

No. 15-0135

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator

On Petition for Writ of Mandamus to
Probate Court No. 1, Travis County, Texas

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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**REPLY IN SUPPORT OF
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TO THE HONORABLE SUPREME COURT OF TEXAS:

Real Party in Interest Sonemaly Phrasavath asks the Court to treat this mandamus proceeding as if it concerned only a run-of-the-mill ruling on special exceptions, rather than an issue that has legal, social, political, relational, and personal ramifications for thousands of Texas citizens. To date, and with the exception of a few days in February 2015, the judicial resolution of the same-sex-marriage question in Texas has proceeded in an orderly fashion, without the spectacle seen in other States of same-sex couples and the State racing to the courthouse. The probate court's ruling threatens to upset Texas's deliberative process.

To demonstrate its entitlement to mandamus relief, the State must show (1) a clear abuse of discretion, and (2) no adequate remedy on appeal. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992, orig. proceeding). The State has done so. Given the high stakes and immediate impact of its same-sex-marriage ruling, the probate court clearly abused its discretion in purporting to strike down Texas marriage law without allowing the appellate process to play out. And the harm that the State seeks to prevent—the uncertainty and confusion caused by the very existence of the probate court’s order—cannot be remedied by way of an appeal that would occur months from now. The Court should grant the State’s petition.

I. THE PROBATE COURT ABUSED ITS DISCRETION BY FAILING TO STAY ITS RULING IN LIGHT OF THE IMPORTANCE OF THE SAME-SEX-MARRIAGE ISSUE AND ITS IMMINENT RESOLUTION BY HIGHER COURTS.

By purporting to declare Texas marriage law unconstitutional and failing to stay its ruling, Supp. MR Tab A, the probate court was not simply “doing its job.” Phrasavath Resp. 5. It was abusing its discretion.

Phrasavath argues that the decision to grant or deny a stay is discretionary. *Id.* 7–8. But a trial court can still abuse its discretion when making that decision. *See, e.g., In re Merrill Lynch & Co.*, 315

S.W.3d 888, 892–93 (Tex. 2010) (per curiam) (finding abuse of discretion in failing to grant stay of litigation pending arbitration); *Alpine Gulf, Inc. v. Valentino*, 563 S.W.2d 358, 359–60 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref’d n.r.e.) (finding abuse of discretion when trial court refused to stay suit pending litigation in New York, as a matter of comity); see also Order, *In re Marriage of A.L.F.L. & K.L.L.*, No. 04-14-00364-CV (Tex. App.—San Antonio, July 8, 2014) (staying a trial court ruling that Texas marriage law is unconstitutional because “the issues to be presented in this appeal are similar to those issues pending before the Texas Supreme Court”). Because of the nature of the same-sex-marriage issue, its imminent resolution by higher courts, and the harm that would occur if the probate court’s ruling were overturned after same-sex couples married in reliance on it, the probate court clearly abused its discretion in failing to stay its ruling.

The same-sex-marriage issue is undoubtedly important, but it has not been resolved. The constitutional question has been fully briefed and argued to this Court, the Fifth Circuit, and the United States Supreme Court, where an answer is anticipated by the end of June. The only question before the Court in this proceeding is how Texas courts should

handle challenges to Texas marriage laws until then: (1) wait for a ruling from this Court or the United States Supreme Court so that everyone in Texas is treated uniformly and without legal uncertainty, or (2) allow trial judges to make independent, and possibly conflicting, rulings leading to same-sex couples and the State racing to the courthouse to obtain what may be only temporary relief.

Phrasavath's argument that many other courts have not stayed their same-sex decisions is unhelpful. Phrasavath Resp. 8–10. Texas may decide for itself how best to proceed. And it should take note of what has occurred around the country. As described in the State's petition, other States have experienced significant confusion when trial courts declared their marriage laws unconstitutional, only to have a stay put into place by an appellate court at a later date pending resolution of the appeal. Pet. 6–7. The Court should avoid that outcome by preserving the status quo until the constitutional question is finally resolved.

Texas is not suggesting a rule that all trial courts must stay their cases if the issues are currently on appeal elsewhere. Phrasavath Resp. 7–8. Again, the same-sex-marriage context and the impact of any order in this area makes this case different. The circumstances must be

exceptional to warrant the relief sought. *See, e.g., Merrill Lynch & Co.*, 315 S.W.3d at 892–93 (staying case pending resolution in other forum); *Alpine Gulf, Inc.*, 563 S.W.2d at 359–60 (same). The circumstances in this case suffice. The probate court overstepped its bounds and abused its discretion.

II. THERE IS NO ADEQUATE REMEDY ON APPEAL BECAUSE IT IS THE EXISTENCE OF THE PROBATE COURT’S ORDER THAT IS CAUSING THE HARM.

Whether the State has an adequate remedy on appeal is a “practical and prudential” determination that “depends heavily on the circumstances presented and is better guided by general principles than by simple rules.” *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136–37 (Tex. 2004). “[A] remedy by appeal may be an inadequate remedy when there are extraordinary circumstances present.” *In re First Mercury Ins. Co.*, 437 S.W.3d 34, 38–39 (Tex. App.—Corpus Christi 2014, orig. proceeding) (describing instances in which mandamus was granted to correct rulings on pleas to the jurisdiction); *see also In re Brick*, 351 S.W.3d 601, 607 (Tex. App.—Dallas 2011, orig. proceeding) (finding mandamus relief appropriate to remedy the wrongful denial of special exceptions). Because the existence of the probate court’s order itself is responsible for

the harm that the State seeks to prevent, any appellate remedy that will occur months from now is inadequate.

A. The State Seeks to Avoid the Confusion Caused by the Probate Court’s Declaration That Texas Marriage Law Is Unconstitutional.

The possibility that a probate court might recognize a single same-sex marriage is not the harm. Rather, the irremediable harm is the confusion and disorder that could be caused by a ruling that Texas marriage law is unconstitutional. Pet. 6–7. It is, therefore, the existence of the probate court’s order that concerns the State, as it could lead same-sex couples, county clerks, and judges to mistakenly believe that Texas marriage law is no longer in effect.

Phrasavath did not address the specific harm identified by the State in its mandamus petition, perhaps because the actions of her own counsel confirmed that the State’s fears were well-founded. Despite assuring this Court that the State’s concern was “wholly speculative” in response to the State’s motion to stay, Phrasavath’s counsel was—on the very same day—preparing the pleadings necessary to take advantage of the purported “window of opportunity” created by the probate court’s ruling in order to secure an invalid marriage license for his other clients.

See Resp. to Emergency Mot. for Temp. Relief at 2, *In re State*, No. 15-0135 (Tex., Feb. 19, 2015); Angela Morris, *The Wedding Planner: A Step-by-Step Legal Analysis of State's First Same-Sex Marriage*, TEXAS LAWYER, March 2, 2015.¹ Phrasavath cannot, therefore, deny that the probate court's order could, and did, lead parties, attorneys, and a criminal district court judge to believe that Texas marriage law was unconstitutional.²

Granting the State's petition will not open the floodgates to all sorts of pretrial requests for mandamus. Phrasavath Resp. 13. Indeed, the Court has previously granted mandamus relief to otherwise incidental pretrial rulings when "exceptional" circumstances are present. *See, e.g., In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex. 1999) (granting

¹ The article is available at <http://www.texaslawyer.com/id=1202719113269/The-Wedding-Planner-A-StepByStep-Legal-Analysis-of-States-First-SameSex-Marriage?slreturn=20150426161054>.

² To be clear, the probate court's order had no legal effect outside of the probate proceeding. *See State v. Shook*, 244 S.W.2d 220, 221 (Tex. Crim. App. 1951) ("It is rudimentary that courts are not bound by the decisions of other courts of equal jurisdiction."). Regardless, in reliance on this order, Phrasavath's counsel convinced a criminal district judge to order the Travis County clerk to issue a same-sex marriage license. *See In re State*, No. 15-0139; *see also* Morris, *The Wedding Planner* (quoting an attorney who stated that the probate court's order meant same-sex marriage was legal in Travis County). If the Court chooses to deny the State's request for mandamus relief on the ground that the probate court's order applied only to the case before it and, therefore, cannot form the basis for other same-sex marriages, the Court should say so expressly to avoid any further confusion.

mandamus relief regarding transfer of venue when circumstances were “exceptional”); *CSR Ltd. v. Link*, 925 S.W.2d 591, 593 (Tex. 1996) (orig. proceeding) (granting mandamus relief regarding special appearance because of “exceptional circumstances”). As long as the Court is clear that it is the unique circumstances of this case that warrant the Court’s intervention, lower courts and litigants will not be tempted to overuse the mandamus process.

Because the existence of the order itself causes the harm the State seeks to prevent, there is no adequate remedy on appeal. Moreover, preventing the State from enforcing its laws is generally considered an irreparable injury. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (“When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.”); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”). The State lacks an adequate remedy on appeal, and mandamus relief is necessary.

B. The State Acted Properly and Expediently To Seek Appropriate Relief from This Court.

Phrasavath also makes multiple attempts to shift the blame to the State, arguing that the State should have intervened earlier, the State should have asked the probate court for a stay, and the State should have asked this Court for a statewide stay in one of the pending same-sex divorce cases. Phrasavath Resp. 13–14. All of her arguments lack merit.³

First, there was no need for the State to intervene earlier. The Texas Rules of Civil Procedure do not contain a deadline for intervention. *Tex. Mut. Ins. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008); TEX. R. CIV. P. 60. And Phrasavath has not moved to strike the State’s intervention as untimely, nor has she challenged the State’s right to intervene.

The State has already made its legal position clear before this Court, the Fifth Circuit, and the United States Supreme Court. Moreover, as pointed out by the other real parties in interest, whether a same-sex common-law marriage could be retroactively recognized raises multiple significant questions that counseled against permitting Phrasavath’s claim to go forward. Powell Resp. 3–20. The State could

³ Phrasavath refers throughout the brief to the “Attorney General.” The Attorney General, however, is simply the State’s counsel in this case, not a party himself.

not have reasonably anticipated that the probate court would abuse its discretion.

Second, moving for a stay from the probate court would have been futile and cost the State valuable time. Having been served with the State's mandamus petition and motion to stay, the probate court was well aware of the State's position that the court should stay its order. Yet it did nothing. The State did not have the luxury of waiting to find out what might happen and, as later circumstances showed, even a two-day delay was too long to prevent another trial court from erroneously relying on the order.

And finally, Phrasavath's argument that the State should be blamed for failing to request a statewide stay in one of the same-sex divorce cases pending before the Court is bewildering. Phrasavath Resp. 13–14. As the members of the Court are undoubtedly aware, having studied the briefs and participated in oral argument, a stay was unnecessary in those cases. In *In re JB and HB*, No. 11-0024, the Fifth Court of Appeals *upheld* Texas marriage law as constitutional. *In re JB & HB*, 326 S.W.3d 654, 681 (Tex. App.—Dallas 2010, pet. granted). And in *State v. Naylor*, No. 11-0114, and *In re State*, No. 11-0222, which

concerned the same underlying proceeding, the trial court simply granted a same-sex divorce without ruling one way or the other on the constitutionality of Texas law. *State v. Naylor*, 330 S.W.3d 434, 437 (Tex. App.—Austin 2011, pet. granted). There was no need for a stay in any of those cases, much less a statewide stay. The State’s actions were appropriate and are not a bar to mandamus relief.

PRAYER

The Court should grant the petition for writ of mandamus.

Respectfully submitted.

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I certify that on May 29, 2015, the foregoing document was served via File & ServeXpress or electronic mail upon counsel for real parties in interest. A courtesy copy was also sent to counsel for real parties in interest by electronic mail.

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The Respondent was served a copy by email and by U.S. Mail, sent May 29, 2015.

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In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 2149 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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