Nos. 14-2386, 14-2387, 14-2388

In The United States Court of Appeals
For The Seventh Circuit

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees,

v.

GREG ZOELLER, et al.,
Defendants-Appellants.

MIDORI FUJII, et al.,
Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF REVENUE, in his official capacity, et al.,
Defendants-Appellants.

PAMELA LEE, et al.,
Plaintiffs-Appellees,

v.

BRIAN ABBOTT, et al.,
Defendants-Appellants.

Response of *Fujii* and *Lee* Appellees in Opposition to Request for Stay of Mandate Pending Disposition of United States Supreme Court Proceedings

The appellants in this action ("State") have requested that this Court stay the issuance of its mandate until such time as there is final disposition of any proceedings in the United States Supreme Court following their filing of a petition for writ of certiorari on September 9, 2014. Although this case is certainly

appropriate for resolution in the Supreme Court, the necessary requirements for the grant of a stay are not present and the State's request should be denied

I. The standard for granting a request for the stay of the mandate

Rule 41(d)(2) of the Federal Rules of Appellate Procedure allows this Court to stay its mandate pending the filing of a writ of certiorari and, once filed, pending final disposition of the matter by the Supreme Court. In order to obtain the stay the party seeking it must show that the petition "present[s] a substantial question and that there is good cause for the stay." Rule 41(d)(2)(A). This means that the "applicant must show a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse the judgment of this Court." *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers). Additionally, given that the "stay is a form of temporary injunction . . . in general [ ] governed by the same principles . . . the inquiry must center on whether the applicant will suffer irreparable injury." *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (*per curiam*). And, "in a close case it may be appropriate to 'balance the equities' – to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rotsker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

II. The State cannot meet its burden to establish a stay

The respondents concede that this case is worthy of consideration by the Supreme Court and there is a reasonable probability that, if not this case, the Court will accept one of the same-sex marriage cases pending before it for review.

However, this case fails to meet any of the other standards for the issuance of a stay.

First, the State cannot demonstrate that there is a "reasonable possibility" that the Supreme Court will reverse this Court's decision. The Court's decision is one of numerous federal decisions that have, with only one exception, concluded that a prohibition on same-sex marriages and/or same-sex marriage recognition violates the Constitution. *See Bostic v. Schaefer,* __F.3d___, 2014 WL 3702493 (4th Cir. July 28, 2014), *petitions for cert. filed*, Nos. 14-153, 14-251, 14-225 (August 8, 2014, August 22, 2014, August 29, 2014); *Bishop v. Smith,* __F.3d__, 2014 WL 3537847 (10th Cir. July 18, 2014), *petition for cert. filed*, No. 14-136 (August 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *petition for cert. filed*, No. 14-124 (Aug. 5, 2014); *Brenner v. Scott*, __F. Supp. 2d__, Nos. 4:14cv107 & 4:14cv1380, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2014); *Burns v. Hickenlooper,* __F. Supp. 2d__, No. 14-cv-01817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), *appeal docketed*, No. 14-5818 (6th Cir. July 8, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014) *appeal docketed*, No. 14-35427 (9th Cir. May 16, 2014); *Latta v. Otter*, __F. Supp. 2d__, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420 & 14-35421 (9th Cir. May 14, 2014); *Henry v. Himes*, __F. Supp. 2d__, No. 1:14-cv-129, 2014 WL 1418395, (S.D. Ohio April 14, 2014), *appeal docketed*, No. 14-3464 (6th Cir. May 12, 2014); *De Boer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *appeal docketed,*

No. 14-1341 (6th Cir. Mar. 21, 2014); *Tanco v. Haslam*, __F. Supp. 2d__, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (preliminary injunction), *appeal docketed,* No. 14-5287 (6th Cir. Mar 19, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex., 2014) (preliminary injunction), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *appeal docketed*, No 14-5291 (6th Cir. Mar. 19, 2014); *Lee v. Orr*, No. 13-1879, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. Jan. 22, 2014). *But see Robicheaux v. Caldwell,* __F. Supp. 2d__, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099 (E.D. La. Sept. 3, 2014). Given this virtual unanimity of opinion, the State simply cannot meet its burden to demonstrate that it is likely that the Supreme Court will reverse this Court.

The State faces no harm at all, let alone irreparable harm. This Court's decision is quite clear that not only will allowing same-sex couples to marry, and recognizing the out-of-state marriages of same-sex couples, not hurt the State, it will benefit the couples, their children, and the public at large given "the fact that a child's parents are married enhances the child's prospects for a happy and successful life." *See Baskin v. Bogan*, __F.3d__, 2014 WL 4359059, *11 (7th Cir. August 26, 2014). And, entering a stay will do nothing but harm the respondents, including the respondent children, by "impos[ing] a heavy cost, financial and emotional, on [the couples] and their children." *Id.* at *17. The harm to homosexuals . . . of being denied the right to marry is considerable." *Id.* at *5.

For the respondent couples in *Lee,* without the stay, the Indiana Public Retirement System will not recognize the same sex spouses of four first responders. Three of the four first responders are on active duty and daily confront dangerous situations requiring the wearing of a bullet proof vest as part of their uniform. One of the three active duty officers is the sole support for her young children and her stay-at-home wife. If the mandate is stayed and one of these three officers or the fourth plaintiff, a retired firefighter, should die, their surviving spouse will be unable to claim the death benefits that she will need to continue to support herself and/or her children.[1] While the potential harm to the State of making such payments during the pendency of this action is purely monetary, the harm to be suffered by the surviving spouse may mean the loss of the only home shared by the couple or the inability to support the officer's children while the stay-at-home mom attempts to find employment, affordable housing and to satisfy outstanding debts, having lost the family's only source of income. If the stay is not imposed during pendency of further appeal and none of the first responders die, then the recognition of the first responders' marriages will result in no harm to the State.

The State can therefore not satisfy the standards for the issuance of a stay. What it is left to argue is that a stay must be granted because the Supreme Court has granted stays in comparable cases and that without a stay there will be widespread confusion and chaos. Neither are valid grounds to deny the stay here.

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[1] Death in the line of duty currently results in a $150,000.00 tax-free payment to the opposite sex surviving spouse in addition to other spousal benefits such as monthly amounts based upon pension calculations. Death while on active duty or retired also results in benefits such as monthly payments to the opposite sex surviving spouse.

The fact that stays have been granted in other cases is not dispositive here. The propriety of the issuance of a stay "is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation and citation omitted). Thus, "[t]he traditional stay factors contemplate individualized judgments in each case." *Id.* (internal quotation and citation omitted). What has occurred in other cases is not dispositive. However, the ever-growing weight of authority strongly counsels against a conclusion that this Court erred in its decision and demonstrates why a stay is not appropriate. The bottom-line is that the State has not come close to meeting its burden and the stay must be denied.

Given that the possibility of a stay by the Supreme Court cannot be predicted, the only other argument made by the State – that without a stay there may be widespread uncertainty if a stay is eventually entered by the Supreme Court – fails. If a stay is not entered now there will be certainty – the District Court's decision must be followed. The marriages that will be performed or recognized will not have to be "unwound" later even if the Supreme Court ends up reversing this Court's ruling. That's because once these couples lawfully marry, they are married, and a state cannot "unmarry" them after the fact. *See Evans v. Utah*, No. 14CV55, --- F. Supp. 2d ---, 2014 WL 2048343 (D. Utah May 19, 2014), *stayed pending final disposition by the Tenth Circuit*, No. 14A65, 83 USLW 30783, 2014 WL 3557112 (U.S. July 18, 2014)(ruling that same-sex couples who married in Utah before the Supreme Court stayed any further marriages are legally married and that the state must respect those marriages). Having to comply with the

district court's decision will not produce chaos. It will produce compliance with the Constitution.

III. Conclusion

This Court has demonstrated that the State's reasons for denying the respondents the benefits that flow from marriage fail even minimal rationality. This Court has also demonstrated the harms that result because of Indiana's prohibition of same-sex marriage and the recognition of out-of-state same-sex marriages. The respondents, both adults and their children, have suffered and have waited long enough. The public at large has also had to wait long enough to reap the benefits that this Court recognizes that marriage equality brings. The motion to stay the mandate must be denied.

s/ *Kenneth J. Falk*
Kenneth J. Falk
Gavin M. Rose
Kelly R. Eskew
ACLU OF INDIANA
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
212/549-2627

s/ *Sean Lemieux*
Sean Lemieux
LEMIEUX LAW
23 E. 39th St.
Indianapolis, IN 46205
317/985-5809

Counsel for Plaintiffs-Appellees Midori Fujii, et al.

s/ *Karen Celestino-Horseman*
Karen Celestino-Horseman

William R. Groth

AUSTIN & JONES, P.C., Of Counsel
One N. Pennsylvania St., Ste. 220
Indianapolis, IN 46204
317/632-5633

FILLENWORTH DENNERLINE
GROTH & TOWE, LLP
429 E. Vermont St., Ste. 200
Indianapolis, IN 46202
317/353-9363

Robert A. Katz
Indiana University
McKinney School of Law
530 W. New York St., Room 349
Indianapolis, IN 46202
317/278-4791

Mark W. Sniderman
SNIDERMAN NGUYEN, LLP
47 S. Meridian St., Ste. 400
Indianapolis, IN 46204
317/361-4700

Kathleen M. Sweeney
SWEENEY HAYES, LLC
141 E. Washington St., Ste. 225
Indianapolis, IN 46204
317/491-1050

Counsel for Plaintiffs-Appellees Pamela Lee, et al.

Certificate of Service

I hereby certify that on this 11th day of September, 2014, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeal for the Seventh Circuit by using the CM/ECF system and service will be made on counsel of record through that system.

/s/ *Kenneth J. Falk*
Kenneth J. Falk
Attorney at Law