

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

No. 14-50196

United States Court of Appeals
Fifth Circuit

FILED

July 1, 2015

Lyle W. Cayce
Clerk

CLEOPATRA DE LEON; NICOLE DIMETMAN;
VICTOR HOLMES; MARK PHARISS,

Plaintiffs–Appellees,

versus

GREG ABBOTT, in His Official Capacity as Governor of the State of Texas;
KEN PAXTON, in His Official Capacity as Texas Attorney General;
KIRK COLE, in His Official Capacity as Commissioner of the Texas
Department of State Health Services,

Defendants–Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The plaintiffs are two same-sex couples who seek to marry in Texas or to have their marriage in another state recognized in Texas. They sued the state defendants seeking (1) a declaration that Texas’s law denying same-sex couples the right to marry, set forth in Article I, § 32 of the Texas Constitution and, *inter alia*, Texas Family Code §§ 2.001 and 6.204, violates the Due Process and

No. 14-50196

Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1983 and also seeking (2) a permanent injunction barring enforcement of Texas’s laws prohibiting same-sex couples from marrying. On February 26, 2014, the district court issued a preliminary injunction prohibiting the state from enforcing any laws or regulations prohibiting same-sex couples from marrying or prohibiting the recognition of marriages between same-sex couples lawfully solemnized elsewhere. The court immediately stayed its injunction while the state appealed. After full briefing, including participation by numerous *amici curiae*, this court heard expanded oral argument on January 9, 2015.

While this appeal was under submission, the Supreme Court decided *Obergefell v. Hodges*, No. 14-556, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015). In summary, the Court declared that

the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* [, 409 U.S. 810 (1972),] must be and now is overruled, and the State laws challenged by petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Id. at *41–42. “It follows that the Court must also hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” *Id.* at *50.

Having addressed fundamental rights under the Fourteenth Amendment, the Court, importantly, invoked the First Amendment, as well:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be

No. 14-50196

condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Id. at *48–49.

Obergefell, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit¹ and should not be taken lightly by actors within the jurisdiction of this court. We express no view on how controversies involving the intersection of these rights should be resolved but instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them.

In response to *Obergefell*, the same day it was announced, the district court *a quo* issued a one-paragraph order entitled “Order Granting Plaintiffs’ Emergency Unopposed Motion To Lift the Stay of Injunction,” stating that it “hereby LIFTS the stay of injunction issued on February 26, 2014 . . . and enjoins 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.” This court sought and promptly received

¹ If it were suggested that any part of the quoted passages is *obiter dictum*, we need only recall that although “[w]e are not bound by dicta, even of our own court [,] [d]icta of the Supreme Court are, of course, another matter.” *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980). “[W]e give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court.” *Geralds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) (Reavley, J.).

No. 14-50196

letter advisories from plaintiffs and the state, asking their respective positions on the proper specific disposition in light of *Obergefell*. Because, as both sides now agree, the injunction appealed from is correct in light of *Obergefell*, the preliminary injunction is AFFIRMED. This matter is REMANDED for entry of judgment in favor of the plaintiffs. The court must act expeditiously on remand and should enter final judgment on the merits (exclusive of any collateral matters such as costs and attorney fees) by July 17, 2015, and earlier if reasonably possible.²

The mandate shall issue forthwith.

² Any pending motions are denied as moot.

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See FED. R. APP. P. & 5TH CIR. R. 39.* Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

| COSTS TAXABLE UNDER Fed. R. App. P. & 5 th Cir. R. 39 | REQUESTED | | | | ALLOWED (If different from amount requested) | | | |
|---------------------------------------------------------------------|---------------|----------------|----------------|------------|-------------------------------------------------|--------------------|----------------|------------|
| | No. of Copies | Pages Per Copy | Cost per Page* | Total Cost | No. of Documents | Pages per Document | Cost per Page* | Total Cost |
| Docket Fee (\$500.00) | | | | | | | | |
| Appendix or Record Excerpts | | | | | | | | |
| Appellant's Brief | | | | | | | | |
| Appellee's Brief | | | | | | | | |
| Appellant's Reply Brief | | | | | | | | |
| Other: | | | | | | | | |
| Total \$ _____ | | | | | Costs are taxed in the amount of \$ _____ | | | |

Costs are hereby taxed in the amount of \$ _____ this _____ day of _____, _____.

LYLE W. CAYCE, CLERK

State of _____
 County of _____

By _____
 Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

 (Signature)

*SEE REVERSE SIDE FOR RULES
 GOVERNING TAXATION OF COSTS

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than \$0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5th CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise;

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.
- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs of Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 01, 2015

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 14-50196 Cleopatra DeLeon, et al v. Gregg Abbott, et
al
USDC No. 5:13-CV-982

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that defendants-appellants pay to plaintiffs-appellees the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

Jamei R. Schaeffer

By: _____
Jamei R. Schaeffer, Deputy Clerk

Enclosure(s)

Mr. Ralph Joseph Aucoin Sr.
Mr. Keith Miles Aurzada
Mr. James Davis Blacklock
Mr. Carmine Daniel Boccuzzi Jr.
Mr. Richard Arthur Bordelon
Mr. David Christopher Boyle
Mr. Boyce C. Cabaniss
Mr. Sean Michael Callagy
Mr. George David Carter Jr.
Mr. Barry Alan Chasnoff
Mr. Michael P. Cooley
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