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June 29, 2015

VIA ECF

The Honorable Patrick E. Higginbotham
The Honorable Jerry E. Smith
The Honorable James E. Graves
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *De Leon v. Perry*, No. 14-50196: Plaintiffs' Letter Advisory in Response to Order Dated June 29, 2015

Dear Judge Higginbotham, Judge Smith, and Judge Graves:

Pursuant to this Court's order dated June 29, 2015 (the "Order"), Plaintiffs Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss (collectively "Plaintiffs") submit this letter advisory. In its order, issued following the Supreme Court's decision in *Obergefell v. Hodges*, No. 14-556, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015), this Court has requested that the parties address: (1) what is the proper order or opinion that the Court should render in response to that controlling case; (2) what is the impact on this appeal of the District Court's order on June 26, 2015 to lift the stay of injunction; (3) what motions, if any, remain pending in this Court and what disposition should be made of any such motion; and (4) whether there is any reason why this matter should be returned to the District Court or whether, instead, the final rendering can and should be made by this Court.

We address these questions in turn.

1. *Obergefell* Controls This Appeal, And The Court Should Affirm the District Court's Injunction.

Obergefell squarely decided the issues raised in this appeal. The Supreme Court held that state laws prohibiting same-sex couples from marrying and denying recognition of marriages by same-sex couples married in other states violate the Fourteenth Amendment of the United States Constitution. The preliminary injunction should be affirmed in light of *Obergefell*.

2. The Court Should Dismiss Plaintiffs' Motion To Lift The Stay Of The Injunction As Moot In Light Of The District Court's Order Lifting The Stay.

In light of the District Court's order lifting its stay of the injunction, Plaintiffs' Opposed Motion to Lift the Stay of Injunction for All Parties or, in the Alternative, for Order re Birth of Child, filed February 12, 2015, is now moot. It should be dismissed as moot.

The District Court's order lifting the stay, however, does not affect this Court's jurisdiction or the subject of this appeal. That the preliminary injunction is no longer stayed does not preclude Defendants from challenging its merits in this Court. Consequently, this Court should affirm the preliminary injunction.

3. No Other Motions Remain Pending In This Court.

The only pending motion in this matter is the aforementioned motion to lift the stay, which, as just discussed, is now moot.

4. This Court Should Affirm The Injunction And Remand For Entry Of Final Judgment in Plaintiffs' Favor, Including Any Necessary Steps to Enforce that Judgment.

This Court's final question is whether there is any reason to return this matter to the District. While the Court should, at a minimum, affirm the District Court's injunction, it also has the authority to reach the merits and direct the District Court to enter judgment and a permanent injunction.

In *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that the court of appeals had jurisdiction, on an appeal from the district court's denial of a preliminary injunction, to strike down as unconstitutional portions of a Pennsylvania abortion statute, and affirmed the judgment of the court of appeals on the merits. *See id.* at 755-57. Where, as here, "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Id*. at 757.

Consistent with these principles, this Court and courts in other circuits have reached the merits of an underlying claim on appeal from a preliminary injunction. *Clements Wire & Mfg.*

Co. v. NLRB, 589 F.2d 894, 897-98 (5th Cir. 1979) (finding it "apparent that appellee will not succeed on the merits of its action" and thus vacating the preliminary injunction and remanding "with instructions to the district court to enter a judgment consistent with this opinion"); *Martinez v. Matthews*, 544 F.2d 1233, 1236-37 (5th Cir. 1976) (on appeal from preliminary injunction issued under former law, court would consider new law raised for first time on appeal); *see also Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1250 (11th Cir. 2004) (in appeal of preliminary injunction striking down permit requirements on First Amendment grounds, court would reach merits because appeal presented pure questions of law, and "our disposition dictates the outcome of the underlying claim"); *Hurwitz v. Directors Guild of Am., Inc*., 364 F.2d 67, 69-70 (2d Cir. 1966) (reversing denial of preliminary injunction but directing entry of judgment for plaintiffs on the merits, reasoning that doing so "served the obvious interest of economy of litigation" and was appropriate since the case "contained no triable issue of fact"); *United Parcel Serv., Inc. v. United States Postal Serv*., 615 F.2d 102, 106-07 (3d Cir. 1980) (reaching the merits because the case involved "a pure question of law," the legal question was "intimately related to the merits of the grant of preliminary injunctive relief," and the legal issue would not "be seen in any different light after final hearing than before"); *Doe v. Sundquist*, 106 F.3d 702, 707-08 (6th Cir. 1997) (finding that reaching the merits was "in the interest of judicial economy," since "the legal issues have been briefed and the factual record does not need expansion"); *Illinois Council On Long Term Care v. Bradley*, 957 F.2d 305, 310 (7th Cir. 1992) ("Since plaintiffs cannot win on the merits, there is no point in remanding the case for further proceedings. Therefore we affirm the district court's judgment and remand with instructions to dismiss the case on the merits."). As this court has explained, "[o]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973) (quoting 9 Moore's Federal Practice Para. 110.25[1] (2d ed. 1972)); accord *Martinez*, 544 F.2d at 1237 (quoting *Mercury*).

Accordingly, this Court may, in light of *Obergefell*, direct the District Court to enter judgment in favor of Plaintiffs; issue a permanent injunction to enjoin Defendants from enforcing Article I, Section 32 of the Texas Constitution, any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage; and take any and all steps necessary to enforce the judgment and permanent injunction.

Respectfully submitted,

/s/ Daniel McNeel Lane, Jr.

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cc: All counsel of record
[Via the Court's CM/ECF system]

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CERTIFICATE OF SERVICE

I certify that the foregoing was electronically filed on the 29th day of June, 2015, using the court's CM/ECF system which will provide a notice of electronic filing to counsel of record. I further certify that on this same date, a copy of this document was served via First Class U.S. Mail to the following:

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s/ *Daniel McNeel Lane, Jr.*
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