IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RITA JERNIGAN, et al. **APPELLEES**

v. **CASE NO. 15-1022**

LARRY CRANE **DEFENDANT**
DUSTIN MCDANIEL, et al. **APPELLANTS**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

APPELLEES' RESPONSE IN OPPOSITION TO SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE DISTRICT COURT'S ORDER AND JUDGMENT

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I. PROCEDURAL HISTORY

The District Court issued an Opinion and Order on November 25, 2014, wherein the Court concluded that Arkansas's Marriage Laws "unconstitutionally deny consenting same-sex couples their fundamental right to marry in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, (Add. 36), and "impose unconstitutional classifications on the basis of gender in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." (Add. 41.) The State Defendants filed a Notice of Appeal on December 23, 2014. The parties completed briefing on April 3, 2015. This Court then deferred oral arguments pending the decision from the Supreme Court on *Obergefell v. Hodges*. The Supreme Court issued its decision in *Obergefell* on June 26, 2015 and struck down marriage bans and anti-recognition laws in Michigan, Tennessee, Kentucky, and Ohio. In light of the Supreme Court's decision in *Obergefell*, this Court asked that the parties inform the Court of their proposals regarding disposal of this Appeal. Plaintiffs-Appellees filed a letter on July 2, 2015 stating that the Court should summarily affirm the District Court's decision. Defendants-Appellants filed a Suggestion of Mootness and Motion to Vacate on July 8, 2015. For the reasons below, the Court should deny Defendants' Suggestion of Mootness and Motion to Vacate in its entirety.

II. ARGUMENT

The Supreme Court's decision in *Obergefell* dictates the result in this case, but does not obviate the need for a final decision. Following the Supreme Court's holding in *Obergefell*, this Court is left with only one real option—summarily affirm the District Court's decision. This Court should not dismiss the appeal for mootness or vacate the District Court's decision, however, because such an outcome erases the efforts Plaintiffs-Appellees have made and the results Plaintiffs-Appellees have obtained in this case. Arkansas's marriage laws, specifically Amendment 83 to the Arkansas Constitution and Ark. Code Ann. §§ 9-11-109, 9-11-107, and 9-11-208, which define marriage as "only between a man and a woman" are still valid laws on the books in Arkansas. Defendants-Appellants have cited no authority for their claim that the Supreme Court's precedent-setting decision in *Obergefell* moots this case—a *different* case addressing *different* state laws. The District Court for the District of Idaho, the only court to address this issue in light of *Obergefell*, denied a similar motion to dismiss, noting that dismissal based on the defendants' voluntary cessation leaves the defendant "free to return to his old ways." *Taylor v. Brasuell*, 2015 WL 4139470, at *6 (D. Idaho Jul. 9, 2015)(citing *Porter v. Brown*, 496 F.3d 1009, 1017 (9th Cir. 2007)).

This Court should implement the Supreme Court's decision by summarily affirming the District Court's judgment in favor of Plaintiffs. Since the Supreme

Court's decision in *Obergefell* on June 26, 2015, the Fifth Circuit Court of Appeals ordered that District Courts in Texas, Mississippi, and Louisiana enter final judgment in favor of plaintiffs in cases challenging the constitutionality of discriminatory marriage laws, s*ee, e.g.*, *Robicheaux v. Caldwell*, 2015 WL 4032118 (5th Cir. July 1, 2015), and the district courts have now done so. *Robicheaux v. Caldwell*, 2015 WL 4090353 (E.D. La. July 2, 2015)(entering final judgment and permanent injunction in favor of plaintiffs); *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d (S.D. Miss. July 1, 2015)(same); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. July 7, 2015)(same). Other courts have lifted stays and entered final judgment for plaintiffs as well. *See Lawson v. Kelly*, Case No. 4:14-cv-00622, Dkt. No. 72 (W.D. Mo. Jul. 2, 2015)(lifting stay); *Jorgensen v. Montplaisir*, Case No. 3:14-cv-58, Dkt. No. 59 (D.N.D. Jun. 29, 2015)(entering final judgment). In fact, this Court, on June 30, 2015, entered an order vacating a stay of the District of Nebraska's injunction in *Waters v. Rickets*, Case No. 15-1452 (8th Cir. Jun. 30, 2015). This Court should follow suit here and summarily affirm the District Court and forever foreclose the issue of Arkansas's unconstitutional marriage laws raised in this case.

A. Plaintiffs-Appellees' Claims are Not Moot

Defendants-Appellants incorrectly posit that Plaintiffs-Appellees' claims are moot in light of the Supreme Court's decision in *Obergefell*. Although the Court did

hold that states must allow marriages between persons of the same sex, the Court did not directly address the Arkansas laws at issue in this case. The Supreme Court in *Obergefell* addressed marriage bans and anti-recognition laws from Michigan, Tennessee, Kentucky, and Ohio. Thus, *Obergefell* has precedential value and informs this Court's decision, but it does not dispose of the claims raised by Plaintiffs-Appellees in this case arising out of Arkansas's marriage laws.

Defendants-Appellants argue that the Supreme Court's decision in *Obergefell* and the State's voluntary adherence to the Court's directive mandate a dismissal for mootness. This argument ignores well-settled law that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)(citations omitted). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 190. The Supreme Court has stated that, to "deprive a litigant of the rewards of its efforts . . . on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000).

Defendants-Appellants cannot meet their burden. Defendants-Appellants cite

no authority for the proposition that a case is moot simply because binding precedent dictates the Court's actions with respect to questions of law. As stated in Defendants-Appellants' Suggestion of Mootness and Motion to Vacate, Defendants, along with other Arkansas State officials, are currently complying with the Court's reasoning in *Obergefell*. However, such compliance is not enough. *Obergefell* does not strike down Arkansas's Marriage Bans or Anti-Recognition Laws. *Obergefell* does not compel the State of Arkansas to allow marriages between members of the same sex or recognize such marriages performed in other states. Without a declaration that these laws are unconstitutional or an injunction prohibiting such action, the State is left to continue enforcing the *currently valid* unconstitutional laws. If the State of Arkansas resumes enforcing these laws as written, the only recourse is another lawsuit where the plaintiffs would ask for the same relief sought here—a declaration that such laws are unconstitutional and an injunction prohibiting their enforcement. Thus, Plaintiffs-Appellees still have "need of the judicial protection that [they] sought." *See Adarand Constructors, Inc.*, 528 U.S. at 224.

Defendant-Appellants claim that "[n]o live case or controversy exists, and the case is moot" confuses the issue of standing with the issue of mootness. Standing and mootness "are not interchangeable inquiries." *Taylor*, 2015 WL 4139470, at *7. The Supreme Court has specifically held that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too

speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth*, 528 U.S. at 190.[1] When a defendant claims that its own voluntary compliance moots the case, that defendant bears the burden of showing that the conduct will not happen again. *Id.* at 189–90.

As stated above, Arkansas's marriage laws are still on the books in Arkansas. The State of Arkansas has not repealed the challenged laws. Amendment 83 remains part of the Arkansas Constitution. *See* Ark. Const. Amend. 83. Arkansas's marriage statutes still define marriage as "only between a man and a woman." *See* Ark. Code Ann. §§ 9-11-107, 9-11-109, 9-11-208. Defendants-Appellants cannot guarantee perpetual compliance with *Obergefell* with these laws still in effect. Thus, Plaintiffs-Appellees still have a "live case or controversy" and Defendants-Appellants cannot meet their burden of establishing mootness.

B. The Court Should Not Vacate the District Court's Decision

Even if the Court concludes that this case is moot in light of *Obergefell* and Defendants-Appellants' voluntary cessation of the offending practices, vacatur of

[1] National organizations, such as the "Liberty Counsel," are currently actively encouraging county clerks in many states to refuse to issue marriage licenses to same-sex couples—and offering legal defense to clerks that follow their lead. At least one Arkansas County Clerk initially stated that she would refuse to issue same-sex licenses, although she later reconsidered after counsel for Plaintiffs-Appellees' counsel threatened litigation. *See* http://www.arktimes.com/ArkansasBlog/archives/2015/07/08/van-buren-clerk-says-she-wont-issue-marriage-licenses-urges-others-to-join-resistance. Plaintiffs-Appellees and the public need the certainty attending this Court's declaration that the specific Arkansas laws have been declared unconstitutional.

the District Court's decision is still inappropriate. Vacatur is an extraordinary remedy that gives this Court the ability to essentially erase Plaintiffs-Appellees' victory in the District Court. Vacatur is improper where, as here, "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24–26 (1994).[2] Vacatur of the District Court's decision is appropriate "only where mootness has occurred through 'happenstance'—circumstances not attributable to the parties." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). Defendants-Appellants cite a list of cases for the proposition that the Court should dismiss the appeal and vacate the District Court's decision, yet each of these cases deal with cases mooted by "happenstance," not the defendant's voluntary cessation of the wrongful conduct. "Mere voluntary cessation of allegedly illegal conduct does not moot a case." *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

Defendants-Appellants' Motion to Vacate asks that this Court do a disservice to the public as a whole. As the Court noted in *Bancorp*, federal courts "must also take into account the public interest" when considering a request for equitable relief, such as a motion to vacate. *Bancorp*, 513 U.S. at 26. "Judicial precedents are

[2] Although Defendants-Appellants note that "[t]he established practice of the Court in dealing with a civil case from a court in federal system which has become moot . . . is to reverse or vacate the judgment below and remand with direction to dismiss," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950), the Court later held that "the portion of Justice Douglas' opinion in *Munsingwear* describing the 'established practice' for vacatur was dictum," noting numerous cases where the Court did not follow this practice. *Bancorp.*, 513 U.S. at 23.

presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." *Id.* (citations omitted). The reasons that the Court has stated for vacatur establish that such remedy is inappropriate here. As the Supreme Court stated in *Munsingwear*, vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment." *Munsingwear*, 340 U.S. at 40. Eliminating the District Court's judgment, thereby creating the potential for relitigation of these issues, creates an undesired result—uncertainty and a potential waste of state and judicial resources. This cannot be the intended outcome of this case.

Arkansas still has the unconstitutional marriage laws on the books. Vacatur of the District Court's decision clearly offends the public interest of the people of the State of Arkansas. Although *Obergefell* informs this Court that Arkansas's marriage laws are unconstitutional and should not stand, the *Obergefell* Court *did not* strike down Arkansas's offending laws. The District Court's decision is entirely consistent with *Obergefell*. Thus, the Court should summarily affirm the decision. Without such precedent, the State of Arkansas may continue or resume violating same-sex couples' fundamental constitutional rights.

III. CONCLUSION

For the foregoing reasons, the Court should deny Defendants-Appellants'

Suggestion of Mootness and Motion to Vacate in its entirety, and summarily affirm the District Court's decision.

Respectfully submitted,

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By: /s/ Angela Mann

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CERTIFICATE OF SERVICE

I, Angela Mann, do hereby certify that, on this date, July 20, 2015, I submitted the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit for electronic filing via the Court's ECF/CM system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Angela Mann