

IN THE ARKANSAS SUPREME COURT

M. KENDALL WRIGHT, et al

PLAINTIFFS-APPELLEES

VS.

Case No. _____

NATHANIEL SMITH, MD, MPH, et al

DEFENDANTS-APPELLANTS

STATE DEFENDANTS-APPELLANTS'
PETITION FOR EMERGENCY STAY

The Director of the Arkansas Department of Health and the Director of the Arkansas Department of Finance and Administration, in their official capacities, and their successors in office (the “State”), state as follows for their petition for an emergency stay of the Circuit Court’s Orders entered on May 9, 2014, and May 15, 2014:

1. The State requests an immediate stay of the Circuit Court’s May 9, 2014 “Order Granting Summary Judgment in Favor of the Plaintiffs and Finding Act 144 of 1997 and Amendment 83 Unconstitutional” and the Court’s “Final Order and Rule 54(B) Certification” and “Order Entering ‘Final Order and Rule 54(B) Certification’ *Nunc Pro Tunc*” entered May 15, 2014. A stay is warranted under the circumstances of this case. Minutes after the Circuit Court’s first ruling at 4:51 p.m. on Friday, May 9, the State filed a motion requesting a stay from the Circuit Court, but on May 15, the Circuit Court denied the State’s request for a

stay. The State sought a stay from this Court of the Circuit Court's May 9 order in Case No. CV-14-414, but the Court dismissed the State's first petition because the Circuit Court's May 9 order is not, standing alone, final and appealable. Today, the State has filed a Notice of Appeal of the Circuit Court's orders, and the Circuit Court has now entered a final and appealable order.

2. This year, the United States Supreme Court has granted a stay in a case where the trial court declared a state's marriage law unconstitutional. *See Herbert v. Kitchen*, No. 13A687, 134 S. Ct. 893 (Jan. 6, 2014). The Supreme Court grants a stay if there is "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 189-90 (2010) (per curiam). Thus, as a matter of law, the Supreme Court has already indicated the likelihood that the Supreme Court will ultimately affirm state marriage laws such as Amendment 83 and Arkansas Act 144 of 1997. More importantly, the Supreme Court has indicated that a stay is appropriate under the circumstances of this case, regardless of how the appellate court may rule.

3. Several district courts that have struck down laws similar to Amendment 83 have also granted requests for stays made by the States. *See Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26,

2014); *Love v. Beshear*, No. 3:13-CV-750-H (W.D. Ky. Mar. 19, 2014) (order granting stay). Most recently, a Michigan district court enjoined the State of Michigan from enforcing its constitutional marriage amendment but declined to issue a stay of its ruling. *DeBoer v. Snyder*, No. 2:12-cv-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014). On March 25, 2014, the Sixth Circuit Court of Appeals granted a stay of the district court's order pending final disposition of Michigan's appeal by the Sixth Circuit. *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014). The Sixth Circuit held that "[i]n light of the Supreme Court's issuance of a stay in a similar case, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), a stay of the district court's order is warranted." *Id.* at * 1. To date, all of the marriage decisions by trial courts over the last year have been placed under stay, and remain stayed at this time.

4. Absent a stay, there is likely to be a repetition in Arkansas of the confusion and uncertainty as seen prior to the entry of the stay by the United States Supreme Court in *Herbert v. Kitchen*, *supra*, and as already seen in Arkansas in the days since the Court's May 9 order that did not include a stay. Only this Court or the United States Supreme Court can decide the constitutionality of Arkansas's marriage laws in a way that commands the respect, allegiance, and compliance of the entire State – and until this Court or the United States Supreme Court provides that decision, any lower court ruling is subject to reversal.

5. Four factors guide the Court’s consideration of the State’s request for a stay pending appeal: (1) the State’s likelihood of success on the merits; (2) the likelihood of irreparable harm absent a stay; (3) the balance of equities; and (4) the public interest. *See Winter v. Natural Res. Defense Council*, 555 U.S. 7 (2008). Again, in a substantively identical case, the United States Supreme Court considered these factors and resolved them in favor of a stay. *Herbert v. Kitchen*, No. 13A687, 134 S. Ct. 893 (Jan. 6, 2014). These factors all lead to the same conclusion: the Court should “suspend [] judicial alteration of the status quo” on the important issues at stake in this litigation by staying any order that alters the status quo pending appeal. *Nken v. Holder*, 129 S. Ct. 1749, 1758 (2009) (quotation marks omitted).

6. The State is likely to succeed on the merits of its appeal for the reasons that the State has already set forth in the State’s exhaustive briefing on summary judgment before the Circuit Court.

7. The Circuit Court’s orders impose certain – not just likely – irreparable harm on Arkansas and its citizens. *See 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.”); *accord Maryland v. King*, 567 U.S. ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

8. The balance of equities tips in the State's favor because as explained above, *see New Motor Vehicle Bd., supra*, Arkansas and its citizens will suffer irreparable injury from halting the enforcement of the State's definition of marriage, as a matter of law. The State may also incur ever-increasing administrative and financial costs to address the marital status of same-sex couples married before the appeal is resolved.

9. Avoiding the uncertainty explained above weighs very heavily in favor of the public interest. And again, given the United States Supreme Court's willingness to grant a stay of the Utah litigation pending appeal, the United States Supreme Court has already concluded that the public interest weighs in favor of a stay.

10. The Circuit Court's orders should be stayed while this Court considers the State's appeal, in order to avoid confusion and uncertainty about the effect of the Circuit Court's orders on Arkansas marriage law. Circuit clerks across Arkansas are uncertain about whether they are required to immediately issue marriage licenses to same-sex couples, pursuant to the Circuit Court's order, or required to refrain from doing so, pursuant to Amendment 83. This Court should grant a stay immediately, to resolve the confusion and uncertainty that have arisen out of the Circuit Court's orders.

WHEREFORE, the State prays that this Court immediately issue a stay of the Circuit Court's May 9, 2014 "Order Granting Summary Judgment in Favor of the Plaintiffs and Finding Act 144 of 1997 and Amendment 83 Unconstitutional" and the Court's "Final Order and Rule 54(B) Certification" and "Order Entering 'Final Order and Rule 54(B) Certification' *Nunc Pro Tunc*" entered May 15, 2014, and prays for all other just and appropriate relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, certify that on this 15th day of May, 2014, I have served the foregoing upon the following via electronic mail attachment:

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CERTIFICATE OF COMPLIANCE

I, Colin R. Jorgensen, do hereby certify that I have submitted and served on opposing counsel an unredacted PDF document that complies with the Rules of the Supreme Court and the Court of Appeals of Arkansas. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from computer viruses. A copy of this certificate has been submitted with the paper copies filed with the Court and has been served on all parties.

/s/ Colin R. Jorgensen