

SIXTH CIRCUIT REVIEW

Cert. Denied, Stays Denied, Marriage Equality Advanced

How the Supreme Court Used Nonprecedential Orders to Diminish the Drama of the Marriage Equality Decision

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I. INTRODUCTION

On June 26, 2015, the Supreme Court—in a 5–4 decision authored by Justice Anthony Kennedy—held that the Fourteenth Amendment of the Constitution bars states from banning same-sex couples from marrying.¹ The case, *Obergefell v. Hodges*, changed the status of marriages laws for same-sex couples in thirteen states and in part of two others. The change, while celebrated by supporters of marriage equality and decried by some of the most vocal opponents, was the denouement of a lengthy process that had played out over the past two decades.

Obergefell could have been a far more dramatic ruling, however, changing the marriage laws in thirty or more states in a single day—not just in the thirteen it did.² The reason the case was not so wide-reaching is in great part

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¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

² Earlier thoughts on the path laid out here were published contemporaneously with the developments detailed in this article. See, e.g., Chris Geidner, *Justice Anthony Kennedy’s Marriage Equality End Game*, BUZZFEED NEWS (Oct. 7, 2014), <http://www.buzzfeed.com/chrisgeidner/justice-anthony-kennedys-marriage-equality-end-game> [<http://perma.cc/CB7Z-UWBC>]; Chris Geidner, *The Supreme Court Has Been Preparing the Country for Marriage Equality*, BUZZFEED NEWS (Jan. 16, 2015), <http://www.buzzfeed.com/chrisgeidner/the-supreme-court-has-been-preparing-the-country-for-marriage-equality> [<http://perma.cc/MBY5-EJXV>]; Chris Geidner, *Nationwide Marriage Equality, It Turned Out, Was the Denouement of a Decades-Long Fight*, BUZZFEED NEWS (Aug. 16, 2015), <http://www.buzzfeed.com/chrisgeidner/nationwide-marriage-equality-it-turned-out-was-the-denouement> [<http://perma.cc/QS6Z-PTEN>].

due to several procedural and other nonprecedential actions taken by the Supreme Court itself—actions that were praised or opposed in their moment, but generally viewed as isolated matters. Cumulatively, these actions made the end result of *Obergefell* both a foregone conclusion and a far less dramatic one that appeared to do less than it actually did. What’s more, at least one of the Justices opposed to the eventual decision—likely Chief Justice John Roberts, but possibly (or also) Justice Samuel Alito—made that easing of the path possible.

In short, the true moment of the Supreme Court’s marriage equality decision could just as readily be pinned to its denial of certiorari (cert.) in five marriage equality cases on October 6, 2014, as it is to *Obergefell* on June 26, 2015.

II. FROM NINETEEN TO THIRTY-EIGHT

On January 6, 2014, the Supreme Court stopped same-sex couples from marrying in Utah.³ The procedural move—a stay pending the outcome of an appeal in the Tenth Circuit Court of Appeals⁴—was not a significant surprise for those familiar with the process of federal courts. Rather, the bigger surprise had been the actions of lower courts prior to the Supreme Court’s granting of Utah’s application for stay; that is, that those lower courts had denied applications for stay.

On December 20, 2013, when U.S. District Court Judge Robert J. Shelby struck down Utah’s ban on same-sex couples’ marriages, he declined to issue a stay along with his ruling.⁵ When state officials applied for a stay, he called for briefing on the question.⁶ In the meantime, and in growing numbers, same-sex couples began marrying in Utah. When Judge Shelby formally denied the application for stay,⁷ Utah officials went to the Tenth Circuit.⁸ A day later on

³ *Herbert v. Kitchen*, 134 S. Ct. 893, 893 (2014) (granting stay pending final disposition of appeal in 755 F.3d 1193 (10th Cir.)).

⁴ *Id.*

⁵ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) (holding that Utah’s ban on same-sex marriage was unconstitutional and enjoining the state from enforcing the ban); *see also* *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634, at *1 (D. Utah Dec. 23, 2013) (noting that “the court’s [December 20, 2013] Order did not include a stay of its judgment as none had been requested by the State”); Chris Geidner, *Federal Judge Rules Utah Ban on Same-Sex Couples Marrying Is Unconstitutional*, BUZZFEED NEWS (Dec. 20, 2013), <http://www.buzzfeed.com/chrisgeidner/federal-judge-rules-utah-ban-on-same-sex-couples-marrying-is> [<http://perma.cc/W2UN-QD2R>].

⁶ *See Kitchen*, 2013 WL 6834634, at *1 (D. Utah Dec. 23, 2013) (“The State . . . requested the court to stay its Order of its own accord. The court declined to issue a stay without a written record of the relief the State was requesting The State filed a Motion to Stay[, and t]he court ordered expedited briefing on the State’s Motion”).

⁷ *Id.* (denying both the State’s Motion to Stay and the State’s request for a temporary stay).

Christmas Eve, the Tenth Circuit also denied the stay request, leading marriages to continue after Christmas and into the new year.⁹

Eventually, the Supreme Court stepped in, issuing its procedural order stopping Utah's same-sex couples from marrying while the Tenth Circuit considered the merits of the state's appeal.¹⁰ "Permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13-cv-217, on December 20, 2013, stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit," read the short order from the Court.¹¹

In the months that followed, similar situations played out—district courts, appellate courts, or the Supreme Court put rulings that would have struck down bans on same-sex couples' marriages on hold while cases made their way through the system. During that time, only two states were added to the marriage equality column, as officials in Oregon and Pennsylvania declined to appeal district court rulings striking down their bans on same-sex couples' marriages.¹² This led to full marriage equality in those states and brought the national total to 19 states where same-sex couples enjoyed the same marriage rights as opposite-sex couples.¹³

By late summer, three federal appellate courts ruled on the question—all affirming decisions striking down state bans¹⁴—and petitions for cert. were filed with the Supreme Court in cases out of five states.¹⁵ During this time, and

⁸ See Chris Geidner, *Trial Court Denies Stay in Utah Marriage Case, Same-Sex Couples Marry, Case Goes on Appeal*, BUZZFEED NEWS (Dec. 23, 2013), <http://www.buzzfeed.com/chrisgeidner/stay-denied-in-utah-marriage-case-same-sex-couples-continue> [<http://perma.cc/9AFM-DE5N>].

⁹ See Chris Geidner, *Appeals Court Refuses to Halt Utah Marriages for Same-Sex Couples*, BUZZFEED NEWS (Dec. 24, 2013), <http://www.buzzfeed.com/chrisgeidner/appeals-court-refuses-to-halt-utah-marriages-for-same-sex-co> [<http://perma.cc/TXR3-H5JE>].

¹⁰ *Herbert v. Kitchen*, 134 S. Ct. 893, 893 (2014) (granting stay pending final disposition of appeal in 755 F.3d 1193 (10th Cir.)).

¹¹ *Id.*

¹² See Elizabeth Chuck, *Pennsylvania Gay Marriage Ruling Stands, Governor Won't Appeal*, NBC NEWS (May 21, 2014) <http://www.nbcnews.com/news/us-news/-gay-marriage-ruling-stands-governor-wont-appeal-n111286> [<http://perma.cc/8X6J-7BXX>]; see also *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (holding Pennsylvania laws banning same-sex marriage unconstitutional); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1147 (D. Or. 2014) (holding Oregon laws banning same-sex marriage unconstitutional).

¹³ See Zach Pluhacek, *Same-Sex Marriage Rulings: A Timeline*, JOURNALSTAR.COM (Mar. 2, 2015), http://journalstar.com/news/local/same-sex-marriage-rulings-a-timeline/article_1b7f5567-8226-5fc4-b5d2-6f16bdba3192.html [<http://perma.cc/CYY5-LU2R>].

¹⁴ See *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir.), *aff'g* 12 F. Supp. 3d 1144 (S.D. Ind. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir.), *aff'g sub nom.* *Bostic v. Rainey*, No. 2:13CV395, 2014 WL 10022686 (E.D. Va. Feb. 14, 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014), *aff'g* 961 F. Supp. 2d 1181 (D. Utah 2013).

¹⁵ These cases originated in Indiana, Oklahoma, Utah, Virginia, and Wisconsin. See *Baskin*, 766 F.3d 648, *cert. denied*, 135 S. Ct. 316, and *cert. denied sub nom.* *Walker v.*

presumably in deference to the Court's decisions to grant stays in *Herbert v. Kitchen*¹⁶ and *McQuigg v. Bostic*,¹⁷ stays remained in all states where state officials were appealing rulings that struck down bans on same-sex couples' marriages.¹⁸

On October 6, 2014—nine months to the day the Supreme Court halted Utah's same-sex marriages and effectively put the national progression of marriage equality through the federal courts on hold—everything changed. That day, the Court denied cert. petitions from Indiana, Oklahoma, Utah, Virginia, and Wisconsin,¹⁹ setting in motion a ripple effect that became the wave that set the stage for the Court's ultimate June 2015 ruling ending the remaining bans on same-sex couples' marriages across the country. The Court's denial of cert. meant that fewer than four justices voted to hear the cases. No Justice publicly voiced his or her dissent to the denial of cert.

In the days that followed, the five immediately affected states allowed same-sex couples to marry.²⁰ Additionally, the Fourth, Seventh, and Tenth Circuits' opinions went into effect, allowing all other states in these circuits to implement full marriage equality as well²¹ (the lone exception was in the

Wolf, 135 S. Ct. 316 (2014) (Indiana and Wisconsin); *Schaefer*, 760 F.3d 352, cert. denied, 135 S. Ct. 308, and cert. denied sub nom. *McQuigg v. Bostic*, 135 S. Ct. 314, and cert. denied sub nom. *Rainey v. Bostic*, 135 S. Ct. 286 (2014) (Virginia); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.), cert. denied, 135 S. Ct. 271 (2014) (Oklahoma); *Kitchen*, 755 F.3d 1193, cert. denied, 135 S. Ct. 265 (2014) (Utah); see also Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html> [<http://perma.cc/Q9ZF-U6PU>].

¹⁶ *Kitchen*, 134 S. Ct. at 893 (granting stay pending final disposition of appeal in 755 F.3d 1193 (10th Cir.)).

¹⁷ *McQuigg v. Bostic*, 135 S. Ct. 32 (2014) (granting stay of the Fourth Circuit's mandate in *Schaefer*, 760 F.3d 352, pending disposition of a petition for a writ of certiorari).

¹⁸ See Amanda Holpuch & Tom McCarthy, *Gay Marriage Advocates Hail 'Extraordinary' Victory After Supreme Court Declines to Hear Appeals*, GUARDIAN (Oct. 6, 2014), <http://www.theguardian.com/us-news/2014/oct/06/gay-marriage-victory-supreme-court-decision> [<http://perma.cc/7W58-Q6YB>].

¹⁹ *Bogan v. Baskin*, 135 S. Ct. 316, denying cert. to 766 F.3d 648 (7th Cir. 2014) (Indiana); *Walker v. Wolf*, 135 S. Ct. 316, denying cert. sub nom. to *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (Wisconsin); *Schaefer v. Bostic*, 135 S. Ct. 308, denying cert. to 760 F.3d 352 (4th Cir. 2014) (Virginia); *McQuigg v. Bostic*, 135 S. Ct. 314, denying cert. sub nom. to *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Virginia); *Rainey v. Bostic*, 135 S. Ct. 286, denying cert. sub nom. to *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Virginia); *Smith v. Bishop*, 135 S. Ct. 271, denying cert. to 760 F.3d 1070 (10th Cir. 2014) (Oklahoma); *Herbert v. Kitchen*, 135 S. Ct. 265, denying cert. to 755 F.3d 1193 (10th Cir. 2014) (Utah); see also Liptak, *supra* note 15.

²⁰ Jack Healy et al., *Scenes of Exultation in Five States as Gay Couples Rush to Marry*, N.Y. TIMES (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/us/same-sex-marriage-ruling.html> [<http://perma.cc/WNZ9-E6NU>].

²¹ See Liptak, *supra* note 15. There were six additional states that had same-sex marriage bans and were affected by the denials of cert. of the circuit court rulings: North

Tenth Circuit, where Kansas officials fought against state recognition even as same-sex couples began marrying locally).²² With this, those states recognizing marriage equality went from nineteen to twenty-four and eventually to twenty-nine.²³ Thus, without considering the merits of the issue, the Supreme Court—through the nonprecedential order denying cert.—effectively changed the country’s dynamic from marriage equality in the minority of states to marriage equality in the majority of states.

Further expanding the ripples of the Supreme Court’s denial of cert., on October 7, 2015, the Ninth Circuit Court of Appeals issued its ruling in the cases it had heard addressing the marriage question a month earlier, striking down Nevada’s and Idaho’s state bans on same-sex couples’ marriages and issuing the mandate in both cases at the same time.²⁴

Notably, the decision as to Nevada was a reversal of the district court’s decision upholding the state’s ban.²⁵ While Nevada officials declined to pursue an appeal—meaning marriage equality would begin in the state, and establishing marriage equality in thirty states—Idaho officials remained ready to fight, seeking an emergency order from the Supreme Court granting a stay of the Ninth Circuit’s decision.²⁶

Although Justice Anthony Kennedy granted a temporary stay while the court considered Idaho’s request, the Court ultimately denied the request for stay.²⁷ This marked the first time since the challenges to same-sex couples’ marriage bans cases began that the Court denied a request for a stay, thereby putting the Ninth Circuit’s marriage equality ruling into effect while Idaho’s appeal was still pending. “Application for stay presented to Justice Kennedy and by him referred to the Court denied,” the short order stated.²⁸ “Orders heretofore entered by Justice Kennedy vacated.”²⁹ Again, no Justice publicly disagreed with the decision. Idaho became the 31st state to allow same-sex

Carolina, South Carolina, West Virginia (4th Cir.); and Colorado, Kansas, Wyoming (10th Cir.).

²² See Brad Cooper, *U.S. Supreme Court Lifts the Delay on Same-Sex Marriages in Kansas*, KAN. CITY STAR (Nov. 12, 2014), <http://www.kansascity.com/news/government-politics/article3856611.html> [<http://perma.cc/77NK-V66L>].

²³ See *id.*; Pluhacek, *supra* note 13.

²⁴ See *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931, and *cert. denied sub nom. Idaho v. Latta*, 135 S. Ct. 2931, and *cert. dismissed sub nom. Coal. for the Prot. of Marriage v. Sevcik*, 136 S. Ct. 13 (2015).

²⁵ *Id.* at 476, *rev’g sub nom. Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

²⁶ See Chris Geidner, *Justice Anthony Kennedy Halts Idaho Marriages, Allows Nevada Ruling to Go into Effect*, BUZZFEED NEWS (Oct. 8, 2014), <http://www.buzzfeed.com/chrisgeidner/justice-anthony-kennedy-halts-9th-circuit-marriage-ruling-fr> [<http://perma.cc/DJQ3-XXX3>].

²⁷ *Otter v. Latta*, 135 S. Ct. 345 (2014) (denying stay and vacating previous order issued by Justice Kennedy on October 8, 2014).

²⁸ *Id.*

²⁹ *Id.*

couples to marry,³⁰ as a result of another nonprecedential decision of the Court, but a move contrary to the decisions on the procedural stay requests prior to the October 6, 2014 denials of cert.

Soon thereafter, the process repeated itself in Alaska where the Court declined to issue a stay on October 16, 2014,³¹ following the trial court ruling in *Hamby v. Parnell*, which nullified Alaska's ban in light of the Ninth Circuit's decision in *Latta v. Otter*.³² Although *Hamby* would fall under the Ninth Circuit precedent, the stay denial was notable because it was the first time the court had allowed same-sex couples to marry before state officials were given the opportunity to appeal on the merits of the case.

On November 6, 2014, the Sixth Circuit Court of Appeals struck out on its own and upheld same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee.³³ The decision appeared to ensure a Supreme Court review of the merits. The next week, Kansas officials—despite the Tenth Circuit's rulings in the Utah and Oklahoma cases—went to the Supreme Court to seek a stay of a district court ruling against them, leaning heavily on the Sixth Circuit's decision as a reason for the Justices to treat this stay request differently.³⁴

Referencing the Sixth Circuit's decision in *DeBoer v. Snyder*, Kansas Attorney General Derek Schmidt wrote bluntly, "This Court denied prior petitions for cert. on similar issues October 6, 2014, but at that time no clear split among the federal circuits existed. Now it does."³⁵ Explaining further in the November 10 filing, Schmidt noted that "[t]he *DeBoer* decision has created a clear split of authority among the Circuits on the applicability of the Fourteenth Amendment to state constitutional prohibitions on same-sex marriages, like the one in Kansas, and the final resolution of these important constitutional questions by this Court will certainly be required."³⁶

Justice Sonia Sotomayor asked for a response from the plaintiffs by November 11, 2014, temporarily keeping the trial court order from going into effect.³⁷ On November 12, 2014, however, the Court denied the stay request;³⁸ this time however, Justices Antonin Scalia and Clarence Thomas noted that they would have granted the stay request.³⁹ While the two Justices gave no

³⁰ See Pluhacek, *supra* note 13.

³¹ *Parnell v. Hamby*, 135 S. Ct. 399 (2014) (denying stay).

³² See *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1059 (D. Ala. 2014).

³³ *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014).

³⁴ See Lyle Denniston, *New Test of Court's View on Same-Sex Marriage (Updated)*, SCOTUSBLOG (Nov. 10, 2014, 5:07 PM), <http://www.scotusblog.com/2014/11/new-test-of-courts-view-on-same-sex-marriage/> [<http://perma.cc/R6WN-4H3T>].

³⁵ Emergency Application to Stay Preliminary Injunction Pending Appeal at 10, *Moser v. Marie*, 135 S. Ct. 511 (2014) (No. 14A503).

³⁶ *Id.*

³⁷ See Denniston, *supra* note 34.

³⁸ *Moser*, 135 S. Ct. at 511.

³⁹ See Chris Geidner, *Supreme Court Allows Same-Sex Marriages to Proceed in Kansas*, BUZZFEED NEWS (Nov. 12, 2014), <http://www.buzzfeed.com/chrisgeidner/supreme-court-ends-stay-on-kansas-same-sex-marriage-order> [<http://perma.cc/4R4W-PZXH>].

explanation for their decision at that time, a day later, the curtain was raised slightly as to the battle being waged within the Court in a case that had nothing to do with marriage.

On November 13, 2014, the Court denied a stay to Arizona officials after the Ninth Circuit struck down a law refusing bail for undocumented immigrants.⁴⁰ Justice Thomas, joined by Justice Scalia, wrote a statement “respecting the denial of the application for a stay.”⁴¹ Noting the court’s practice of ordinarily granting review whenever lower courts strike down federal laws, Justice Thomas added that the Court also “often review[s] decision[s] striking down state laws, even in the absence of a disagreement among lower courts.”⁴² The first citation for this point was the Court’s 2012 decision to review the Ninth Circuit’s decision striking down California’s Proposition 8 marriage amendment—a grant of cert. in a marriage case in the absence of any circuit split.⁴³

Striking at the heart of the current procedural moves being made by the Court in the cases challenging states’ bans on same-sex couples’ marriages, Justice Thomas wrote, “But for reasons that escape me, we have not [reviewed federal court decisions striking down state laws] with any consistency, especially in recent months.”⁴⁴ Justice Thomas then cited the recent marriage cases: the denials of cert. in cases out of Indiana, Oklahoma, Utah, Virginia, and Wisconsin and the stay denials in cases out of Idaho and Alaska.⁴⁵

Although Kansas officials continued fighting state recognition of same-sex couples’ marriages, same-sex couples began marrying in the state after the state’s application for stay was denied.⁴⁶ Likewise, same-sex couples began marrying in Arizona and Montana after marriage equality resulted from decisions adhering to the Ninth Circuit’s precedent,⁴⁷ and in Missouri, where a state court ruling brought marriage equality to St. Louis⁴⁸—developments

⁴⁰ *Maricopa Cty. v. Lopez–Valenzuela*, 135 S. Ct. 428 (2014) (denying stay).

⁴¹ *Id.* (statement of Thomas, J.).

⁴² *Id.* (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2013) (per curiam)).

⁴³ *Hollingsworth*, 558 U.S. at 190.

⁴⁴ *Maricopa*, 135 S. Ct. at 428 (statement of Thomas, J.).

⁴⁵ *Id.* (citing *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (Utah) (denying cert.); then citing *Smith v. Bishop*, 135 S. Ct. 271 (2014) (Oklahoma) (denying cert.); then citing *Rainey v. Bostic*, 135 S. Ct. 286 (2014) (Virginia) (denying cert.); then citing *Walker v. Wolf*, 135 S. Ct. 316 (2014) (Wisconsin) (denying cert.); then citing *Otter v. Latta*, 135 S. Ct. 345 (2014) (Idaho) (denying a stay); and then citing *Parnell v. Hamby*, 135 S. Ct. 399 (2014) (Alaska) (denying a stay)).

⁴⁶ See Cooper, *supra* note 22.

⁴⁷ See *Connolly v. Jeanes*, 73 F. Supp. 3d 1094 (D. Ariz. 2014); *Majors v. Horne*, 14 F. Supp. 3d 1313 (D. Ariz. 2014); *Rolando v. Fox*, 23 F. Supp. 3d 1227 (D. Mont. 2014).

⁴⁸ *State v. Florida*, No. 1422-CC09027, 2014 WL 5654040 (Mo. Cir. Ct. Nov. 5, 2014); see also Chris Geidner, *Judge Rules Missouri Can’t Keep St. Louis Officials From Marrying Same-Sex Couples*, BUZZFEED NEWS (Nov. 5, 2014), <http://www.buzzfeed.com/chrisgeidner/judge-rules-missouri-cant-keep-st-louis-officials-from-marry> [<http://perma.cc/4LDE-27FE>].

bringing the number of states in which same-sex couples were marrying to thirty-six.⁴⁹

A month later on December 19, 2014, the Court pushed the matter even further when it denied Florida's application for stay of a district court ruling striking down its ban on same-sex couples' marriages.⁵⁰ The procedural ruling meant that the Court—again, over the noted objections of Justices Scalia and Thomas⁵¹—was allowing same-sex couples to marry on the basis of a district court ruling in a state where the corresponding federal appeals court had yet to issue a decision on the merits of the question with regards to any state in the circuit. On January 5, 2015, Florida became the thirty-seventh state in which same-sex couples were marrying.⁵²

Eleven days later, and as expected, the Supreme Court granted cert. in the Sixth Circuit cases, agreeing to hear the cases out of all four states within the circuit.⁵³ Next, U.S. District Court Judge Callie V.S. Granade struck down Alabama's ban on same-sex marriages.⁵⁴ Judge Granade's rulings, one striking down the marriage ban and the other striking down the ban on recognition of same-sex couples' marriages, were to go into effect on February 9, 2015.⁵⁵ Despite the grant of cert. by the Supreme Court in the Sixth Circuit cases, the Eleventh Circuit denied the Alabama's stay request.⁵⁶

Alabama Attorney General Luther Strange, in seeking a stay from the Supreme Court noted, "[T]his Court will resolve this issue by the end of this current Term."⁵⁷ Despite that, the Court denied the stay request on the morning of February 9, as Judge Granade's stay expired and as same-sex couples began marrying in some counties.⁵⁸ Justice Thomas, again joined by

⁴⁹ See Pluhacek, *supra* note 13.

⁵⁰ *Armstrong v. Brenner*, 135 S. Ct. 890 (2014) (denying stay); see also Chris Geidner, *Supreme Court Allows Florida Same-Sex Marriages to Proceed in January*, BUZZFEED NEWS (Dec. 19, 2014), <http://www.buzzfeed.com/chrisgeidner/supreme-court-allows-florida-same-sex-marriages-to> [<http://perma.cc/JLG3-PG4Z>].

⁵¹ See *Armstrong*, 135 S. Ct. at 890.

⁵² See Pluhacek, *supra* note 13.

⁵³ *Bourke v. Beshear*, 135 S. Ct. 1041 (2015) (Kentucky); *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015) (Michigan); *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (Tennessee); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (Ohio).

⁵⁴ See *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1286 (S.D. Ala. 2015).

⁵⁵ *Id.*; *Strawser v. Strange*, 44 F. Supp. 3d 1206, 1207 (S.D. Ala. 2015); see also Chris Geidner, *With U.S. Supreme Court Silent, Alabama Chief Justice Aims to Stop Same-Sex Marriages*, BUZZFEED NEWS (Feb. 8, 2015), <http://www.buzzfeed.com/chrisgeidner/with-us-supreme-court-silent-alabama-chief-justice-aims-to-s> [<http://perma.cc/528G-WDK2>].

⁵⁶ See Lyle Denniston, *Eleventh Circuit Puts Off Same-Sex Marriage Cases*, SCOTUSBLOG (Feb. 5, 2015, 7:31 AM), <http://www.scotusblog.com/2015/02/eleventh-circuit-puts-off-same-sex-marriage-cases/> [<http://perma.cc/LU88-99LV>].

⁵⁷ Application to Stay Injunctions of the United States District Court for the Southern District of Alabama at 7, *Strange v. Searcy*, 135 S. Ct. 940 (2015) (No. 14A840).

⁵⁸ *Searcy*, 135 S. Ct. at 940 (denying application for stay); Amy Howe, *No Stay for Alabama (Updated)*, SCOTUSBLOG (Feb. 9, 2015, 9:59 AM), <http://www.scotusblog.com/2015/02/no-stay-for-alabama/> [<http://perma.cc/B5TT-HLWW>].

Justice Scalia, wrote in opposition to the order denying the application for stay, calling the decision to grant a stay pending the appeal in *Kitchen* a little more than a year earlier “no surprise.”⁵⁹ Justice Thomas wrote of that decision and a similar decision granting a stay in *Bostic*: “Those decisions reflected the appropriate respect we owe to States as sovereigns and to the people of those States who approved those laws. This application should have been treated no differently.”⁶⁰

Specifically highlighting the significant difference, in Justice Thomas’s view, that the grant of cert. of the Sixth Circuit cases should have made in terms of stay requests, he wrote, “I acknowledge that there was at least an argument that the October [cert. denial] decision justified an inference that the Court would be less likely to grant a writ of certiorari to consider subsequent petitions. That argument is no longer credible.”⁶¹ Echoing Strange’s request, Justice Thomas wrote, “The Court has now granted a writ of certiorari to review these important issues and will do so by the end of the Term.”⁶² Nonetheless, the Court did not stay the district court’s decision in *Searcy v. Strange* and same-sex couples began marrying in Alabama, making it the thirty-eighth state with same-sex couples marrying.⁶³

In all of this, it should not be lost that neither Chief Justice Roberts nor Justice Alito voiced dissent to these actions alongside Justices Scalia and Thomas. Chief Justice Roberts, for his part, has recently had his first decade at the Court assessed as having shown, at times, a greater interest in protecting the Supreme Court’s institutional authority than in advancing conservative principles.⁶⁴ Similarly, CNN’s Ariane de Vogue noted earlier this year that, after Chief Justice Roberts voted for a second time in favor of the Affordable Care Act, “perhaps more than any other justice now on the bench Roberts cares about the Court as an institution.”⁶⁵

In opposing the stay denial in *Searcy*, Justice Thomas wrote about how, in his view, the court was failing in those institutional responsibilities by

⁵⁹ See *Searcy*, 135 S. Ct. at 940 (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014)).

⁶⁰ *Id.* at 940 (citing *Kitchen*, 134 S. Ct. 893; and then *McQuigg v. Bostic*, 135 S. Ct. 32 (2014)).

⁶¹ *Id.* at 941.

⁶² *Id.*

⁶³ Later developments in the case led Judge Granade to issue her own stay of a class-action injunction in the case pending the outcome of the Supreme Court’s decision in the Sixth Circuit cases. See Pluhacek, *supra* note 13.

⁶⁴ See Brianna Gorod, *Roberts at 10: A Very Conservative Chief Justice Who Occasionally Surprises*, CONST. ACCOUNTABILITY CTR. ISSUE BRIEFS, Sept. 2015, at 1, http://theusconstitution.org/sites/default/files/briefs/Roberts_at_10-Capstone.pdf [<http://perma.cc/M5J5-GUAJ>].

⁶⁵ Ariane de Vogue, *4 Things We Learned About John Roberts*, CNN (June 25, 2015), <http://www.cnn.com/2015/06/25/politics/supreme-court-john-roberts-obamacare-takeaways/> [<http://perma.cc/QZ2Q-FRZV>].

allowing the district court ruling to go into effect.⁶⁶ He wrote, “This acquiescence may well be seen as a signal of the Court’s intended resolution of that question. This is not the proper way to discharge our Article III responsibilities. And, it is indecorous for this Court to pretend that it is.”⁶⁷

III. “THE LEGITIMACY OF THIS COURT”⁶⁸:
HOW THESE CHANGES HAPPENED, WHO MADE THEM HAPPEN,
AND A QUESTION FOR THE FUTURE

On April 28, 2015, the Court heard oral arguments in the Sixth Circuit’s cases.⁶⁹ As of that day, same-sex couples had legally married across or in parts of thirty-eight states—double the number of states where same-sex couples were able to marry on the day before the Court denied cert. in the batch of cases it was asked to consider at the beginning of the term. Eleven of those new states were added to the list through denial of cert.⁷⁰ (or by virtue of being in the circuits in which cert. was denied);⁷¹ another four were allowed to proceed with same-sex couples’ marriages following the Court’s stay denials;⁷² and the remaining three states of the Ninth Circuit with marriage equality likely had that result helped along by the denials of cert.⁷³

Only one decision, the state court decision on November 5, 2014, regarding same-sex couples’ marriages in St. Louis, Missouri,⁷⁴ led to marriage equality during that time independent of the Supreme Court’s denial of cert. decision. Yet, the denial of cert. happened a week after oral arguments were held on the motions and it would be hard to argue that the denial and federal ripple effect had no effect on the state court decision that didn’t come until a month later.

Given that the same nine Justices who decided *United States v. Windsor*⁷⁵ also heard *Obergefell*, the decision on June 26, 2015 to expand marriage

⁶⁶ *Searcy*, 135 S. Ct. at 940 (Thomas, J., dissenting).

⁶⁷ *Id.*

⁶⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, J., dissenting).

⁶⁹ *Supreme Court of the United States October Term 2014: For the Session Beginning April 20, 2015*, U.S. SUP. CT., http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthlyArgumentCalApril2015.html [<http://perma.cc/77TP-8JXU>].

⁷⁰ *See supra* pp. 162–64 (detailing marriage equality in Indiana, Oklahoma, Utah, Virginia, and Wisconsin).

⁷¹ *See supra* pp. 164–65 (detailing marriage equality in Colorado, Kansas, North Carolina, South Carolina, West Virginia, and Wyoming).

⁷² *See supra* pp. 165–68 (detailing the process by which Alabama, Alaska, Florida, and Idaho implemented marriage equality).

⁷³ *See supra* pp. 165, 167 (explaining how Arizona, Montana, and Nevada arrived at marriage equality).

⁷⁴ *State v. Florida*, No. 1422-CC09027, 2014 WL 5654040, at *1 (Mo. Cir. Ct. Nov. 5, 2014).

⁷⁵ *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

equality nationwide was not surprising. There is no question, however, that the Court's procedural and other nonprecedential decisions relating to stay applications and cert. petitions decreased the significance of the change resulting from *Obergefell* by increasing the number of states where same-sex couples were marrying before the Court issued the decision. Had the Justices accepted cert.—which requires the vote of only four Justices—in one or more of the cases before it on October 6, 2014, it would have been reaching a decision expanding marriage equality to roughly sixty percent of the states. Instead, its ruling affirmed the right in roughly the final twenty-five percent of states still enforcing marriage bans at the time of the decision.

The Supreme Court was able to achieve this stark difference without considering a single case on the merits or issuing a single precedential decision. Moreover, the Court necessarily took these actions—at least the key action of the denial of cert.—with the support of at least one of the Justices who eventually dissented in *Obergefell* when that Justice (or those Justices) refused to provide a vote for cert. in October.

Although Justice Alito could have refused to vote for cert., a far more likely candidate is Chief Justice Roberts—the man interested in protecting the Court itself. Indeed, even in the section of his dissenting opinion in *Obergefell* addressing the role of the judiciary, the Chief Justice begins by noting, “The legitimacy of this Court ultimately rests ‘upon the respect accorded to its judgments.’”⁷⁶ In this scenario, by refusing to provide one of the four votes needed for cert. in October 2014, Chief Justice Roberts—who likely knew the five votes were there for the ultimate decision in favor of nationwide marriage equality—allowed the process to make its way across the country over the course of the year rather than happening all at once, making the ultimate *Obergefell* decision less likely to cause any significant damage to the court as an institution.⁷⁷

The question of whether this series of moves was wise (as appears to be the passive decision of the majority of the current court)⁷⁸ or not (as Justices Scalia⁷⁹ and Thomas⁸⁰ clearly believe) is a question open to debate, as are the Chief Justice and/or Justice Alito's motivations for allowing it to happen. That it took place is a reality, however, that should be addressed and debated. This is so both for its success at easing the transition to nationwide marriage

⁷⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, J., dissenting) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

⁷⁷ Although the decision to vote against certiorari could have been made by Alito, there is no reason suggested in any of Alito's writings or public comments to believe he would have voted against cert.—at least not unless he was joining Roberts and both of them voted against granting cert. in October 2014. Roberts, on the other hand and as detailed earlier, has been described by many as being willing to consider the court's institutional interests as part of his role on the court.

⁷⁸ See *Obergefell*, 135 S. Ct. at 2593.

⁷⁹ See *id.* at 2626 (Scalia, J., dissenting).

⁸⁰ See *id.* at 2631 (Thomas, J., dissenting).

equality—a constitutional right the court held is now guaranteed to all—and for its implications for other issues that will find their way to the Supreme Court in the future.