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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

The State of South Carolina ex rel Alan Wilson, Attorney General
. . . . . Petitioner,

v.

Irvin G. Condon, in his capacity as Judge of Probate Charleston County . . . . .
Respondent.

PETITION FOR ORIGINAL JURISDICTION
AND MOTION FOR TEMPORARYINJUNCTION

The State of South Carolina ex rel Alan Wilson, Attorney General, respectfully requests that the South Carolina Supreme Court authorize the bringing of this petition and motion within its original jurisdiction pursuant to Rule 245, SCACR, S.C. Code Ann §14-3-310 and S.C. Const. art. V §5 and that this Court issue a temporary injunction and administrative order as set forth below.

INTRODUCTION

This case is about following the rule of law and the legal process. As the chief legal officer of South Carolina, it is the sworn duty of the Attorney General to seek to uphold State law until set aside by the courts. Moreover, a public official may not refuse to follow State law because "he thought the law unconstitutional." It is, instead, his

or her duty to "follow it until judicially declared invalid." *Trustees of Wofford College v. Burnett*, 209 S.C. 92, 104-5, 395 S.E.2d 155 (1946).

Today, Justice Kennedy has stayed a decision of the Ninth Circuit Court of Appeals in *Otter v. Latta,* 14A374, 2014 WL 4996356 (U.S. Oct. 8, 2014). concluding that Idaho's ban on same sex marriages violates the Equal Protection Clause. *Baker v. Nelson*, 409 U.S. 810 (1972), dismissed, for want of a federal question, an appeal from a decision of the Supreme Court of Minnesota, concluding that the federal constitution did not bestow a constitutional right to same sex marriage. This decision has never been overruled and must be followed by lower courts such as this Court and the Probate Court of Charleston County. *Hicks v. Miranda*, 422 U.S. 332 (1975) ("the lower courts are bound by summary decisions by this Court 'until such time as [this] Court informs (them) that (they) are not." *Hicks*, 422 U.S. at 344-45). Although state courts are bound by the decision of the United States Supreme Court construing federal law, there is no similar obligation with respect to lower federal courts. *Abela v. GM Corp.*, 677 N.W.2d 325 (Mich. 2004). Judge Childs has just lifted her stay and ordered a briefing schedule in the Bradacs case, challenging the constitutionality of South Carolina's marriage amendment. It is our understanding that Greenville County has denied marriage license applications. *See, Post and Courier* article, *infra.*

Thus, it is entirely premature for Respondent to begin issuing marriage licenses today. We urge this Court, therefore, to allow the legal process to run its course before any licenses in South Carolina are issued. Until the federal courts rule on this very

important matter, in which the people of the State voted overwhelmingly, it is not legally proper to issue such licenses. If the federal courts conclude, in accordance with the Fourth Circuit panel in *Bostic*, that South Carolina's marriage amendment (Art. XIII, § 15) is invalid, there will be sufficient time to issue marriage licenses to same sex couples. That time is not now, however. Until the courts rule, the rule of law must prevail.

I

BACKGROUND

According to the attached news article, Respondent Probate Judge Irvin Condon has announced that he has accepted a marriage license application from a same-sex-couple and that he will issue a marriage license to them after the mandatory 24 hour waiting period unless he is enjoined by the Supreme Court. "First same sex marriage license to be granted in Charleston County, *The Post and Courier* , October 8, 2014, on-line edition, http://www.postandcourier.com/article/20141008/PC1603/141009465/1177. The State asks that he be enjoined from issuing the license because South Carolina statutes and its Constitution prohibit same-sex marriages. S.C. Code Ann §§20-1-10 and 20-1-15 and S.C. Const. art. XVII, §15.

Although Federal litigation is pending regarding §20-1-15 and art. XVII, §15, they have not been enjoined. *Bradacs v. Haley*, 3:13-CV-02351-JMC was brought last August, 2013 in the United States District Court regarding the constitutionality of those provisions. The District Court stayed that case on April 22, 2014 (Document Number 54, CMECF) until a final order of the Court of Appeals for the Fourth Circuit was issued in

the appeal of a Virginia same-sex marriage case, *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014). *Bostic* was decided in July, and this week, the Supreme Court denied the petition for certiorari in that case. *McQuigg v. Bostic*, 14-251, 2014 WL 4354536 (U.S. Oct. 6, 2014).

The legal issues regarding same-sex marriage remain unsettled. In *Bostic,* only Virginia laws were found to be unconstitutional. South Carolina law was not at issue. Today, as noted, the United States Supreme Court by Justice Kennedy granted a temporary stay of the decision of the Court of Appeals for the Ninth Circuit striking down same-sex marriage bans in Nevada and Idaho. *Otter v. Latta, supra.* Therefore, the possibility remains that the constitutional issues regarding same-sex marriage may be considered by the Supreme Court in those cases or in a case now pending in a federal district court or court of appeals.

Moreover, *Bradacs* remains active. The Honorable Michelle Childs issued a text order yesterday lifting the stay in that case which had been imposed while *Bostic* was pending and directed the parties to submit a proposed amended scheduling order and / or briefing scheduled by next Wednesday, October 15. *See* text order. Therefore, the issue of the constitutionality of South Carolina's same-sex marriage laws remains alive in the courts.[1] Although Judge Childs has not yet issued an updated scheduling order, a strong chance exists that she could issue a ruling on the merits of the issue in that case this year.

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1 Issues regarding the Constitutionality of South Carolina's same-sex marriage bans have also been raised in the pending appeal *Swicegood v. Thompson, Respondent and State ex rel Wilson,* Appellate Case No. 2014-001109. The State has taken the position that the constitutional claims are not properly before the Court or controlling.

II

AUTHORITY OF THE COURT TO ASSUME ORIGINAL JURISDICTION AND REASONS FOR TAKING JURISDICTION

Under Rule 245, SCACR, the Court may assume original jurisdiction "if the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised...." *See also* S.C. Const. art. V, §§ 5 and 20 and §14-3-310 (1976); *see* also *Key v. Currie*, 305 S.C. 115, 406 S.E. 2d 356, 357 (1991). Certainly, the public interest is involved here, when South Carolina law has not been enjoined or declared unconstitutional, but a Probate Judge is taking steps to issue marriage licenses. Although we do not question that Judge Condon is acting in what he believes to be good faith, he is barred by South Carolina law from issuing licenses now, and he should be enjoined from doing so until the District Court issues a final ruling regarding South Carolina's law.

The Fourth Circuit's decision in *Bostic* is not binding on the Supreme Court. For example, this Court has declined to apply a strict scrutiny test applied by that circuit and followed the law of other circuits. *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 453, 633 S.E.2d 482, 487 (2006). Although the South Carolina Court of Appeals has stated that Fourth Circuit decisions are binding on that Court, this Supreme Court is not so limited. *State v. Dukes*, 404 S.C. 553, 561, 745 S.E.2d 137, 141 (Ct. App. 2013). Moreover, as noted, the constitutionality of South Carolina law remains a live issue.

South Carolina's statutes and constitutional provision at issue still carry a strong presumption of constitutionality. As stated in *S. Carolina Pub. Interest Found. v. S. Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 523 (2013):

> This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). "A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution." *Segars–Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010). A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Id.*

This presumption is very difficult to overcome, and here, the statutes at issue are supported by a State Constitutional provision, art. S.C. Const art. XVII, §15 that states, in part, that "[a] marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State."

No controlling precedent applicable to this Court would overcome this presumption of constitutionality. *Baker v. Nelson*, *supra,* dismissed a case for want of a substantial federal question in which two men sought review of a Minnesota decision that no fundamental right exists to marry someone of one's own sex; that the traditional definition of marriage works "no irrational or invidious discrimination;" and that it easily survives rational basis review. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (en banc).

With this ruling by the United States Supreme Court, and the absence of any ruling to the contrary as to the statutes at issue by the District Court in this State, or the South

Carolina Supreme Court[2], no binding authority authorizes the Probate Courts to issue marriage licenses to same-sex couples contrary to this State's laws.

III

MOTION FOR TEMPORARY INJUNCTION

Pursuant to authority of this Court in its original jurisdiction (*see* Complaint and Petition for Original Jurisdiction herein) and Rule 15 (a), SCRCP, the Petitioners move for this Court to issue a temporary injunction to Respondent directing him not to issue any marriage licenses until a final, operative order is issued in the *Bradacs* case and this Court lifts the injunction. Petitioners also ask this Court by administrative order, injunction or by other means it deems fit, direct the same instructions to the other Probate Judges of this State.

"For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). Here, regardless of the likelihood of ultimate success, litigation regarding same-sex marriage is ongoing under the authority of the Federal District Court in this state.

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2 Although the South Carolina Supreme Court has not addressed the constitutionality of the same-sex marriage ban statutes, it has referenced §20-1-15. "The following types of marriages in South Carolina are considered void *ab initio:* . . .(2) same sex marriages, S.C.Code Ann. § 20-1-15 (Supp.2002) . . . ." *Joye v. Yon*, 355 S.C. 452, 455, 586 S.E.2d 131, 133 (2003)

Irreparable harm could result if licenses were granted without full consideration of the constitutionality of South Carolina law. Because at least one Probate Court in this State is apparently not issuing marriage licenses to same-sex couples, different rules and procedures would apply in this state contrary to law if the Charleston Court were allowed to issue such licenses.

IV

THE STATE REQUESTS WAIVER OF THE REQUIREMENT FOR FILING A COMPLAINT

Due to the urgency of this matter and the simple request for a temporary injunction, the State requests that this Court waive or defer filing of a complaint in this action. Normally, such a complaint is required by Rule 245(c), SCACR, but the State does not seek a ruling by this Court on the merits of the constitutional issues. The State only asks that this Court temporarily enjoin the issuance of licenses until the issuance of a final, operative order by the District Court. If the Court would like a complaint filed, we will do so quickly as directed.

CONCLUSION

The State ex rel Wilson respectfully requests that this Court order the following relief:

1. Grant this Petition
2. Issue an injunction to the Respondent directing him not to issue any marriage licenses until a final, operative order is issued in the *Bradacs* case, and this Court lifts this injunction.

3. Enjoin or issue an administrative order, directing all Probate Judges in this state not to issue such licenses until *Bradacs* is decided as set forth above and this Court lifts the injunction.

Respectfully submitted,

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August 21, 2013