

CV-14-427

IN THE ARKANSAS SUPREME COURT

M. KENDALL WRIGHT, et al

PLAINTIFFS-APPELLEES

VS.

Case No. CV-14-427

NATHANIEL SMITH, MD, MPH, et al

DEFENDANTS-APPELLANTS

PLAINTIFFS-APPELLEES' MOTION FOR THE IMMEDIATE LIFTING OF STAY

Comes Kendall Wright, et al, Plaintiffs-Appellees herein, and respectfully submit their Motion for the Immediate Lifting of Stay and state:

1. That on May 15, 2014 this appeal was lodged in the Arkansas Supreme Court and on Motion of Appellants, this Court issued a stay of the lower court ruling on May 16, 2014. It has been over Nineteen (19) Months since Plaintiffs-Appellees originally filed their complaint seeking an end to the irreparable harms suffered by them due to the denial of their constitutional rights.

2. This was the first such case filed in any court in the United States following the United States Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013). At that time only 13 states permitted same-sex marriage and the recognition thereof. Since that time 24 more states and the District of Columbia have been added, placing Arkansas in the minority with 12 other states who continue to deny these citizens their constitutional rights.

3. In light of the current position and decisions of and by the United States Supreme Court, Plaintiffs respectfully request that this Court reconsider the necessity of its stay and immediately order that said stay be vacated.

4. Following the issuance of this Court's stay, on October 6, 2014 the United States Supreme Court denied certiorari in several cases, similar to the one at bar, from the Fourth, Seventh and Tenth Circuits, each of which had found state laws and/or constitutional amendments banning the performance of and/or recognition of same-sex marriages to be unconstitutional. As a result, all existing stays were dissolved. Thus same-sex marriages became legal in Utah, Oklahoma and many other jurisdictions. (See *Herbert v. Kitchen*, 135 S.Ct. 396 (2014); *Smith v. Bishop*, 135 S.Ct. 271 (2014); *Rainey v. Bostic*, 135 S.Ct. 286 (2014).

5. On December 20, 2014, the Supreme Court of the United States denied the State of Florida's request for a stay of an injunction thereby requiring the enforcement of same-sex marriages while the matter is on appeal. (See *Armstrong v. Brenner*, 135 S.Ct. 890 (2014).

6. In January 2015 the United States Supreme Court granted petitions for writ of certiorari in four cases with identical issues to those of the case at bar. Oral arguments are scheduled for April 2015 and a decision is expected in June 2015. See *DeBoer v. Snyder*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015); *Bourke v. Beshear*, No. 14-571, 2015 WL 213651 ((U.S. Jan. 16, 2015); *Obergefell v.*

Hodges, No. 14-556, 2015 WL 213646 (U.S. Jan. 16, 2015); *Tanco v. Haslam*, No. 14-562, 2015 WL 213648 (U.S. Jan. 16, 2015).

7. Now with a final decision by the United States Supreme Court a certainty, that Court has taken the unprecedented step of permitting a preview of their final decision. On February 9, 2015 the United States Supreme Court denied a request by the State of Alabama to stay the decision of the United States District Court for the Southern District of Alabama which held Alabama's ban and non-recognition of same sex marriages to be in violation of the 14th amendment to the United States Constitution. *Strange v. Searcy*, No. 14A840, 2015 WL 505563 (U.S. Feb. 9, 2015). In his dissent, Justice Clarence Thomas stated:

“When courts declared state laws unconstitutional and enjoin state officials from enforcing them, our ordinary practice is to suspend those injunctions from taking effect pending appellate review. See, e.g., *Herbert v. Kitchen*, 571 U.S. ___ (2014) Although a stay is not a matter of right, this practice reflects the particularly strong showing that States are often able to make in favor of such a stay. Because States are required to comply with the Constitution, and indeed take care to do so when they enact their laws, it is a rare case in which a State will be unable to make at least some showing of a likelihood of success on the merits.”

Strange at 1-2 (citation omitted).

Justice Thomas went on to state: “This acquiescence may well be seen as a signal of the Court's intended resolution of that question.” *Id* at 3.

8. The grant of certiorari in *DeBoer, et al*, did not alter the United States Supreme Court's position that stays are not necessary. The Supreme Court's post-certiorari denial of a stay in *Strange* necessitates that the stay in the case at bar should be immediately vacated.

9. A party seeking the extraordinary relief of a stay must satisfy a four-prong test, which requires, among other things, a strong showing that the stay applicant is likely to succeed on the merits and a showing that the applicant will be irreparably harmed. *See e.g., City of Fort Smith v. Carter*, 364 Ark. 100, 107, 216 S.W.3d 594, 598 (2005); *Nken v. Holder*, 556 U.S. 418, 434 (2009). None of the requirements for a continuing stay pending appeal are present in this case.

10. The United States Supreme Court, as stated above, has strongly indicated that it will find laws and state constitutional amendments, such as those of the State of Arkansas, to be in violation of the Fourteenth Amendment to the Constitution of the United States. The Defendants can make no showing of any likelihood of success on the merits as required by *City of Fort Smith* and *Nken* .

11. Further, Defendants cannot show that the other factors favoring a continued stay are satisfied in this case. Defendants would suffer no harm whatsoever if Plaintiffs and other same-sex couples are permitted to marry or have their existing marriages recognized while the appeal process continues. Plaintiffs

and their children suffer serious irreparable harm each and every day that this stay remains in effect. In addition to suffering financial losses and demeaning treatment, the security provided by marriage in the event of death, illness, incapacity, etc. is denied to Plaintiffs in, as the lower Court has found, violation of their constitutional rights. The harm to Plaintiffs is real, immediate and should not continue.

12. The only “Harm” alleged by the State in its Motion for Emergency Stay filed in this court on May 15, 2014 was state sovereignty and an alleged administrative/financial burden. Denying a stay does require that the state invest resources in issuing marriage licenses and allocating the attendant benefits of marriage to same-sex couples.

13. Any administrative burdens are overstated: procedures for issuing licenses and distributing benefits to married couples are already in place; the only real difference is that more people would be eligible for them. The increased volume would be small.

14. The Equal Protection and Due Process Clauses of Article 2 of the Arkansas Constitution provide for more stringent protection of those rights than does the United States Constitution. The effect of a decision by this court in overturning the lower court’s decision would result in a judicial reduction of equal

protection and due process rights, non-recognition of legal marriages performed in the majority of the United States and the permitted continuation of the animus of the “majority” against a defenseless minority.

15. In light of this Court’s opinions in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) and *Arkansas Dep’t of Human Services v. Cole*, 2011 Ark. 145, 380 S.W.3d 429 (2011) this scenario is very unlikely.

16. As the Hon. Chris Piazza eloquently stated in his May 15, 2014 denial of Defendants-Appellants’ Motion for a stay pending appeal:

“Defendants have asked that this Court stay any ruling adverse to its position. This Court, however, cannot in good conscience grant such a request. Constitutional violations are routinely recognized as triggering irreparable harm unless they are promptly remedied. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional “freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”). Under the circumstances presented here, granting a stay of the Plaintiffs’ rights imposes irreparable harm.

There is no evidence that Defendants, that State or its citizens were harmed by the entry of the Court’s original order or that they will be harmed by the clarifications contained within the Final Order and Rule 54 (b) certification. However, the same cannot be said of the Plaintiffs and others same-sex couples who have not been afforded the same measure of human dignity, respect and recognition by this state as their similarly situated, opposite- sex counterparts. A stay would operate to further damage Arkansas

families and deprived them of equal access to the rights associated with marriage status in this state. Weighing all factors applicable to analyzing whether a stay should be granted, Defendants' Motion for Immediate Stay is DENIED."

("Order Denying Defendants' Motion For Immediate Stay" pages 1-2).

CONCLUSION

For the foregoing reasons, this Court should set aside its Stay entered on May 16, 2014. A continuation of the stay only perpetuates the ongoing, and irreparable dignitary, legal, financial and practical harms suffered by the Plaintiffs-Appellees that cannot be redressed by money damages or subsequent court order including, but certainly not limited to:

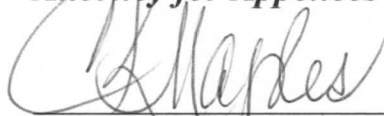
- a. The right to make health decisions for the other spouse;
- b. The right to support;
- c. The right to equal distribution of property obtained during marriage;
- d. The right to claim an elective share of a spouses estate;
- e. The right to share in employment benefits;
- f. All rights of both parents regarding children born during the relationship; and
- g. The right to claim a deceased spouses body

This Court should not allow any unnecessary continuation of the deprivation of

Plaintiffs' constitutional rights. The ruling of the Hon. Chris Piazza and his denial of a stay pending appeal was based upon a thoughtful and carefully reasoned application of the precedents that control this case and it is likely to be affirmed on appeal. The relevant factors are overwhelmingly tilted in favor of lifting the stay. Plaintiffs-Appellees therefore respectfully ask this Court to exercise its discretion and lift the current stay.

Respectfully submitted,

Attorney for Appellees



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CERTIFICATE OF SERVICE

The undersigned counsel hereby states that a true and correct copy of the foregoing document was served upon the following counsel via email on February 17, 2015:

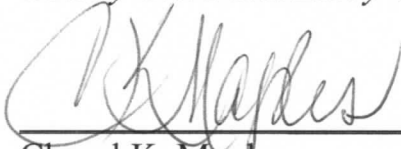
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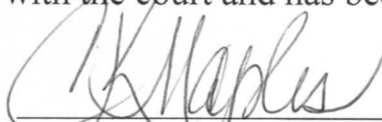
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Cheryl K. Maples

CERTIFICATE OF COMPLIANCE

I hereby certify that I have served on opposing counsel and unredacted and, if required, a redacted PDF document that complies with the Rules of the Supreme Court and the Court of Appeals. The PDF documents are identical to the corresponding parts of the paper documents from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.



Cheryl K. Maples