No. 14A840

In the Supreme Court of the United States

Luther Strange, in his official capacity as Attorney General of the State of Alabama,

Applicant,

v.

Cari D. Searcy, Kimberly McKeand, James N. Strawser and John E. Humphrey,

Respondents.

OPPOSITION OF RESPONDENTS JAMES N. STRAWSER AND JOHN E. HUMPHREY TO APPLICATION FOR STAY OF DISTRICT COURT INJUNCTIONS PENDING APPEAL

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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 James N. Strawser and John E. Humphrey (together, "respondents"), through their counsel of record, hereby submit this memorandum in opposition to the application (the "Application") filed by Luther Strange, Attorney General of the State of Alabama ("applicant") for a stay pending appeal of two injunctions entered by the United States District Court for the Southern District of Alabama. Respondents respectfully request that the Application be denied.

INTRODUCTION

Following this Court's October 6, 2014 denial of petitions for writs of certiorari in cases similar to this one from the United States Courts of Appeals for the Fourth, Seventh, and Tenth Circuits, s*ee Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014), this Court has rejected all requests for stays pending appeal or pending filing of a certiorari petition in cases from around the country challenging state laws prohibiting marriage for same-sex couples. As a result of those orders, district court injunctions have been permitted to take effect while appeals in those cases proceed, allowing couples to marry in Alaska, Florida, Idaho, Kansas, and South Carolina.[1] Like the district

[1] *See Armstrong v. Brenner,* 135 S. Ct. 890 (2014) (Florida; denying stay pending appeal); *Wilson v. Condon,* 135 S. Ct. 702 (2014) (South Carolina; same); *Moser v. Marie*, 135 S. Ct. 511 (2014) (Kansas; same); *Parnell v. Hamby*, 135 S. Ct. 399 (2014) (Alaska; same); *Otter v. Latta*, 135 S. Ct. 345 (2014) (Idaho; denying application for stay pending filing of petition for writ of certiorari).

courts and courts of appeals in each of those cases, the district court and the court of appeals here concluded that the relevant considerations did not warrant a stay pending appeal.

"[W]hen a district court judgment is reviewable by a court of appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears 'an especially heavy burden.'" *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (citing *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)). In addition, "[r]espect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). Applicant cannot meet his burden of showing that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding [whether] to issue the stay," and that Applicants "may be seriously and irreparably injured [without] the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

Here, as in the other recent cases in which this Court has denied stays, the considerations governing this Court's decision to grant a stay pending appeal are not satisfied. First, applicant cannot "establish[] that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). As noted, on October 6, 2014, the Court denied seven petitions for writs of certiorari seeking review of judgments from three courts of appeals that together held that five States' prohibitions on

marriages by same-sex couples violate those couples' Fourteenth Amendment rights.[2] Moreover, now that the Court has decided to review the Sixth Circuit's contrary judgment upholding four states' marriage bans against Fourteenth Amendment challenges, *see DeBoer v. Snyder,* No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015), applicant cannot establish that this Court likely will grant any petitions for writs of certiorari in this case, which involves the same constitutional questions. In any event, this Court has continued to deny stay applications in marriage cases even after the circuit conflict created by the Sixth Circuit's decision in *DeBoer* on November 6, 2014, made it likely that this Court would grant certiorari in a marriage case. *See Armstrong,* 135 S. Ct. 890; *Wilson,* 135 S. Ct. 702; *Moser,* 135 S. Ct. 511.

Second, applicant cannot establish that, even if certiorari were granted, there would be "a fair prospect that five Justices will conclude that the case was erroneously decided below." *Lucas*, 486 U.S. at 1304. A large majority of the federal courts to have addressed the questions presented here after this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), has concluded that under the Court's precedents, state marriage bans violate same-sex couples' due process or equal protection rights under the Fourteenth Amendment. Applicant has not demonstrated a fair prospect that this Court likely will reach a different conclusion.

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[2] *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014) (No. 14-225), 135 S. Ct. 314 (2014) (No. 14-252), 135 S. Ct. 286 (2014) (14-153); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014) (No. 14-136); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014) (No. 14-124); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied* 135 S. Ct. 316 (2014) (No. 14-277), *and cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014) (No. 14-278).

Third, applicant's reliance on a speculative interest in "avoiding confusion among local officials and additional litigation in Alabama's other district courts" (Application at 9) cannot satisfy the required showing of irreparable injury necessary to warrant a stay. In this regard, there is no relevant difference between these Alabama cases and cases from Florida and other states in which this Court in recent months has denied stays pending appeal.

Furthermore, any claimed harm to applicant and other Alabama officials arising from such "confusion" is far outweighed by the harm to respondents that would arise from the grant of a stay. *See ibid.* If a stay issues, respondents will continue to be denied the right to enter into or have recognized the "most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted), and they will continue to lack critical legal protections. Respondents are facing significant health issues; a delay of even several months would expose them to a significant risk that they will be denied the right to make medical decisions for one another—as has already occurred during previous hospitalizations (Application, App'x A at 2)—or even that they could lose forever the opportunity to marry due to illness or death, leaving the surviving partner with no recognition or protection.

A stay would impose these severe harms on respondents, even though this Court's October 6, 2014, denials of certiorari petitions and its recent denials of stays in other similar cases had the effect of allowing enforcement of lower court judgments preventing similarly situated same-sex couples and their children from suffering such

harms in at least ten other States.[3] Applicant points to nothing that would justify issuance of a stay in this case when recent orders of this Court have had the effect of dissolving all stays in every other case raising the same constitutional issues. There is no relevant difference between this case and those earlier cases that would warrant a different outcome here.

The application should be denied.

BACKGROUND

1. The "Sanctity of Marriage Amendment" to the Alabama Constitution provides, among other things, that "[n]o marriage license shall be issued in the State of Alabama to parties of the same sex," and that "[t]he State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued." Ala. Const., art. I, § 36.03. The Alabama Code contains identical provisions. Ala. Code § 30-1-19.

2. Respondents are James Strawser and John Humphrey, who applied for a marriage license in Mobile County, Alabama, but were denied because of Alabama's constitutional and statutory prohibitions on marriage for same-sex couples. (Application, App'x A at 2.) Respondents testified that Strawser is facing health issues requiring surgery that will put his life at great risk. Prior to previous hospitalizations for surgery, respondent Strawser had given respondent Humphrey a

[3] Those states are Alaska, Florida, Idaho, Indiana, Kansas, Oklahoma, South Carolina, Utah, Virginia, and Wisconsin. See cases cited in footnotes 1 and 2, *supra*.

medical power of attorney, but was told by the hospital that the facility would not honor the document because Humphrey was not a family member or spouse. (*Ibid.*) In addition, Strawser's mother faces health issues, and he is concerned that Humphrey will not be permitted to assist his mother with her affairs should Strawser pass away in the near future. (*Ibid.*)

3. Respondents filed an action in the United States District Court for the Southern District of Alabama under 42 U.S.C. § 1983, alleging that Alabama's statutory and constitutional marriage bans violate the Fourteenth Amendment. (Application, App'x A.) Separately, another same-sex couple, Cari Searcy and Kimberly McKeand, who were legally married in California under that state's laws but whom Alabama refuses to recognize as married, filed a similar action in the same district court challenging Alabama's non-recognition provisions. (*Ibid.*) The district court granted the *Searcy* plaintiffs' motion for summary judgment and subsequently granted the *Strawser* respondents' motion for a preliminary injunction. (*Ibid.*) The district court concluded that the freedom to marry is a fundamental liberty interest guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that laws impermissibly deprive respondents of that right. (*Ibid.*) The district court enjoined enforcement of Alabama's marriage bans and non-recognition provisions. (*Ibid.*) The injunctions were stayed until February 9, 2015, to permit applicant to request a stay from the Eleventh Circuit. (*Ibid.*)

4. The court of appeals denied applicant's requests for stays of the district court's injunctions. (Application, App'x C.)

REASONS THE STAY SHOULD BE DENIED

To warrant a stay from this Court, an applicant must establish four things: "(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). Justices considering such applications also "'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (internal quotation marks omitted).

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). When a court of appeals previously has denied a stay in a case that will be reviewed on appeal by that court, an applicant seeking a stay from this Court bears "an especially heavy burden." *Edwards*, 512 U.S. at 1302 (citation and internal quotation marks omitted). Applicant cannot meet that burden.

I. Applicant Has Not Established A Reasonable Probability That This Court Will Grant Review In This Case

Applicant has not established that there is a "reasonable probability" that certiorari will be granted in this case. *Hollingsworth,* 558 U.S. at 190. On January 16, 2015, this Court granted writs of certiorari to review the Sixth Circuit's

judgment upholding state marriage bans in four states. *See Obergefell v. Hodges,* No. 14-556 (Ohio; *Tanco v. Haslam,* No. 14-562 (Tennessee); *DeBoer v. Snyder,* No. 14-571 (Michigan); *Bourke v. Beshear,* No. 14-574 (Kentucky). The Court directed the parties to brief two questions: "1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?" and "2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" *See, e.g.*, *Obergefell v. Hodges*, No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015). Applicant cannot show that this Court is likely to grant a duplicative petition raising the same issues with respect to Alabama's marriage laws.

II. Applicant Has Not Established A Fair Prospect That A Majority Of This Court Would Vote To Reverse The Judgment Below

Applicant also has failed to meet his burden of showing a fair prospect that a majority of the Court would reverse the decision below, even if review were granted. *Hollingsworth,* 558 U.S. at 190. The challenged Alabama marriage laws should be subject to heightened scrutiny because they infringe upon respondents' fundamental right to marry and because they classify based on sexual orientation and sex. Regardless of the applicable level of scrutiny, however, there is no rational connection between Alabama's discriminatory marriage laws and any conceivable legitimate aim of government.

Contrary to applicant's assertion, there is no rational connection between barring same-sex couples from marriage and any claimed interest in "link[ing] children to their biological parents" (Application at 8), or any other conceivable

justification relating to parenting or child welfare. To the extent the protections of marriage encourage opposite-sex couples to marry before having children, those incentives existed before Alabama's exclusionary laws were enacted, and they would continue to exist if those laws are struck down. Excluding same-sex couples from marriage does not rationally further the goal of creating stable family units for raising children. To the contrary, the exclusion *undermines* that goal. By treating same-sex relationships as unequal and unworthy of recognition, the state "humiliates" the children "now being raised by same-sex couples" in Alabama, bringing them "financial harm" by depriving their families of a host of benefits and "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families." *Windsor*, 133 S. Ct. at 2694-95. Prohibiting same-sex couples from marrying does not enhance the stability of families headed by married couples raising their biological children, but serves only to harm the children now being raised by same-sex couples. In short, Alabama's marriage ban lacks even a rational basis, let alone the compelling justification required to deprive respondents and other same-sex couples of their fundamental right to marry. Applicant cannot demonstrate that this Court would reach a different conclusion.

III. Applicant Will Not Suffer Irreparable Harm In The Absence Of A Stay

To obtain a stay from this Court, applicant must show that the court of appeals' application of the standard for a stay pending appeal was "demonstrably wrong." *Coleman*, 424 U.S. at 1304. Applicant reasserts the same arguments that were properly rejected as inadequate by both the district court and the court of appeals.

Applicant contends that an order preventing the enforcement of a state law is in itself an irreparable harm to the state. (Application at 8.) Applicant also claims that denial of a stay will result in "confusion" among probate judges and other officials concerning their obligations with respect to issuance of marriage licenses and state recognition of the marriages of same-sex couples. (*Id.* at 8-9.) Applicant also argues that if he prevails on appeal, he will be injured by "confusion in the law and the legal status of marriages" entered into pursuant to the district court's injunction. (*Id.* at 8.) None of these claims constitutes irreparable harm.

First, in the chambers decisions on which applicant relies for the proposition that a State is harmed when it is enjoined from effectuating a state law, each Justice so concluded only after first determining that the state law was likely constitutional. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers). The government does not suffer irreparable harm when a court enjoins an unconstitutional measure. Assessing irreparable harm requires consideration of not only "the relative likelihood that the merits disposition one way or the other will produce irreparable harm," but also "the relative likelihood that the merits disposition one way or the other is correct." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). Because applicant cannot show he is likely to prevail, this asserted harm is illusory.

Second, the claimed "confusion" among public officials concerning their obligations under the district court's injunctions does not constitute irreparable

harm. Thirty-six states now permit same-sex couples to marry, many as a result of preliminary or permanent injunctions issued by federal or state courts. Complying with the district court's injunctions will require no change in the existing legal structure or administration of civil marriage in Alabama, and like other states that have implemented similar rulings, Alabama can readily and effectively comply with the district court's orders. If denial of a stay leads to further "litigation against other non-parties, such as county officials and probate judges" (Application at 9), it will be because those officials choose not to comply with the district court's orders, not because they are confused about how to comply. Indeed, this Court's denial of a stay of a similar district court order from Florida has not resulted in confusion among public officials in that State, and State and local officials have readily complied with that order by issuing marriage licenses to same-sex couples and recognizing their marriages under State law.

Moreover, applicant's claim that he will suffer irreparable harm if Alabama's marriage ban is upheld on appeal has no merit. Such a ruling would not require the State to seek invalidation of existing marriages validly entered into pursuant to the district court's orders, nor would it likely result in the invalidation of those marriages. *See Caspar v. Snyder,* No. 14–CV–11499, -- F. Supp. 3d --, 2015 WL 224741, *27 (E.D. Mich. Jan. 15, 2015); *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *17 (D. Utah May 19, 2014). Even if this Court were to decide that State marriage bans do not violate the Fourteenth Amendment, marriages performed in the interim would not irreparably harm applicant. Under well-settled law, any "administrative" or

"financial costs" that might arise from seeking judicial determinations concerning the validity of such marriages cannot constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Indeed, applicant's alleged injury is no different from the result of this Court's denial of the petitions for certiorari on October 6, 2014 or its denials of stays in every marriage case since then. Each of those decisions had the result of allowing to go into effect injunctions requiring states to permit same-sex couples to marry or to recognize their marriages, even while this Court has not yet finally determined the unconstitutionality of state laws excluding same-sex couples from marriage or marriage recognition.

IV. The Balance Of Harms Weighs Strongly Against A Stay

Even if applicant could show that he faces irreparable harm (which he cannot), he would not be entitled to a stay. "The 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, any injury to applicant would be greatly outweighed by the ongoing injury to respondents and the public.

Respondents will face concrete, severe, and ongoing harm from a stay. As *Windsor* confirmed, marriage is a status of "immense import." 133 S. Ct. at 2692. It is the "most important relation in life." *Zablocki*, 434 U.S. at 384 (internal quotation marks omitted). During a stay of even a few months, respondents will continue to experience a major life event—serious illness—without the crucial legal protections

afforded by marriage. Respondent Strawser faces serious health problems and already has endured multiple life-threatening surgeries (Application, App'x A at 2); a delay of even a few months may mean that he again will be hospitalized without the security of knowing that respondent Humphrey will be allowed to make medical decisions on his behalf, or even that he may not survive long enough for the couple to marry. In these circumstances, the balance of harms plainly counsels against a stay.

CONCLUSION

For the foregoing reasons, the Application should be denied.

Respectfully submitted,

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