

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

SUSAN WATERS, et al.,

Appellees,

v.

**PETE RICKETTS, in his official
capacity as Governor of
Nebraska, et al.,**

Appellants.

Case No. 15-1452

**SUGGESTION OF MOOTNESS AND
MOTION TO VACATE PRELIMINARY
INJUNCTION**

COME NOW State Appellants and hereby notify the Court that no case or controversy exists between the parties and, therefore, Appellees' claims are moot. On that basis, State Appellants move the Court to vacate the preliminary injunction and remand this case with instructions to the district court to dismiss Appellees' amended complaint as moot.

INTRODUCTION

The central legal issues in this case are whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. *See* Joint Appendix ("App.") 29-33, ¶¶ 76-102. These issues were resolved by the United

States Supreme Court in *Obergefell v. Hodges*, No. 14-556, (June 26, 2015) (slip op. available at <http://1.usa.gov/1QTtTz1>).

Obergefell held that the Fourteenth Amendment requires states to license a marriage between two people of the same sex and recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. *Obergefell*, slip op. at 28. *Obergefell* has determined the rights of the Appellees, and controls over any existing Nebraska laws concerning the right to marriage or Nebraska's recognition of marriages celebrated in other jurisdictions.

Accompanying this filing is the Declaration of the Attorney General of Nebraska. Until *Obergefell*, State Appellants have principally relied upon this Court's ruling in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), in defense of Nebraska's marriage laws. The *Bruning* Court specifically upheld the constitutionality of the one man-one woman marriage provision challenged in this case. *Obergefell* has, for all relevant purposes, effectively reversed *Bruning*.

In light of *Obergefell*, the Attorney General has confirmed that the State of Nebraska will comply with the ruling of the Supreme Court. Declaration, ¶ 5. He has further declared that Nebraska officials will not enforce any Nebraska laws that are contrary to *Obergefell*.

No case or controversy exists between the parties and, therefore, this case is moot.

ARGUMENT

1. This case is moot.

“Federal courts are courts of limited jurisdiction and can only hear actual ‘cases or controversies’ as defined under Article III of the Constitution.” *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994). “The ‘case or controversy’ requirement applies at all stages of review.” *Id.* “When a case on appeal no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it.” *Id.* (citing *Preiser v. Newkirk*, 422 U.S. 395 (1975)).

As a general rule, where a law has been declared unconstitutional by a controlling court, pending requests for identical declaratory relief become moot. *Longley v. Holahan*, 34 F.3d 1366, 1367 (8th Cir. 1994) (claim moot where challenged statute was declared unconstitutional in companion case); *Thayer v. Chiczewski*, 705 F.3d 237, 256–57 (7th Cir. 2012) (claim for declaratory and injunctive relief moot in light of Seventh Circuit's invalidation of challenged law in another case); *Eagle Books, Inc. v. Difanis*, 873 F.2d 1040, 1042 (7th Cir. 1989) (claim moot where state supreme court had declared challenged statute unconstitutional).

Appellees seek injunctive relief to enjoin provisions of Nebraska law which define marriage as between one man and one woman on the grounds that such provisions violate the Fourteenth Amendment. App. 33-34, ¶¶ 103-105. Appellees are same-sex couples who variously seek to have their out-of-state marriages recognized by Nebraska (App. 10, ¶ 8; 12, ¶ 19; 14, ¶ 25; 16, ¶ 34; 16-17, ¶ 38; 18, ¶ 44) or to enter into marriage in Nebraska. App. 15, ¶ 33.

The *Obergefell* decision and the Attorney General’s Declaration provide Appellees with the prospective relief they sought. They may obtain Nebraska marriage licenses, have their foreign marriages recognized here, file married-filing-jointly tax returns, petition for divorce in Nebraska courts, and receive the marriage-dependent benefits under Nebraska law to which married heterosexual couples were entitled prior to *Obergefell*. This includes all of the example scenarios listed in Appellees’ amended complaint. App. 23-27, ¶ 68(a-s).

Moreover, this case does not fall within the exception to the mootness doctrine for cases that are capable of repetition yet evading review. *See Pena*, 42 F.2d at 1172. “In order to fall within this exception (1) there must be a reasonable expectation that the same complaining party would be subjected to the same action again (the ‘capable of repetition’ prong); and (2) the action must be in duration too short to be fully litigated prior to cessation or expiration (the ‘evading review’ prong). *Id.* (internal citations omitted).

The Supreme Court has established the meaning of the Fourteenth Amendment in this context and the Attorney General has declared the State of Nebraska will comply. Since there is no reasonable expectation that Appellees will again be subjected to the denial of the benefits of marriage (and any such denial could not reasonably evade judicial review), this exception does not apply.

2. The preliminary injunction should be vacated and the case remanded with instructions to dismiss the amended complaint.

“The established practice of the [Supreme] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See also Pena*, 42 F.2d at 1173 (applying *Munsingwear*, the Eighth Circuit vacated the district court’s denial of a preliminary injunction and remanded with instructions to dismiss as moot); *Longley v. Holahan*, 34 F.3d 1366 (8th Cir. 1994) (same posture and outcome as *Pena*); *State of South Dakota v. Hazen*, 914 F.2d 147, 151 (8th Cir. 1990).

As established above, this case is now moot. Accordingly, the appropriate course of action is to vacate the district court’s preliminary injunction and remand with instructions to dismiss as moot.

CONCLUSION

For the foregoing reasons, State Appellants respectfully request the Court hold this case is moot, vacate the preliminary injunction, and remand to the district court with instructions to dismiss as moot.

Submitted June 26, 2015.

**PETE RICKETTS, DOUG PETERSON,
LEONARD J. SLOUP, and COURTNEY PHILLIPS,
State Appellants.**

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2015, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on Appellee's counsel of record.

By: s/ David A. Lopez

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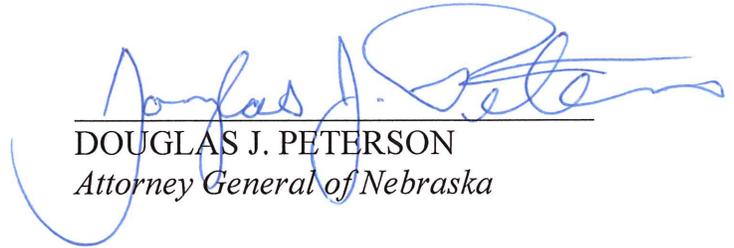
Case No. 15-1452

DECLARATION OF NEBRASKA
ATTORNEY GENERAL
DOUGLAS J. PETERSON

1. I am the Attorney General of the State of Nebraska. I submit this Declaration in connection with and in support of the Appellants' Suggestion of Mootness filed herewith.
2. Under Nebraska law, the Nebraska Attorney General has "charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof" and has the authority "to appear for the state and . . . defend, in any court or before any officer, board or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interested." *See* Neb. Rev. Stat. §§ 84-202 and 84-203. "[T]he [Nebraska] Attorney General is clothed and charged with all such common-law powers and duties except insofar as they have been limited by statute; and in the absence of some express legislative restriction to the contrary, he may exercise all such power and authority as the public interests may require from time to time." *See, State v. Douglas*, 349 N.W.2d 870, 891 (Neb. 1984), quoting with approval from *State Board of Equalization and Assessment*, 242 N.W. 609 (Neb. 1932).
3. This Declaration is submitted in exercise of my foregoing authority on behalf of the State of Nebraska, its offices, and its officials.
4. In *Obergefell v. Hodges*, the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution requires states to license a marriage between two people of the same sex and recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. *Obergefell*, No. 14-556, slip op. at 28 (June 26, 2015). *Obergefell* has effectively reversed this Court's opinion in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), which specifically upheld the constitutionality of Nebraska's marriage laws and upon which Appellants have relied, prior to *Obergefell*, for their legal position in this case.

5. The State of Nebraska will comply with the ruling of the United States Supreme Court in *Obergefell*. Nebraska officials will not enforce any Nebraska laws that are contrary to the United States Supreme Court's decision in *Obergefell*.

Executed June 26, 2015.



DOUGLAS J. PETERSON
Attorney General of Nebraska