UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER, *et al.*,

Plaintiffs-Appellees,

-vs- 6th Cir #14-1341
ED Mi #12-civ-10285

RICHARD SNYDER, *et al.*,

Defendants-Appellants.

PLAINTIFFS-APPELLEES' RESPONSE TO
STATE DEFENDANTS-APPELLANTS' PETITION FOR
INITIAL HEARING *EN BANC*

Now come April DeBoer and Jayne Rowse and their minor children, Plaintiffs-Appellees herein, by and through their undersigned attorneys, and in response to the State Defendants-Appellants' petition for initial hearing *en banc* in this matter state as follows:

1. For the reasons articulated in their motion to expedite the appeal, Plaintiffs-Appellees agree with the State Defendants-Appellants' assertion that the appeal in this matter should be expedited. Petition, p 4 [Document #15]. Each day the minor Plaintiffs-Appellees are left with only one legally recognized parent is a day they and all other similarly situated children are left more vulnerable and deprived of the security to which they are constitutionally entitled. Notably, the loss of a constitutional right "even for minimal periods of time, unquestionably constitutes irreparable injury".

Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir 1998), citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Newsom v. Harris*, 888 F. 2nd 371, 378 (6th Cir 1989) (same).

2. Plaintiffs-Appellees disagree, however, with the State Defendants-Appellants' assertion that hearing *en banc* will result in more expeditious consideration. To the contrary, hearing before a 3-judge pane rather than hearing *en banc* will be most likely to expedite this Court's consideration of the case.

3. The State Defendants-Appellants' other reasons in support of hearing *en banc* are also seriously flawed:

a. While the case presents issues of great public and jurisprudential significance, the State Defendants-Appellants now posture the central issue as one that does not exist. They assert that the case "presents the question whether one of our most fundamental rights – the right to vote – matters". Petition, p 5. The State Defendants-Appellants have not presented this desperate argument before; they cite no law whatever to support the assertion that a judicial finding that a state constitutional provision is unconstitutional implicates the right to vote; and well-settled law makes clear that the argument is utterly without merit, since "fundamental rights may not be submitted to vote; they depend on the outcome of no elections". *West Virginia St. Bd. of Educ.*

v. Barnette, 319 U.S. 624, 638 (1943). See also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) ("the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause");

b. *En banc* consideration of this case is not "necessary to secure or maintain uniformity of the court's decisions". F. R. App. P. 35(a)(1). *All* of the marriage and marriage-recognition cases decided since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), have found state bans on same-sex marriage and/or state recognition of marriages lawfully entered into in another state to be unconstitutional. There is no split of authority whatever, either among districts within this Circuit or among the various districts in different circuits;

c. Similar appeals pending in the Fourth, Fifth and Tenth Circuits are being heard by three-judge panels. *Bostic v. Rainey*, 4th Cir. #14-1169;[1] *DeLeon v. Perry*, 5th Cir. #14-50196;[2] *Kitchen v. Herbert*, 10th Cir #13-4178;[3]

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[1]District court decision reported at ___ F.Supp.2d ___ (E.D. Va. 2014) [2014 WL 561978].

[2]District court decision reported at ___ F.Supp.2d ___ (W.D. Tex. 2014) [2014 WL 715741].

[3]District court decision reported at 961 F.Supp.2d 1181 (D. Utah 2013).

Bishop v. Smith, 10th Cir #14-5003 and #14-5006;[4]

d. Both *Windsor*, *supra*, and *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), were decided by three-judge panels *en route* to the Supreme Court. *Cf. Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); and

e. A three-judge panel will be able to give the case the full and prompt consideration to which it is entitled.

WHEREFORE, Plaintiffs-Appellees request that this Court –

(1) grant their previously filed motion to expedite the appeal, and

(2) deny the State Defendants-Appellants' petition for initial hearing *en banc*.

Respectfully submitted,

s/Carole M. Stanyar
CAROLE M. STANYAR P34830
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(313) 819-3953
cstanyar@wowway.com

s/ Kenneth M. Mogill
Kenneth M. Mogill P17865
MOGILL, POSNER & COHEN
27 E. Flint St., 2nd Floor
Lake Orion MI 48362
(248)814-9470
kmogill@bignet.net

s/Dana M. Nessel
DANA M. NESSEL P51346

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[4]District court decision reported *sub nom. Bishop v. U. S. ex rel. Holder*, 962 F.Supp.2d 1252 (N.D. Okla. 2014).

645 Griswold, Suite 4300
Detroit MI 48226
(313)556-2300
dananessel@hotmail.com

Attorneys for Plaintiffs-Appellees

s/Robert A. Sedler
ROBERT A. SEDLER P31003
Wayne State University Law School
471 W. Palmer Street
Detroit, MI 48202
(313) 577-3968
rsedler@wayne.edu

Of Counsel for Plaintiffs-Appellees

Dated: April 11, 2014

CERTIFICATE OF SERVICE

I certify that on this date I served the foregoing document on all counsel of record through the CM/ECF system.

s/ Kenneth M. Mogill
Kenneth M. Mogill P17865
MOGILL, POSNER & COHEN
27 E. Flint St., 2nd Floor
Lake Orion MI 48362
(248)814-9470
kmogill@bignet.net

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