DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA
THIRD DISTRICT
Case No. __________

AARON R. HUNTSMAN AND
WILLIAM LEE JONES,

L.T. CASE NO. 2014-CA-305-K

Plaintiffs/Appellees

v.

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

Defendant/Appellee,

and

STATE OF FLORIDA

Intervenor-Defendant/Appellant

MOTION TO VACATE THE STAY

Appellees/ Plaintiffs, Aaron Huntsman and William Lee Jones, respectfully submit this Motion to Vacate the Stay in the above-named case, pursuant to Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure, which authorizes this Court to vacate the automatic stay that arises when the State seeks review.

Appellant/Intervenor-Defendant, the State of Florida, appeals from the trial court's July 17, 2014 order granting final summary judgment in favor of Plaintiffs

and declaring that Florida's Marriage Protection Act (FMPA), Article I, Section 27 of the Florida Constitution, and section 741.04(1), Florida Statutes, which categorically bar same-sex couples from marriage, are unconstitutional as violative of the equal protection and due process clause of the federal constitution. (*See* Notice of Appeal, including Order on appeal, attached as Composite Exhibit A).

In the order, the lower court ordered the Monroe County Clerk of Court to "issue a marriage license to [Plaintiffs/Appellees, Huntsman and Jones], and similarly situated same-sex couples subject to the same restrictions and limitations applicable to opposite sex-couples under Florida law" to commence "no sooner than Tuesday, July 22, 2014."

This Court should exercise its discretion to vacate the automatic stay that went into effect when the state filed its notice of appeal. An Emergency Motion to Lift the Stay was filed in the lower court on July 21, 2014 and denied the same day. (See Exhibits B and C). In its Memorandum in Opposition to Lift the Stay, the State of Florida failed to address any of the criteria for the court to consider lifting the stay. (See Exhibit D). Instead, the State of Florida simply cited a list of cases from other jurisdictions across the United States which also granted stays in similar cases.

In determining whether to grant Plaintiffs'/Appellees' motion to vacate 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 vacating the stay in this case. Neither factor was addressed by the State of Florida in its opposition nor was it addressed by the trial court in its denial of the motion. Specifically, the State did not make any allegations of irreparable harm the State would suffer if the stay were lifted, and the State made no allegation of their success upon the merits of the appeal.

In *Tampa Sports Authority*, the Florida Supreme Court was faced with similar procedural facts as here, in that at the time of the rendering of their opinion, "the briefing in the appeal had just begun and [they] had not been furnished transcripts of the circuit court proceedings." *Id.* at 1077. "Therefore, when deciding the stay issue our understanding of the facts is grounded in the traditional appellate principle that must apply throughout the appeal — that is, the order on appeal is presumed correct unless or until the appellant demonstrates otherwise." *Id.* citing *Smith v. Coal. to Reduce Class Size*, 827 So.2d 959, 961 (Fla. 2002).

As in a similar case challenging the constitutionality of Florida statutes, "to the extent it rests on purely legal matters, the appropriate appellate standard of review of the lower court's injunction is *de novo*". *Operation Rescue v. Women's Health Center*, 626 So.2d 664, 670 (Fla. 1993).

Maintaining the stay will cause Plaintiffs/Appellees, as well as other similarly situated same-sex couples, irreparable harm by continuing to deprive

them of "important constitutional interests," *Tampa Sports Authority* 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, the lower 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). In light of that consensus, it is highly unlikely that the State of Florida will succeed in obtaining a reversal of the lower court's summary judgment order on appeal. For the reasons explained in more detail below, this Court should grant Plaintiffs'/Appellees' motion to vacate the automatic stay.

I. Plaintiffs/Appellees and Other Same-Sex Couples Will Suffer Continuing and Irreparable Harms if the Stay is Not Vacated

First, as the lower court's decision demonstrates, the Plaintiffs/Appellees and other same-sex couples who wish to marry are suffering serious, irreparable harms every day the FMPA remains in effect. The lower court has already determined that the Plaintiffs/Appellees 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 17, 2014) at 8. 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*, 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/Appellees of important constitutional rights, the continued enforcement of FMPA also inflicts serious, ongoing, and irreparable dignitary and practical harms on Appellees and other same-sex couples that cannot be redressed by money damages or a subsequent court order. As the trial court 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/Appellees 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 (July 17, 2014) at 8-9.

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 same sex 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.

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. 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. *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 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 the trial 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/Appellees 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, vacating the stay during the pendency of this appeal will not cause the state to suffer any irreparable harm. The lower court has determined that while causing serious and irreparable harms to the Plaintiffs/Appellees 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. Vacating the stay will not burden or harm the State of Florida in any way, much less cause irreparable harm. In fact, as similarly noted in the *Tampa Sports Authority* decision, the equities here are "over-whelmingly tilted" against maintaining the stay.

In sum, the first factor strongly supports lifting the stay. Continued enforcement of FMPA subjects Plaintiffs/Appellees 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 *Windso*r 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.

The trial 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 *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 the trial court stated, 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 the trial court found, 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 the trial 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).

This Court should reject any suggestion by the State that the Supreme Court's entry of a stay in *Herbert v. Kitchen* 134 S. Ct. 893 (Jan. 6, 2014), supports maintaining the stay. The district court decision in *Kitchen v. Herbert*, 961 F.Supp. 2d 1181 (D. Utah 2013), invalidating Utah's ban on marriage by same-sex couples, was the first reported decision of any court to address a marriage equality claim in the wake of the Supreme Court's decision in *Windsor*. While the district court's reasoning was clearly correct, at the time it was decided, it stood virtually alone as federal authority; accordingly, the stay application had to be measured against a limited jurisprudence of a single case. Since that decision, however, an unbroken wave of federal and state courts in every corner of the nation—including Arkansas, Idaho, Illinois, Indiana, Kentucky, Michigan, New Mexico, New Jersey, Ohio, Oklahoma, Tennessee, Texas, Utah, and Virginia—have come to the same conclusion: In the wake of *Windsor*, marriage equality is a constitutional imperative. Not a single court in the nation has found to the contrary.

In light of that extraordinary consensus, this Court's assessment of the merits, must be measured against a substantial body of doctrine that is consistent and uniform in supporting the correctness of the trial court's judgment. That body of uniform case law—virtually non-existent in *Kitchen*—differentiates this case and strongly supports vacating the stay.

The State may rely on other post-*Windsor* cases granting stays, but those decisions have not performed an independent analysis of the required test. Instead, they simply cite the Supreme Court's ruling in *Kitchen*, with little or no examination of the relevant factors. For example, in *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014), the panel issued a stay without analyzing the factors because it could find "no apparent basis to distinguish this case" from *Kitchen*. *Id.* at 1. The dissent, however, noted that Michigan "ha[d] not made the requisite showing" and that, although the Supreme Court issued a stay in *Herbert v. Kitchen*, "it did so without a statement of reasons, and therefore the order provides little guidance." *Id.* at 3-4. *See also, e.g.*, Bourke v. Beshear, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (relying on the Supreme Court's ruling in *Kitchen* without any analysis of the relevant factors and despite recognizing that, unlike the expedited proceedings in *Kitchen*, "it may be years before the appeals process is completed"); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (relying solely on ruling in *Kitchen* with no analysis of factors); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (same).

In sum, the second factor also strongly supports vacating the stay. The lower 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 the lower 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 gathered in Monroe County today in anticipation of the issuance of marriage licenses. The lower court's ruling should be allowed to proceed.

III. CONCLUSION

Every day that goes by, Plaintiffs/Appellees and other same-sex couples are being deprived of important constitutional rights and suffering additional serious, ongoing, and irreparable dignitary, legal, and economic harms. The lower 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 vacating the stay. Plaintiffs/Appellees therefore respectfully ask this Court to vacate the stay.

I CERTIFY that a copy of the foregoing and Complaint has been delivered to Adam Tanenbaum and Allen Winsor, Appellant/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 23rd day of July 2014.

Respectfully Submitted,

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