.S. 1100 (1975) (Court continued interim stay); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (April 2, 1993) (denying stay and injunction and vacating prior order entered by Justice Blackmun on March 31, 1993); *Patterson v. Superior Court*, 420 U.S. 1001 (1975) (Court vacated interim stay and then denied stay).

In any case, due to the importance of this case, if Applicants' motion is not denied outright, it should be referred to the full Court. The decision not to grant an emergency stay is consistent with the procedure utilized by this court in cases raising the identical issues as Applicants' appeal. In those cases, the stays put into effect prior to October 6 were vacated on that day. Since October 6, no Supreme Court stay has been in effect for more than two days, and no Supreme Court stay is now in place in any same-sex marriage ban litigation.

## CONCLUSION

Applicants have failed to establish that the Eleventh Circuit grossly abused its discretion when the panel below denied, without dissent, their motion to stay the District Court's opinion. They are likewise unable to establish that they will suffer irreparable harm if their motion to stay is denied by this Court. There is no significant likelihood that Applicants will prevail on the merits in the event the Eleventh Circuit ultimately rules against them.

Accordingly, the motion for an emergency stay should be denied.

Respectfully submitted,

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Wright, Wilkinson & Sussman
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Telephone: (904) 398-1818
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CO-COUNSEL FOR APPLICANTS

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Elizabeth L. White, Esquire
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sheplaw@att.net
COUNSEL FOR APPLICANTS

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2014, a copy of the foregoing document was furnished to the following via Electronic Mail:

**Danny Brickell, Clerk**
**Supreme Court of the United States**
**1 First Street, N.E.**
**Washington, D.C. 20543**
**dbrickell@supremecourt.gov**

**Allen C. Winsor, Esquire**
**Adam S. Tanenbaum, Esquire**
**Florida Attorney General**
**The Capitol PL-01**
**Tallahassee, Florida 32399-1050**

**Daniel Boaz Tilley, Esquire**
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**ACLU Foundation of Florida, Inc.**
**4500 Biscayne Boulevard, Suite 340**
**Miami, Florida 33137**

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**Miami, Florida 33130**

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**Liberty Counsel**
**Post Office Box 540774**
**Orlando, Florida 32854**

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**123 South Calhoun Street**
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I HEREBY CERTIFY that on December 18, 2014, a copy of the foregoing document was furnished to the following via Federal Express Delivery:

**Danny Brickell, Clerk**
**Supreme Court of the United States**
**1 First Street, N.E.**
**Washington, D.C. 20543**

ldh[Brenner.james.opposition.supreme.ct]

APPENDIX

# APPENDIX

## A

## Unopposed Motion of Appellants For First 30-Day Extension of Time to File Their Joint Initial Brief

***Brenner v. Sec'y, Fla. Dep't of Health***
***Grimsley v. Sec'y Dep't of Health***

## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellants Secretary of the Florida Department of Health; Secretary of the Florida Department of Management Services; and Clerk of the Court and Comptroller for Washington County, Florida; pursuant to 11th Cir. R. 26.1-1, certify that the following persons and entities have an interest in the outcome of this case and/or appeal:*

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc., The

Albu, Joyce

Andrade, Carlos

Armstrong, Dr. John H.

Ausley & McMullen, P.A.

Bazzell, Harold

Bledsoe, Schmidt & Wilkinson, P.A.

Bondi, Pamela Jo

* For the convenience of the Court, in anticipation of the Clerk's consolidation of Case Nos. 14-14061 and 14-14066, this certificate combines all persons interested in the outcome of either case/appeal.

***Brenner v. Sec'y, Fla. Dep't of Health***
***Grimsley v. Sec'y Dep't of Health***

Brenner, James Domer

Collier, Bob

Cooper, Leslie

Crampton, Stephen M.

Del Hierro, Juan

DeMaggio, Bryan E.

Emmanuel, Stephen C.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Gantt, Thomas, Jr.

Goldberg, Arlene

Goldwasser, Carol (deceased)

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

Hinkle, Hon. Robert L.

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

Jacobson, Samuel

Jacobson Wright & Sussman, P.A.

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Loupo, Robert

Mihet, Horatio G.

Milstein, Richard

Myers, Lindsay

Newson, Sandra

Nichols, Craig J.

Podhurst Orseck, P.A.

Rosenthal, Stephen F.

Russ, Ozzie

Save Foundation, Inc.

Schlairet, Stephen

Scott, Rick

Sevier, Chris

Sheppard, White, Kachergus and DeMaggio, P.A.

Sheppard, William J.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Ulvert, Christian

White, Elizabeth L.

Winsor, Allen C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES D. BRENNER, *et al.*,

*Plaintiffs-Appellees*,

**CONSOLIDATED**

v.

Appeal No. 14-14061-AA

SECRETARY, FLORIDA DEP'T OF HEALTH *et al.*,

*Defendants-Appellants.*
_____/

SLOAN GRIMSLEY, *et al.*,

*Plaintiffs-Appellees*,

v.

Appeal No. 14-14066-AA

SECRETARY, FLORIDA DEP'T OF HEALTH and SECRETARY, FLORIDA DEP'T OF MGMT. SERVS.,

*Defendants-Appellants.*
_____/

**UNOPPOSED MOTION OF APPELLANTS FOR FIRST 30-DAY EXTENSION OF TIME TO FILE THEIR JOINT INITIAL BRIEF**

Defendants-Appellants—the Secretary of the Florida Department of Health; the Secretary of the Florida Department of Management Services; and the Clerk of Court and Comptroller for Washington County, Florida—through undersigned counsel and pursuant to Fed. R. App. P. 26(b) and 11th Cir. R. 26-1 and 31-2(a),

respectfully move this Court for a 30-day extension of time for the filing of their joint initial brief in the above-referenced consolidated cases.[†] If this request is granted, the new deadline for the appellants to file their brief would be **November 14, 2014**. As good cause for this requested extension, the appellants submit the following:

1. Separate notices of appeal were filed in the two above-referenced consolidated cases on September 4, 2014, and they were docketed the next day. Pursuant to Eleventh Circuit Rules 12-1 and 31-1(a), because no transcripts were ordered, the joint initial brief currently is due October 15, 2014.

2. The Office of the Solicitor General of Florida ("OSG") is handling the drafting of the initial brief in these consolidated appeals. The OSG has numerous other appellate case assignments, including several other state appeals involving constitutional questions similar to the ones at issue in these appeals. Initial briefs in two of those appeals are due from the OSG on October 6 and October 20, 2014. The deadline for filing a third initial brief was just extended to November 17, 2014.

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[†] The Washington County Clerk of Court joined with the other two appellants in a joint notice of appeal filed in what is now Case No. 14-14061. The Washington County Clerk of Court was not a defendant in the case on appeal in what is now Case No. 14-14066. The Clerk of this Court, however, will be consolidating these two appeals, absent objection from any party. In turn, the appellants anticipate filing one joint initial brief, and this motion is directed to the deadline for that brief, which will be filed in both consolidated cases.

3. These appeals are interlocutory in nature and stem from stayed orders granting injunctive relief. The appeals will address significant constitutional issues, and additional time is needed to prepare a suitable brief in these consolidated cases.

4. Pursuant to Eleventh Circuit rule 26-1, undersigned counsel for the Secretary of the Florida Department of Health and for the Secretary of the Florida Department of Management Services consulted with opposing counsel in both appeals about the relief sought in this motion. Counsel for both sets of plaintiffs-appellees indicated that they have no objection to the relief sought here.

WHEREFORE, the appellants respectfully request that the Court grant a 30-day extension of time for filing of their joint initial brief and set **November 14, 2014**, as the new deadline for that brief.

[continued on next page]

Respectfully submitted by:

PAMELA JO BONDI
ATTORNEY GENERAL

*/s/ James J. Goodman, Jr.*
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(FBN 71877)
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*Counsel for Washington County Clerk of Court*

*/s/ Adam S. Tanenbaum*
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*Chief Deputy Solicitor General*

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*Counsel for the Secretary of the Florida Department of Health and for the Secretary of the Florida Department of Management Services*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on this first day of October, 2014, a true copy of the foregoing motion was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to the registered Attorney Filers listed on the attached electronic service list; and a true copy in paper form was served by first-class mail on the following unregistered counsel: Samuel Jacobson, Esquire, Bledsoe, Jacobson, Schmidt, Wright, Lang & Wilkinson, 1301 Riverplace Boulevard, Suite 1818, Jacksonville, Florida 32207, *Counsel for Plaintiffs/Appellees in Case No. 14-14061*; Daniel B. Tilley, Esquire, ACLU Foundation of Florida, Inc., 4500 Biscayne Boulevard, Suite 340, Miami, Florida 33137-3227, *Counsel for Plaintiffs/Appellees in Case No. 14-14066*; and Stephen C. Emmanuel, Esquire, Ausley & Mcmullen, P.A., Post Office Box 391, Tallahassee, Florida 32302-0391, *Counsel for Amicus*.

*/s/ Adam S. Tanenbaum*
ADAM S. TANENBAUM
Florida Bar No. 117498

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# APPENDIX

## B

## Order of the Eleventh Circuit Court of Appeals Granting Appellants Extension of Time to File Initial Brief

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-14061-AA

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JAMES DOMER BRENNER,
CHARLES DEAN JONES,
STEPHEN SCHLAIRET,
OZZIE RUSS,
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,
CAROL GOLDWASSER,

Plaintiffs - Appellees,

versus

ATTORNEY GENERAL, STATE OF FLORIDA,

Defendant,

JOHN H. ARMSTRONG,
In His Official Capacity as Agency
Secretary for the Florida Department
of Management Services,
CRAIG J. NICHOLS,
In His Official Capacity as Agency
Secretary for the Florida Department

of Management Services,
HAROLD BAZZELL,
In His Official Capacity as Clerk of
Court and Comptroller for Washington
County Florida,

Defendants - Appellants.

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No. 14-14066-AA

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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,
SAVE FOUNDATION, INC.,
ARLENE GOLDBERG,
CAROL GOLDWASSER,

Plaintiffs - Appellees,

versus

RICK SCOTT,
Governor of the State of Florida, et al,

Defendants,

JOHN H. ARMSTRONG,
Surgeon General and Secretary of
Health for the State of Florida,
CRAIG J. NICHOLS,
Agency Secretary for the Florida

Department of Management Services,

Defendants - Appellants.

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Appeals from the United States District Court
for the Northern District of Florida

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ORDER:

All Appellants are GRANTED an extension for filing the following documents.

All appellants' briefs are due November 14, 2014, with the Appellants' appendices due no later than seven days from the filing of the appellants' briefs.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 08, 2014

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 14-14061-AA ; 14-14066 -AA
Case Style: James Brenner, et al v. John Armstrong, et al
District Court Docket No: 4:14-cv-00107-RH-CAS

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.**

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: David L. Thomas, AA
Phone #: 404-335-6130

EXT-1 Extension of time