IN THE ARKANSAS SUPREME COURT

M. KENDALL WRIGHT, et al **PLAINTIFFS-APPELLEES**

v. **CASE NO. CV-14-427**

NATHANIEL SMITH, MD, MPH, et al **DEFENDANTS-APPELLANTS**

RESPONSE TO PETITIONS FOR EMERGENCY STAY

Come now the Plaintiffs-Appellees, M. Kendall Wright, *et al.*, by and through their attorneys, Cheryl K. Maples and Jack Wagoner, III, and for their Response to the Petition for Emergency Stay filed by the State Defendants-Appellants and the Expedited Motion for Stay filed by the White, Washington, Lonoke, and Conway County Appellants, state:

I. INTRODUCTION

1. The Defendants-Appellants filed their Petition for Emergency Stay ("Petition") in this Court on May 15, 2014, requesting that this Court stay the May 9, 2014 Pulaski County Circuit Court order and the May 15, 2014 Orders entering final judgment and Rule 54(B) certification (the "May 9th and 15th Orders") in *Wright v. Smith*, No. 60CV-2013-2662. The May 9th and 15th Orders held that Arkansas' constitutional and statutory provisions barring same-sex couples from marriage and refusing to recognize the marriages of same-sex couples who legally married in other jurisdictions violate the equal protection and due process requirements of the Fourteenth Amendment of the United States Constitution, as well as Article 2, Section 2 of the Arkansas Constitution, and the fundamental right to privacy implicit in the Arkansas Constitution.

2. The Defendants-Appellants previously filed a Motion for Immediate Stay of the May 9, 2014. This Court denied that stay and dismissed the appeal on the basis that the May 9, 2014 order was not final.

3. The Defendants-Appellants assert that the May 9th and 15th Orders should be stayed pending appeal in order to avoid alleged confusion and uncertainty about the effect of the Order on Arkansas marriage law.

4. The Plaintiffs-Appellees assert that the Petition for Emergency Stay should be denied and dismissed because the Defendants-Appellants have failed to allege facts or law establishing their entitlement to the stay requested.

II. ARKANSAS LAW REGARDING TEMPORARY RELIEF AND STAY PENDING APPEAL

5. Stays pending appeal are governed by Rule 62 of the Arkansas Rules of Civil Procedure and Rule 8 of the Arkansas Rules of Appellate Procedure – Civil. A party seeking appeal of an order may move the circuit court to stay enforcement of the order during the pendency of the appeal. *See* Ark. R. Civ. P. 62(d). Here, Defendants-Appellants filed such a motion in the Circuit Court, which was denied.

6. Although Rule 8 of the Arkansas Rules of Appellate Procedure does not provide an express standard for granting a stay of a circuit court's order pending appeal, this Court ruled in *City of Fort Smith v. Carter*, 364 Ark. 100, 107, 216 S.W.3d 594, 598 (2005) that because of "the similarities of our rules with the Federal Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of a significant precedential value."

7. In considering similar requests for stays pending appeal, federal courts have held that the party seeking a stay bears the burden of demonstrating its necessity through a four-part test, including: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder,* 556 U.S. 418, 434 (2009)

(citation omitted). "The first two factors of the traditional standard are the most critical." *Id.* With respect to likelihood of success, "[m]ore than a mere possibility of relief is required." *Id.* (citation and internal quotation marks omitted). Similarly, the stay applicant must show more than a mere "possibility of irreparable injury." *Id.* As the United States Supreme Court has observed, "[t]here is substantial overlap between these and the factors governing preliminary injunctions." *Id.*

8. In the preliminary injunction context, this Court has applied a standard that is substantially similar to the federal standard. "In determining whether to issue a preliminary injunction . . . , this court considers whether irreparable harm will result in the absence of a preliminary injunction and whether the moving party has demonstrated a likelihood of success on the merits." *Custom Microsystems, Inc. v. Blake,* 344 Ark. 536, 541, 42 S.W.3d 453, 456-57 (2001).

9. Accordingly, this Court should consider Defendants-Appellants' request for a stay in light of the four *Nken* factors and the similar considerations this Court has applied in reviewing the grant or denial of a motion for preliminary injunction. All of these factors weigh against a stay of the Circuit Court's Orders.

III. ALL OF THE RELEVANT FACTORS WEIGH AGAINST A STAY

10. The Defendants-Appellants have not shown that *any* of the relevant factors warrant a stay, much less that they meet all of the required criteria, which, as explained above, require *both* a showing of irreparable harm to the movants if the order is permitted to take effect *and* a likelihood of success on the merits. Indeed, the Supreme Court of New Jersey, faced with a case very similar to this one, refused to issue a stay of a lower court order requiring the state to marry same-sex couples. *See Garden State Equality v. Dow*, 216 N.J. 314, 79 A.3d 1036 (N.J.

2013). The court concluded not only that the state failed to show a likelihood of success on the merits of its appeal, but also that it "presented no explanation for how it is tangibly or actually harmed by allowing same-sex couples to marry" and that the harms claimed by the state were outweighed by the "immediate and concrete violations of plaintiffs' right to equal protection under the law." *Id.* at 324, 327, 79 A.3d at 1041, 1043. This Court should reach the same conclusions here and deny Defendants-Appellants' request for a stay.

A. Defendants-Appellants Cannot Make A "Strong Showing" That They Are Likely To Prevail On Their Appeal.

11. The Defendants-Appellants do not make any relevant showing, much less the requisite "strong showing," that they are likely to succeed on appeal. *Nken*, 556 U.S. at 434 (quotation omitted). The Circuit Court correctly concluded that, in light of *United States v. Windsor*, 133 S. Ct. 2675 (2013) and this Court's precedents, the Fourteenth Amendment and the Arkansas Constitution requires the State to afford equal treatment and respect to the marriages of same-sex couples validly entered into in other states, as well as to allow otherwise qualified same-sex couples to marry within the state. Indeed, nearly twenty state and federal courts have struck down similar state laws in recent years, including every federal district court to consider such laws after the *Windsor* decision.[1] In light of this overwhelming consensus that state laws

[1] *Latta v. Otter*, No. 1:13-CV-00492-CWD, 2014 WL 1909999, *29(D. Idaho May 13, 2014); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 WL 1814064, *4 (S.D. Ind. May 8, 2014); *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395, at *18 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *17 (E.D. Mich. Mar. 21, 2014); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, *6 (M.D. Tenn. Mar. 14, 2014); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *28 (W.D. Tex. Feb. 26, 2014); *Lee v. Orr*, No. 13-CV-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 1000 (S.D. Ohio 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013); *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); *Kerrigan v. Comm'r of Public*

prohibiting marriages by same-sex couples, and refusing to recognize valid marriages of same-sex couples performed in other states, violate the due process and equal protection guarantees, Defendants-Appellees fail to make a "strong showing" that they will succeed on the merits. *Nken*, 556 U.S. at 434.

12. Instead, the Defendants-Appellants merely point—without argument or explanation—to the U.S. Supreme Court's issuance of a stay in *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014), to stays issued by some federal district courts, and to the Sixth Circuit's issuance of a stay in *DeBoer v. Snyder*, No. 14-1341 (6th Cir. March 25, 2014). The mere recitation of these decisions does not suffice to show a likelihood of success on the merits, and none of them provide a reason to stay the May 9th and 15th Orders here.

13. This Court should reject Defendants-Appellants' suggestion that the Supreme Court's entry of a stay in *Herbert v. Kitchen* 134 S. Ct. 893 (Jan. 6, 2014), compels a stay here. The district court decision in *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), invalidating Utah's ban on marriage by same-sex couples, was the first reported decision of any court to address a marriage equality claim in the wake of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). While the district court's reasoning was clearly correct, at the time it was decided, it stood virtually alone as federal authority; accordingly, the stay application had to be measured against a limited jurisprudence of a single case. Since that decision, however, an unbroken wave of federal and state courts in every corner of the nation—including Arkansas, Idaho, Illinois, Indiana, Kentucky, Michigan, New Mexico, New Jersey, Ohio, Oklahoma, Tennessee, Texas, Utah, and Virginia—have come to the same conclusion: In

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Health, 957 A.2d 407, 481 (Conn. 2008); *Varnum v. Brien*, 763 N.W. 2d 862, 906-07 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 969 (Mass. 2003); *Garden State Equality v. Dow*, 82 A.3d 336, 368 (N.J. Super. Ct. Law Div. 2013); *Griego v. Oliver*, 316 P.3d 865, 888-89 (N.M. 2013).

the wake of *Windsor*, marriage equality is a constitutional imperative. Not a single court in the nation has found to the contrary.

14. In light of that extraordinary consensus, the stay application in this case, and this Court's assessment of the merits, must be measured against a substantial body of doctrine that is consistent and uniform in supporting the correctness of the Circuit Court's judgment. That body of uniform case law—virtually non-existent in *Kitchen*—differentiates this case and strongly supports the denial of a stay.

15. Defendants cite other post-*Windsor* cases granting stays, but those decisions have not performed an independent analysis of the required test. Instead, they simply cite the Supreme Court's ruling in *Kitchen*, with little or no examination of the relevant factors. For example, in *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014), the panel issued a stay without analyzing the factors because it could find "no apparent basis to distinguish this case" from *Kitchen*. *Id.* at 1. The dissent, however, noted that Michigan "ha[d] not made the requisite showing" and that, although the Supreme Court issued a stay in *Herbert v. Kitchen*, "it did so without a statement of reasons, and therefore the order provides little guidance." *Id.* at 3-4. *See also, e.g., Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (relying on the Supreme Court's ruling in *Kitchen* without any analysis of the relevant factors and despite recognizing that, unlike the expedited proceedings in *Kitchen*, "it may be years before the appeals process is completed"); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (relying solely on ruling in *Kitchen* with no analysis of factors); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (same).

16. Whatever merit rote reliance on *Kitchen* may have had in earlier cases, there is now a compelling basis for performing a substantive analysis of the required factors, including

the required balancing of harms. As the Circuit Court correctly found in denying the Defendants-Appellants' request for a stay, those factors provide no basis for granting a stay in this case. To the contrary, there "is no evidence that Defendants, the State or its citizens were harmed by the entry of the Court's" orders, it is clear that "Plaintiffs and other same-sex couples...have not been afforded the same measure of human dignity, respect and recognition by this state as their similarly situated, opposite-sex counterparts" and "a stay would operate to further damage Arkansas families and deprive them of equal access to the rights associated with marriage status in this state." *See* May 15, 2014 Order Denying Defendants' Motion for Immediate Stay at 2.

B. Defendant-Appellants Have Failed To Establish That They Will Likely Suffer Irreparable Injury In The Absence Of A Stay.

17. Defendants-Appellants have offered no evidence that they will suffer *irreparable* harm, if the May 9th and 15th Orders remain in effect while this appeal is pending. Rather, they allege only generalized harm that results when a state is enjoined from effectuating its statutes. *See* Petition at ¶ 7 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) and *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The state's reliance on such categorical pronouncements rather than a specific showing of actual harm is precisely what the Supreme Court held in *Nken* is insufficient to satisfy the requirements for a stay pending appeal. Moreover, any abstract harm that might result from the inability to enforce state laws under different circumstances is simply not present when the laws at issue are unconstitutional. *See Garden State Equal.*, 216 N.J. at 323, 79 A.3d at 1041 ("The abstract harm the State alleges begs the ultimate question: if a law is unconstitutional, how is the State harmed by not being able to enforce it?); *Joelner v. Vill. Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004 ("[T]here can be no irreparable harm...when [a government] is prevented

from enforcing an unconstitutional statute [.]") (citation omitted). Here, the Circuit Court found that Arkansas's statutory provisions barring same-sex couples from marriage and refusing to recognize the marriages of same-sex couples who legally married in other jurisdictions violate both the federal and state constitutions—a ruling that is consistent with nearly twenty other federal and state courts that have unanimously struck down similar laws across the nation. *See* fn. 1 *supra.*

18. Defendants-Appellants also contend that a stay should be issued "to avoid confusion and uncertainty about the effect of the Circuit Court's order on Arkansas marriage law," alleging that circuit clerks are uncertain about whether they are required to issue marriage licenses to same-sex couples or to comply with Amendment 83. Petition at ¶ 10. That argument has no merit. The May 9th and 15th Orders expressly declared Amendment 83 to be invalid and therefore plainly require that circuit clerks issue marriage licenses to qualified same-sex couples on the same basis as they issue marriage licenses to qualified different-sex couples. There is no basis for confusion.

19. Defendants-Appellants similarly contend that a stay should be issued "to avoid 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." Petition at ¶ 4.[2] But the irreparable harm justifying a stay must be a harm that *Defendants-Appellants* would suffer, not a purported harm to Plaintiffs-

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[2] Defendants-Appellants' assertion that they could "incur ever-increasing administrative and financial costs to address the marital status of same-sex couples married before the appeal is resolved," is wholly speculative and, in any event, does not constitute irreparable harm. *Manila School Dist. No. 15 v. Wagner*, 148 S.W.3d 244, 248 (Ark. 2004) (financial harm is not irreparable, as it can be adequately compensated by money damages) (citing *Three Sisters Petroleum v. Langley*, 72 S.W.3d 95 (Ark. 2002). The state and counties already have well-established systems to issue marriage licenses and there is no evidence that anything different would have to occur to accommodate the constitutional rights of same-sex couples.

Appellees or to third parties not before the Court. There is no uncertainty or confusion from the state's perspective; counties may simply continue to issue marriage licenses as they do in the regular course of their business. Moreover, any supposed harms that might come to third parties if same-sex couples are permitted to marry while appeals are pending are entirely reparable through ordinary legal means.

20. Indeed, the state defendants in *Garden State Equality v. Dow* asserted many of the same arguments regarding alleged irreparable harm, including the abstract harm that results when a state cannot enforce its laws and the speculative confusion that could result regarding marriages that were performed while the appeal was pending. *Garden State Equality*, 216 N.J. at 323-24, 79 A.3d at 1041. The New Jersey Supreme Court rejected those arguments because the state defendants failed to explain "how it is tangibly or actually harmed by allowing same-sex couples to marry." 216 N.J. at 32479 A.3d at 1041. This Court should do the same.

21. Notably, moreover, Defendants-Appellants address only the issuance of marriage licenses; they do not address the devastating impact of staying the May 9th and 14th Orders on the married Plaintiffs and the (now hundreds) of other married same-sex couples. Defendants-Appellants' assertion that enforcing the orders while appeals are pending will generate "confusion" entirely disregards the reality for these married couples—who must face the daily uncertainty and confusion of being respected as legally married for some purposes and in some states, but not in others. If a stay is issued, married same-sex couples in Arkansas will once again be forced to navigate a complex, bewildering, and ever-shifting terrain of uncertainty as to whether they will be respected as a legally married couple by particular federal agencies, private employers, businesses, and particular state and local governmental actors. For such couples, the notion that maintaining this untenable and chaotic "status quo" will somehow insulate them from

uncertainty and confusion has no basis in reality. Regardless of the ultimate outcome of any appeal, having certainty in the interim would provide stability for these couples; and even in the worst case scenario for such couples, in which Amendment 83 and Arkansas Code Sections 9-11-107, 9-11-109 and 9-11-208 are ultimately upheld and enforced again, no irreparable harm to them or others would flow from having their legal marriages recognized in the interim.[3]

C. The Harm Plaintiffs-Appellees Will Suffer If A Stay Is Granted Far Outweighs Any Harm To Defendants-Appellants From Complying With The Circuit Court's Orders.

22. In contrast, it is certain that Plaintiffs-Appellees and other same-sex couples will suffer continuing irreparable harm if a stay is granted. The notion that Plaintiffs-Appellees and other same-sex couples will somehow be harmed by being able to exercise the freedom to marry profoundly misconstrues the significance of the practical and dignitary rights at stake. The harms to Plaintiffs-Appellees if the May 9th and 15th Orders are stayed are immediate, real, continuing, undisputed, and irreparable. The Circuit Court found that the challenged measures violate the fundamental constitutional rights of due process and equal protection. Under well-settled law, any deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *McCuen v. Harris*, 321 Ark. 458, 467 (1995) (finding irreparable harm where a constitutional mandate was violated).

23. In addition, continuing the denial of the now established right to marry, or having one's lawful marriage treated as a nullity, independently exposes Plaintiffs-Appellees to irreparable and continuing insecurity, vulnerability, and stigma. Marriage confers a legal status

[3] In the alternative, at a minimum, this Court should not stay the May 9th and 15th Orders as applied to the married Plaintiffs in this case, who have demonstrated specific irreparable harms. *Cf. Henry v. Himes*, No. 1:14-cv-129 (S.D. Ohio May 16, 2014) (declining to stay order as applied to legally married plaintiffs).

that is intended to address both anticipated and unanticipated life events. The very purpose of marriage, in large part, is to provide security in the face of the certainty of death, the strong likelihood of eventual incapacity, and the always-present possibility of debilitating accidents or illnesses. Same-sex couples who wish to marry are subjected to irreparable harm every day that they are denied their right and forced to live without the protection and security that marriage provides. That harm is not speculative, but immediate and real.

24. For example, the University of Arkansas has announced that health insurance will be available to the same-sex spouses of university employees. *See http://www.arkansasmatters.com/media/lib/183/0/7/b/07b8c585-5cc5-41db-861f-debbecb67319/UA_Letter_on_Insurance_for_Same_Sex_Spouses.pdf* (last visited May 16, 2014). If the Circuit Court order is stayed, the same-sex spouses of university employees will be deprived of this critical protection.

25. These couples are presently harmed in facing the events of their lives in the coming days, weeks, months or years without the multiple safety nets only marriage provides. Unlike those who are married, these couples are unable to plan or approach the often unpredictable future with the certainty and security that the status of being married is intended to afford. It also bears emphasis that many of the protections marriage provides—such as the right to receive social security benefits as a surviving spouse—hinge directly on the length of the marriage. Therefore, by preventing couples who wish to marry now from doing so, staying the Circuit Court's Order would have irreparable consequences for many couples who will be denied benefits or receive significantly diminished protections as a direct result of that delay.

26. Staying the May 9th and 15th Orders would also inflict irreparable injury on all Plaintiffs-Appellees (both married and unmarried) and other same-sex couples, by exposing

them, and their children, to continuing stigma, as the Supreme Court recognized in *United States v. Windsor*. In *Windsor*, the Court echoed principles set forth in *Loving v. Virginia*, 388 U.S. 1 (1967), forty-six years earlier, finding that discrimination against same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). The Court also held that the discriminatory treatment "humiliates tens of thousands of children now being raised by same-sex couples," making "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* These stigmatic harms are equally present and debilitating here; staying the May 9th and 15th Orders would subject Plaintiffs-Appellees and their children to the irreparable injuries they inflict.

D. The Public Interest Strongly Weights Against A Stay.

27. The Defendants-Appellants are also required to establish that the public interest dictates that the court's decision on the merits should be stayed pending appeal. They make no such showing, nor could they. Since the Supreme Court's decision in *Windsor*, every state and federal court to consider similar discrimination in state marriage laws has found those restrictions to be unconstitutional. *See Bourke v. Bashear*, 2014 WL 556729 at *9 (citing cases).

28. The public has no interest in enforcing unconstitutional laws or in relegating same-sex couples and their families to a perpetual state of financial and legal vulnerability. *See, e.g., Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law.").

IV. CONCLUSION

29. In sum, the Petition fails to establish *prima facie* entitlement to a stay pending appeal. The Defendants-Appellants do not establish that irreparable harm will result if the order is allowed to stand pending appeal, and they utterly fail to address the irreparable harm that Plaintiffs-Appellees will suffer if a stay is ordered. Moreover, other than references to a variety of federal cases in which a stay was granted, the Defendants-Appellants provide no argument that they are likely to succeed on appeal in the face of an unbroken wave of state and federal cases finding similar state laws to be blatantly unconstitutional.

WHEREFORE, premises considered, the Plaintiffs-Appellees respectfully request that this Court deny the Defendants-Appellants' Petition for Emergency Stay.

Dated: May 16, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, undersigned counsel, do hereby state that a true and correct copy of the foregoing document was served upon the following counsel via email on May 16, 2014:

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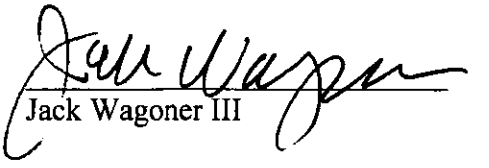
CERTIFICATE OF COMPLIANCE

I have submitted and served on opposing counsel an 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, the documents were not scanned and were converted directly from word processing files to PDF free of computer virus, and scanned by Norton. A copy of this certification has been submitted with the paper copies filed with the court and has been served on all opposing parties on May 16, 2014.



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