IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

STATE OF FLORIDA,

Appellant, Case No. 3D14-1816

v. L.T. Case No. 14-1661 CA 24

CATHERINA PARETO, *et al.*,

Appellees.
_____/

**APPELLANT'S MOTION TO STAY BRIEFING,
RESPONSE TO SUGGESTION FOR RULE 9.125 CERTIFICATION,
AND RESPONSE TO MOTION TO CONSOLIDATE**

The issue in this appeal is whether the Fourteenth Amendment to the United States Constitution requires states to sanction same-sex marriage. That is unquestionably an important issue, and the Plaintiffs, the State, and all citizens deserve a definitive answer. But neither this Court nor the Florida Supreme Court can decide this federal issue with finality.

The United States Supreme Court, however, "has the final word on the United States Constitution." *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257, 1264 n.7 (11th Cir. 2001). And it now has the opportunity to resolve the issue definitively. In just the past week, Utah officials filed a petition for certiorari, asking the United States Supreme Court to decide

"[w]hether the Fourteenth Amendment to the United States Constitution prohibits a state from defining or recognizing marriage only as the legal union between a man and a woman." Petition for Writ of Certiorari, *Herbert v. Kitchen*, No. 14-124, at i (Aug. 5, 2014). And a day later, an Oklahoma official filed a petition for certiorari raising the same issue. Petition for Writ of Certiorari, *Smith v. Bishop*, No. 14-136, at i (Aug. 6, 2014).[1] A ruling from the United States Supreme Court would end the constitutional debate, end this appeal, and end all related cases.

The State of Florida will respect the United States Supreme Court's final word. In the meantime, this Court should preserve taxpayer and judicial resources by staying briefing until the United States Supreme Court rules.

Background

The issue of same-sex marriage has divided citizens, and it has divided courts. The only two federal courts of appeals to decide the issue since *United States v. Windsor* produced divided decisions, both in favor of the plaintiffs. *See Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th

[1] The petitions are available at: http://attorneygeneral.utah.gov/wp-content/uploads/sites/9/2014/08/Herbert-v-Kitchen-Petition-and-Appendix.pdf and http://sblog.s3.amazonaws.com/wp-content/uploads/2014/08/Oklahoma-Smith-petition-8-6-14.pdf, respectively.

Cir. June 25, 2014) (2-1 decision invalidating Utah's marriage laws); *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014) (2-1 decision invalidating Virginia's marriage laws); *see also Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014) (2-1 decision applying *Kitchen* to invalidate Oklahoma's marriage laws). Both Tenth Circuit decisions, *Herbert v. Kitchen* and *Bishop v. Smith*, are now before the Supreme Court.[2]

Notably, the Tenth Circuit stayed its own mandate pending certiorari review, so Utah's marriage laws remain operative until the Supreme Court acts. *See Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014) ("[W]e conclude it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari."); *Bishop v. Smith*, No. 14-5003, 2014 WL 3537847 (10th Cir. July 18, 2014) ("We STAY our mandate pending the disposition of any

[2] The Fourth Circuit decision, *Bostic v. Schaefer*, will soon join them. In a court filing, the Virginia Attorney General indicated his office will file a certiorari petition no later than August 8, 2014. *See* Response of Janet M. Rainey to Intervenor-Appellant's Motion to Stay the Mandate Pending Certiorari at 2, 7, *Bostic v. Shaefer*, No. 14-1167, Doc. 242 (4th Cir. Aug. 5, 2014).

subsequently-filed petition for writ of certiorari.").[3] Thus, despite litigation victories, plaintiffs in these cases must wait for Supreme Court review before obtaining final relief. The same should result here.

MOTION TO STAY BRIEFING

Despite the vigorous policy and legal debates surrounding same-sex marriage, there is little disagreement about this: If the United States Supreme Court holds that States must sanction same-sex marriage, then Florida's contrary laws must fall. And if the United States Supreme Court holds that States may choose, then Plaintiffs' contrary legal claims must fall, and it would be up to Florida's voters to effect any change. Either way, this

[3] Although last week's divided Fourth Circuit decision in *Bostic v. Schaefer*, No. 14-1167 (4th Cir. July 28, 2014), did not include similar stay language, that decision is not yet effective. *See* Fed. R. App. P. 41 (noting that mandate issues only after resolution of certain post-opinion motions or after time runs). A Virginia official has already moved to stay the mandate pending Supreme Court review. *See* Motion of Appellant McQuigg for Stay of Mandate Pending Filing of Petition for a Writ of Certiorari, Doc. 238 (Aug. 1, 2014). And the Virginia Attorney General agreed that a stay is warranted. Response of Janet M. Rainey to Intervenor-Appellant's Motion to Stay the Mandate Pending Certiorari at 2, Doc. 242 (Aug. 5, 2014). It is likely that either the Fourth Circuit or the United States Supreme Court will grant a stay. The United States Supreme Court has already twice stayed lower court orders when the lower courts refused to do so themselves. *See Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014); *Herbert v. Evans*, No. 14A65, 2014 WL 3557112 (July 18, 2014).

appeal would be over, and it would end without consuming any further taxpayer resources and without burdening Florida's judiciary.

1. The United States Supreme Court is poised to resolve the issue with finality.

The pending certiorari petitions present the dispositive issue to the United States Supreme Court. As a practical matter, neither Plaintiffs nor the State likely would benefit from proceeding immediately with briefing or other proceedings in this case. If the United States Supreme Court rules before this Court does, there will be nothing left for this Court to decide. And if this Court rules before the United States Supreme Court, and if it affirms, the order likely would be stayed pending further review, like other orders have been. *See supra* note 3. Either way, even if the United States Supreme Court rules as Plaintiffs argue it should, it is unlikely that Plaintiffs could marry in Florida before that ruling.[4]

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[4] The Virginia Attorney General, who supports Plaintiffs' constitutional arguments, has advocated for a stay pending Supreme Court review:

> There are three reasons the Court should stay the mandate pending the disposition of petitions for certiorari to the United States Supreme Court. First, the Supreme Court has twice issued stays of injunctions invalidating State same-sex-marriage bans under circumstances materially indistinguishable from this case. Second, if the Supreme Court should reverse this Court's decision, unwinding

Under these circumstances, this Court should preserve public resources and temporarily stay briefing and other proceedings.

2. This Court has authority to stay proceedings.

This Court has control over its own cases, including scheduling. *See Winer v. N.Y. Life Ins. Co*., 190 So. 894, 898 (Fla. 1938). The Court's authority is broad, and "[i]n the exercise of a sound discretion [the Court] may hold one lawsuit in abeyance to abide the outcome of another." *Id.* (citing *Landis v. N. Am. Co*., 299 U.S. 248 (1936)). Although this is true "especially where the parties and the issues are the same," *id.*, the Court's authority extends to instances in which the cases involve different parties. *See id.*; *accord Landis*, 299 U.S. at 255 (rejecting contention that "irrespective of particular conditions, there is no power by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger").

> marriages that occur without a stay and restoring the celebrants and third parties to the status quo ante would present wrenching and intractable problems. Third, the controversy will likely be resolved in the next term of the Supreme Court . . . .

Response of Janet M. Rainey to Intervenor-Appellant's Motion to Stay the Mandate Pending Certiorari at 2, *Shaefer*, No. 14-1167, Doc. 242.

The Florida Supreme Court has found "no need to limit this discretion with specific rules or formulas," and it has noted "that there are a number of decisions which provide guidance for courts performing the balancing of the various interests affected by a party's motion seeking to stay a civil action." *Friedman v. Heart Inst. of Port St. Lucie, Inc*., 863 So. 2d 189, 195 (Fla. 2003) (citing, among others, *Landis*). Courts have exercised their discretion and approved stays in a number of contexts. *See, e.g.*, *Allstate Ins. Co. v. Titusville Total Health Care*, 848 So. 2d 1166, 1167 (Fla. 5th DCA 2003) (noting how courts often have held that one court may stay an action to conserve judicial resources "if a similar issue is pending in another action and will be dispositive"); *REWJB Gas Invs. v. Land O'Sun Realty, Ltd.*, 645 So. 2d 1055, 1056 (Fla. 4th DCA 1994) (approving stay and noting that "it would not be in the interest of judicial economy to have more than one court make the same decision"). Notably, in the particular context of same-sex marriage challenges, courts have stayed matters pending the outcome of appeals in other cases. *See, e.g.*, *McGee v. Cole*, No. 13-cv-24068, Doc. 125 (S.D.W.V. June 10, 2014) (staying challenge to West Virginia law based on Fourth Circuit case challenging Virginia's law: "Because of the overlap in the issues present in that case and the one before this Court, the Court *sua*

sponte ORDERS that the instant case be STAYED pending a decision from the Fourth Circuit in *Bostic v. Schaefer*.").

3. The stay need not be long.

The State does not seek an indefinite stay. Although the United States Supreme Court is not obligated to grant certiorari in *Kitchen* or *Bishop*, there are indications that it likely will grant one or both. First, the Court already granted certiorari on essentially the same issue. In *Hollingsworth v. Perry*, the Court granted certiorari after petitioners asked "whether the Equal Protection Clause 'prohibits the State of California from defining marriage as the union of a man and a woman.'" 133 S. Ct. 2652, 2659 (2013) (quoting petition). The Court ultimately did not resolve that question, finding that the petitioners lacked standing to seek review. *Id.* at 2668. The new petitions present the first opportunity after *Hollingsworth* for the Court to resolve an issue it has already indicated deserves an answer. In addition, the Supreme Court has twice granted stays pending review, including in *Kitchen*. *See supra*. As a general matter, the Court will grant a stay only if there is at least "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558

U.S. 183, 189 (2010). Under these circumstances, it is highly likely that the Court will grant review.[5]

Moreover, the Supreme Court's order on the pending certiorari petition is likely not far away. Under Supreme Court rules, any opposition to a petition for certiorari "shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4." Sup. Ct. R. 15.3. The Clerk then distributes the petition and response to the Justices. *See* Stephen M. Shapiro, et al., *Supreme Court Practice*, 520 (10th ed. 2013). "The Court usually takes up the case at conference about two or three weeks later." *Id.* After that, "[t]he Court generally announces its ruling on petitions on the Monday following the conference at which they are discussed." *Id.*

Because the State seeks only a brief stay until the Supreme Court resolves the *Kitchen* and *Bishop* petitions—either by denying both or by

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[5] Notably, it was reported today that attorneys for the respondents in *Kitchen*—those who prevailed below—agree that the Supreme Court should take the case. Adam Liptak, *2 Sides in Gay Marriage Fight Agree: Justices Must Act*, N.Y. Times, Aug. 7, 2014, http://www.nytimes.com/2014/08/08/us/politics/utah-gay-marriage-lawyers-ask-supreme-court-to-act.html?_r=0#. "The unusual move could hasten a final ruling from the Supreme Court on same-sex marriage." *Id.*

granting one or both and subsequently resolving the merits—the requested stay need not be long.

RESPONSE TO SUGGESTION FOR PASS-THROUGH CERTIFICATION

Only the rare case meets the threshold for pass-through certification. *See State v. Adkins*, 71 So. 3d 184, 186 n.1 (Fla. 2d DCA 2011) (noting that during the more than thirty years rule 9.125 has existed, the "court has invoked the rule only in a handful of very exceptional appeals"); *Fla. Dep't of Agric. & Cons. Servs. v. Haire*, 832 So. 2d 778, 781 (Fla. 4th DCA 2002) (noting that "it should be rare" that courts consider certifying cases for pass-through). For the same reasons that this Court should stay briefing, it should decline pass-through certification.

This case is certainly important, but importance alone does not justify pass-through jurisdiction. The Florida Constitution authorizes pass-through only when a case is "certified to require *immediate resolution* by the supreme court." Art. V, § 3(b)(5), Fla. Const. (emphasis added). Florida's District Courts of Appeal routinely handle important cases, and even those certified to be of "great public importance" are decided in the district courts first. No matter how important a case, pass-through requires a need for the

Florida Supreme Court to hear the case *immediately*. Here, there is no such need.

Plaintiffs suggest that immediate Florida Supreme Court review is necessary to "bring finality to this issue on a statewide basis." Suggestion at 3. But as noted above, the Florida Supreme Court cannot provide that finality; finality must come from the United States Supreme Court.

Because the United States Supreme Court is in position to resolve the issue, there is no immediate need for a Florida Supreme Court decision. This Court therefore should not issue a pass-through certification.

RESPONSE TO MOTION TO CONSOLIDATE

The State has no objection to Plaintiffs' request to consolidate the two related cases.

WHEREFORE, the State of Florida respectfully requests that the Court (i) consolidate the two related cases; (ii) decline pass-through certification; and (iii) stay further appellate proceedings in this matter pending resolution of the certiorari petitions in *Kitchen v. Herbert* and *Smith v. Bishop*.

Respectfully submitted,

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/s/ Adam S. Tanenbaum

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this seventh day of August, 2014, a true copy of the foregoing has been furnished via e-mail to counsel listed on the attached service list using the e-mail addresses indicated therein, in compliance with rule 2.516, Florida Rules of Judicial Administration, and rule 9.420(b), Florida Rules of Appellate Procedure.

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