IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

AARON R. HUNTSMAN AND WILLIAM LEE JONES,

Plaintiffs,

v.

AMY HEAVILIN, as Clerk of the Courts of Monroe County, Florida, in her official capacity,

Defendant,

and

STATE OF FLORIDA,
Intervenor-Defendant.

CASE NO. 2014-CA-0305-K

Judge Luis Garcia

EMERGENCY MOTION TO LIFT THE STAY

Plaintiffs respectfully submit this Motion to Lift the Stay in the above-named case, pursuant to Rule 9.310(b)(2).

Rule 9.310(b)(2) provides for an automatic stay pending appeal of an adverse ruling against a public official. The rule also authorizes "the lower tribunal" to lift the stay upon motion. *Id.*

This Court should exercise its discretion to lift the automatic stay that went into effect when the Attorney General appealed this Court's July 17, 2014 ruling

that Florida's Marriage Protection Act (FMPA), which categorically bars same-sex couples from marriage, violates the federal Constitution.

In determining whether to grant Plaintiffs' motion to lift the stay, this Court must consider two principal factors: (1) "the likelihood of irreparable harm if the stay is not lifted"; and (2) "the likelihood of success on the merits by the entity seeking to maintain the stay." *Tampa Sports Authority v. Johnston*, 914 So.2d 1076, 1079 (Fla. 2d DCA 2005). Both of these factors weigh heavily in favor of lifting the stay in this case. Maintaining the stay will cause Plaintiffs irreparable harm by continuing to deprive them of "important constitutional interests," *see id.* at 1083, as well as exposing them to ongoing dignitary and practical harms that cannot be redressed by money damages or a later court order. Similarly, this Court's ruling is consistent with the unanimous conclusion of every federal and state court to consider the validity of laws such as FMPA since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2103). (See Exhibit A). In light of that consensus, it is highly unlikely that the State of Florida will succeed in obtaining a reversal of this Court's summary judgment ruling on appeal. For the reasons explained in more detail below, this Court should grant Plaintiffs' motion to lift the automatic stay.

I. Plaintiffs and Other Same-Sex Couples Will Suffer Continuing and Irreparable Harms If The Stay Is Not Lifted

First, as this Court's decision demonstrates, the Plaintiffs and other same-sex couples who wish to marry are suffering serious, irreparable harms every day the FMPA remains in effect. It is axiomatic that when deciding a stay issue, the order on appeal is presumed correct. *See Tampa Sports Authority, id.* This Court has already determined that the Plaintiffs and other same-sex couples are suffering serious constitutional violations as a result of the FMPA—including violations of and interference with the fundamental right to marry and to equal protection of the laws. *Huntsman v. Heavilin*, No. 2014-CA-305-K (July 14, 2014). It is well-settled that the infringement of a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Tampa Sports Authority*, 914 So.2d at 1080 (finding that permitting stay to remain in effect would deprive the plaintiff in that case "of his constitutional right to be free of unreasonable searches").

In addition to depriving Plaintiffs of important constitutional rights, the continued enforcement of FMPA also inflicts serious, ongoing, and irreparable dignitary and practical harms on Plaintiffs and other same-sex couples that cannot be redressed by money damages or a subsequent court order.[1] As this Court

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[1] The policy behind the automatic stay provision is that a bond from the state is not necessary because a litigant is assured that the state can pay monetary damages incurred during the appeal if the state loses the appeal. *Gonzalez v. City of Tampa, 106 So.3d 47 (Fla. 2d DCA 2013).* This policy purpose is not implicated here.

explained in its summary judgment order, "the purpose and practical effect of FMPA is that it creates a separate status for same-sex couples and imposes a disadvantage and stigma," in addition to depriving Plaintiffs and other same-sex couples of scores of critical legal rights and protections:

> For example, the right to make health care decisions for the other spouse, without a health care directive; federal tax implications; the right to support and equitable distribution of property obtained during the marriage; upon the death of the spouse, the other spouse may receive an elective share of the estate; the obligation of spouses to support children of the marriage.

Huntsman v. Heavilin, No. 2014-CA-305-K, at 8-9 (July 14, 2014).

As *Windsor* affirmed, marriage is a status of "immense import." *Windsor*, 133 S. Ct. at 2692. Florida's laws barring same-sex couples from that status and denying recognition to same-sex couples who are legally married subjects these families to severe and irreparable harms. In addition to subjecting same-sex couples and their children to profound legal and economic vulnerability and harms, those laws stigmatize their relationships as inferior and unequal. In *Windsor*, the Court echoed principles set forth in *Loving v. Virginia*, 388 U.S. 1 (1967), forty-six years earlier, finding that discrimination against same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S.Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). The Court made clear that the discriminatory treatment "humiliates tens of thousands of children now being raised by same-sex couples" and that "the law in question makes it even more difficult for the children to understand the integrity and closeness of their

own family and its concord with other families in their community and in their daily lives." *Id.*

Moreover, cases both here in Florida and across the country have already demonstrated that the inability to marry, or have an existing marriage recognized by the State, subjects gay and lesbian couples not only to catastrophic and permanent harm, but also to the intolerable threat of such harm. In a case that received national attention, in 2008, a Miami hospital refused to let Janice Langbehn into the hospital room with Lisa Pond, her longtime partner who suddenly collapsed while the couple vacationed in Florida with their children. Even though Langbehn held Pond's durable health care power of attorney, the hospital refused to honor it, informing Langbehn that Florida is an "antigay state." The hospital prevented Langbehn and the children from seeing Pond for nearly eight hours as Pond lay dying alone.[2]

Across the country, courts have granted emergency relief and denied motions to stay orders striking down state marriage bans to avoid subjecting same-sex couples and their families to the intolerable risk of suffering similarly irreparable harms. For example, a district court in Illinois granted a temporary restraining order to "medically critical plaintiffs" who, if not permitted to marry immediately, would "be deprived of significant federal rights and benefits." *Lee v.*

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[2] "Kept from a Dying Partner's Bedside," New York Times, May 18, 2009, available at http://www.nytimes.com/2009/05/19/health/19well.html?_r=0.

Orr, No. 13-CV-8719, 2013 WL 6490577, at *3 (N.D. Ill. Dec. 10, 2013). The stay of the Northern District of California's ruling in *Hollingsworth v. Perry* pending appeal cost California couple Stacey Schuett and Lesly Taboada-Hall the opportunity to legally marry before Lesly's death just six days before the Supreme Court issued its decision, leaving her partner's status a widow in legal limbo.[3] *See also Obergefell v. Wymyslo*, Case No. 1:13-cv-501, Final Order Granting Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction, slip op. at 46 (S.D. Ohio Dec. 23, 2013) (holding that incorrectly classifying plaintiffs as unmarried on a death certificate would result in severe and irreparable harm including denial of status as surviving spouse with its attendant benefits and inability to comply with decedent's final wishes); *Griego v. Oliver*, Case No. D 202 CV 2013 2757, Declaratory Judgment, Injunction, and Peremptory Writ of Mandamus, slip. op. at *4 (N.M. Dist. Ct. Sep. 3, 2013) (holding denial of right to marry constitutes irreparable harm after terminally ill plaintiff moved for temporary restraining order allowing her to marry her partner before dying); *Griego v. Oliver*, Case No. D 202 CV2013 2757, Plaintiffs Roper and Neuman's Motion for Temporary Restraining

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[3] *See* Mary Callahan, *Judge Tentatively Sides with Sebastopol Widow in Gay Marriage Case*, The Press Democrat, Sept. 17, 2013, http://www.pressdemocrat.com/article/20130917/articles/130919583; Mary Callahan, *Judge Grants Legal Recognition to Sebastopol Women's Marriage After Legal Battle*, The Press Democrat, September 18, 2013, http://www.pressdemocrat.com/article/20130918/articles/130919524.4

Order (N.M. Dist. Ct. Aug. 21, 2013) (detailing irreparable harms same-sex couple with terminally ill partner would suffer if unable to legally marry in New Mexico).

As this Court recognized: "Numerous benefits are available to married couples that form a safety net for the couples and their children that do not exist for same-sex couples at this time." *Huntsman v. Heavilin*, No. 2014-CA-305-K, at 8. Forcing Plaintiffs and other same-sex couples and their families to wait and hope for the best during the pendency of this appeal imposes an intolerable and dehumanizing burden that no family should bear.

In contrast, lifting the stay during the pendency of this appeal will not cause the state to suffer any irreparable harm. This Court has determined that while causing serious and irreparable harms to the Plaintiffs and other same-sex couples, FMPA does not serve even a single legitimate governmental purpose. *Huntsman v. Heavilin*, No. 2014-CA-305-K, at 10-11. Rather, FMPA is a rare example of a law that singles out a particular group for harm, while providing no benefit or advantage to anyone. FMPA excludes same-sex couples and their children from the equal dignity and critical legal protections of marriage, but it does not provide any additional benefits or protections to opposite-sex couples or their children.

Moreover, apart from requiring the issuance of marriage licenses to qualified same-sex couples, ceasing to enforce FMPA requires no substantive alteration in Florida's marriage laws, which impose exactly the same rights and obligations on spouses regardless of their gender. Lifting the stay will not burden or harm the

State of Florida in any way, much less cause irreparable harm.[4] In fact, as similarly noted in the *Tampa Sports Authority* decision, the equities here are "overwhelmingly tilted" against maintaining the stay.

In sum, the first factor strongly supports lifting the stay. Continued enforcement of FMPA subjects Plaintiffs to serious, irreparable harms, while enjoining its enforcement during the pendency of the appeal will not burden or harm the state in any significant—much less irreparable-way.

II. The State Has Little Likelihood of Success on the Merits on Appeal

Second, the State cannot possibly demonstrate a likelihood of success on the merits. Since *Windsor* was decided, an unbroken wave of federal and state courts across the country have concluded that state laws barring same-sex couples from marriage violate basic due process and equal protection principles. This includes courts in Colorado, Kentucky, Utah, Wisconsin, Pennsylvania, Oregon, Idaho, Arkansas, Ohio, Michigan, Tennessee, Texas, Virginia, Oklahoma, Indiana, Illinois, New Mexico, and New Jersey. *See* attached list of 24 federal and state court post-*Windsor* decisions.

This Court based its thorough and well-reasoned opinion on the Supreme Court's recent decision in *Windsor*, as well as the Supreme Court's decisions in

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[4] The potential requirement of "compelling circumstances" cited in *Tampa Sports Authority* does not apply here, because this case does not address a "planning-level governmental decision" which must be afforded judicial deference.

Loving v. Virginia, 338 U.S. 1 (1967), *Turner v. Safley*, 482 U.S. 78 (1987), and other decisions recognizing that the right to marry is fundamental and belongs to all citizens. As this Court held, the Supreme Court has held that the right to marry "resides with the individual and cannot be infringed by the State." *Huntsman v. Heavilin*, No. 2014-CA-305-K, at 6 (quoting *Loving*). "The right these plaintiffs seek is not a new right, but is a right that these individuals have always been guaranteed by the United States Constitution." *Id.*

Similarly, as this Court also held, even under rational basis review, Florida's exclusion of same-sex couples from marriage deprives them of equal protection because it singles them out for harmful treatment while failing to advance any legitimate governmental purpose. *Id.* at 10-11. Remarkably, the State was unable to identify or articulate even a single substantive justification for that exclusion. *Id.* at 10. That silence speaks volumes and strongly suggests that the State will be similarly unable to defend FMPA on appeal. And as this Court noted, the rationales offered by the Amici Curiae either fail to state a legitimate purpose or fail to show any logical connection between the asserted purpose and what FMPA actually does, which is deny protections to same-sex couples and their children. *Id.* at 10-11 (explaining that tradition alone is not a legitimate state interest and finding a complete logical disconnect between the asserted interests in encouraging procreation and promoting child welfare and the sole impact of the ban, which is to

harm same-sex couples and their children without providing any benefit to opposite-sex couples or their children).

In sum, the second factor also strongly supports lifting the stay. This Court's ruling is consistent with a strong emerging national legal consensus that laws such as the FMPA violate basic due process and equal protection principles. The State of Florida was unable to identify even a single substantive justification for FMPA before this Court and is equally unlikely to succeed on appeal.

This Court instructed the Monroe County Clerk to commence the issuance of marriage licenses to same-sex couples no sooner than July 22, 2014. The Clerk has reported to the media that she is prepared to issue the licenses. Couples are gathering in Monroe County today in anticipation of the issuance of marriage licenses. This Court's ruling should be allowed to proceed.

III. CONCLUSION

Every day that goes by, Plaintiffs and other same-sex couples are being deprived of important constitutional rights and suffering additional serious, ongoing, and irreparable dignitary, legal, and economic harms. This Court's ruling was based on a thoughtful and carefully reasoned application of the precedents that control this case and is likely to be affirmed on appeal. The relevant factors are "overwhelmingly tilted" in favor of lifting the stay. Plaintiffs therefore respectfully ask this Court to exercise its discretion under Rule 9.310(b)(2) and to lift the stay.

I CERTIFY that a copy of the foregoing and Complaint has been delivered to Adam Tanenbaum and Allen Winsor, Counsel for Intervenor-Defendant, State of Florida, Ronald Saunders, Counsel for Defendant Amy Heavilin, and Matthew Staver, Counsel for Amici, via email generated by the Florida Courts E-Filing Portal, on this 21st day of July 2014.

Respectfully Submitted,

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24 FEDERAL AND STATE COURT POST-WINDSOR DECISIONS FROM 19 DIFFERENT STATES

Cases Holding State Constitutional Amendments Violate the United States Constitution:

Huntsman v. Heavilin, (Case No. 2014 CA 305K July 17, 2014)
Rebecca Brinkman and Margaret Burd v. Karen Long and The State of Colorado, Case No. 13-CV-32572 – MDL Case No. 14MD4 (Colorado District Court for Adams County July 9, 2014)
Love v. Beshar, __ F. Supp. 2d __, 2014 WL _____ (W.D. Ky. July 1, 2014)(as to issuance of marriage licenses to couples who intervened in *Bourke*, which involved recognition only)
Kitchen v. Herbert, __ F.3d __ (10th Cir. June 25, 2014) (Utah)
Wolf v. Walker, __ F. Supp. 2d __, 2014 WL 2558444 (W.D. Wis. June 6, 2014)
Whitewood v. Wolf, __ F. Supp. 2d __, 2014 WL 2058105 (M.D. Pa. May 20, 2014)
Geiger v. Kitzhaber, __ F. Supp. 2d __, 2014 WL 2054264 (D. Or. May 19, 2014)
Latta v. Otter, __ F. Supp. 2d __, 2014 190999 (D. Idaho May 13, 2014)
Wright v. Arkansas, Case No: 60CV-13-2662 (Cir. Ct. 2d Div. May 9, 2014)
Henry v. Himes, __ F. Supp. 2d __, 2014 WL 1418395 (S.D. Ohio April 14, 2014) (only as to recognition of out-of-state marriages)
DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. Mar. 21, 2014)
Tanco v. Haslam, __ F. Supp. 2d __ , 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (preliminary injunction only as to recognition of out-of-state marriages)
De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. Feb. 26, 2014)
Bostic v. Rainey, 970 F. Supp. 2d at 456 (E.D. Va. 2014)
Bourke v. Beshar, __ F. Supp. 2d __ , 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (only as to recognition of out-of-state marriages)
Bishop v. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. Jan. 14, 2014)
Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio Dec. 23, 2013) (only as to recognition of out-of-state marriages)
Kitchen v. Herbert, 961 F. Supp. 2d at 1181 (D. Utah 2013)

Cases Holding State Statutory Bans Violate Federal Constitution:

Baskin v. Bogan, 2014 WL ___ (S.D. Ind. June 25, 2014);
Lee v. Orr, __ F. Supp. 2d __, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014)
Gray v. Orr, __ F. Supp. 2d __, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (TRO allowing couple facing serious illness to marry)

Cases Holding State Statutory Bans Violate State Constitution:

Griego v. Oliver, 316 P.3d 865 (N.M. 2013)
Garden State Equality v. Dow, 82 A.3d 336 (N.J. 2013) (declining to stay trial court decision striking down marriage ban)