

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

M. KENDALL WRIGHT, et al

PLAINTIFFS

VS.

Case No. 60CV-13-2662

NATHANIEL SMITH, MD, MPH, et al

DEFENDANTS

**RESPONSE TO PLAINTIFFS’
MOTION FOR CLARIFICATION OF JUDGMENT; AND
RENEWED MOTION FOR 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 Defendants” or the “State”)¹, submit the following Response to Plaintiffs’ Motion for Clarification of Judgment; and Renewed Motion for Stay:

1. The State has requested an immediate stay of the Court’s May 9, 2014 order granting summary judgment to the Plaintiffs. As this Court has recognized in the past², a stay is warranted under the circumstances of this case. The State hereby renews its request for a stay of the Court’s May 9 order, and the State requests a contemporaneous stay of any subsequent order

¹ The State Defendants are represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as counsel for state agencies and entities when requested. *See id.* (“The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.”).

² *See* Final Order and Judgment, May 10, 2010, *Sheila Cole, et al v. Dep’t of Human Services et al*, Pulaski County Circuit Court No. CV 2008-14284 (declaring Arkansas Initiated Act 1 of 2008 unconstitutional and providing that “enforcement of this judgment is stayed without bond pending appeal in accordance with Rule 62 of the Arkansas Rules of Civil Procedure.”).

issued by the Court, or any clarification of the May 9 order. The State incorporates by reference its Motion for Immediate Stay filed at 5:02 p.m. on May 9, pursuant to Rule 10(c) of the Arkansas Rules of Civil Procedure.

2. The State agrees that the Court's May 9, 2014 order should be clarified, or that the Court should enter a separate order that addresses all of the claims in this case, and is therefore final and appealable.

3. The Court should grant a stay of the Court's May 9 order, and any subsequent order of clarification or final order issued by the Court. On January 6, 2014, the United States Supreme Court made clear that it will decide the constitutionality of traditional marriage and until that time, no lower court decision finding traditional marriage unconstitutional should operate to allow same-sex couples to immediately marry or have their marriages of other jurisdictions recognized contrary to the law of their particular States. *See Herbert v. Kitchen*, No. 13A687, 134 S. Ct. 893 (Jan. 6, 2014). 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 the Utah case, and as already seen in Arkansas in the days since the Court's May 9 order that did not include a stay. Only the Arkansas Supreme 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 the Arkansas Supreme Court or the United States Supreme Court provides that decision, any lower court ruling is subject to reversal.

4. The law governing issuance of a stay fully supports the State's request for a stay. This Court has the discretion to grant a stay of its own order. *See Ark. R. Civ. P. 62(c)* ("When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an

injunction, the court from which the appeal is taken, in its discretion, may suspend . . . an injunction during the pendency of the appeal[.]”). “When an appeal is taken by the State of Arkansas or an officer or agent thereof and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.” Ark. R. Civ. P. 62(e). The State will appeal the Court’s final order to the Arkansas Supreme Court. A stay is warranted, and no bond is required.

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 in this case. The State adopts its summary judgment briefs by reference pursuant to Ark. R. Civ. P. 10(c).

7. Should the Court grant injunctive relief to the plaintiffs without including a stay, the Court will 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 (or before a stay is obtained from the Arkansas Supreme Court).

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 Court should immediately grant a stay of its May 9 order, and include a stay with any subsequent order clarifying that order, and any separate final order that grants injunctive relief to the Plaintiffs.

WHEREFORE, the State prays that the Court immediately issue a stay of the Court's May 9, 2014 order, and that the Court include a stay with any subsequent order clarifying the Court's prior order, and any separate final order that grants injunctive relief to the Plaintiffs; and the State 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 electronically filed the foregoing with the Circuit Court Clerk using the Arkansas Judiciary's eFlex electronic filing system, which shall provide electronic notification to the following:

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