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CASE NO. 06-1045

IN THE SUPREME COURT OF THE UNITED STATES

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES, TERRENCE M. SCHUMACHER, SHAD DAHLGREN, HAROLD G. RICKERTSEN, TODD EHLER, and ROBERT E. BECK, III,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO APPLICATION TO STAY ENFORCEMENT OF THE FINAL ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, PENDING CERTIORARI

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I. INTRODUCTION

On December 13, 2006, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of Nebraska dated December 15, 2005, finding that Neb. Const. art. XII, §8 (known as "Initiative 300") violates the Commerce Clause of the United States Constitution. The Eighth Circuit found Initiative 300 to be unconstitutional both as being facially discriminatory against interstate commerce, and as having been adopted with a discriminatory intent. *Jones v. Gale,* 470 F.3d 1261 (8th Cir. 2006).

On December 20, 2006, the Defendants filed a "Motion to Continue Stay" in the District Court, seeking that court's approval to continue enforcing the invalidated provision pending the anticipated filing of a Petition for Writ of Certiorari in this Court. On December 26, 2006, the District Court entered an Order denying the Motion for lack of jurisdiction. Defendants also filed a Motion For Stay of Mandate in the Eighth Circuit Court of Appeals on December 20, 2006. The Plaintiffs filed a brief in opposition, and on January 10, 2007, the Eighth Circuit entered an Order denying the Motion. Pursuant to F.R.A.P. 41(a) the Mandate then issued from the Eighth Circuit on January 18, 2007.

On January 18, 2007 Defendants filed a second Motion to Stay in the District Court. The Plaintiffs filed a brief in opposition, and on January 22, 2007, the Court denied the Motion. The Defendants thereafter filed a Petition for Writ of Certiorari in this Court on January 23, 2007. On January 25, 2007 the District Court issued its Final Order and Permanent Injunction in accordance with the mandate issued by the Eighth Circuit. The Defendants/Petitioners now seek to stay enforcement of the District Court's order.

II. ARGUMENT

Three conditions must exist in order for an applicant to be granted a stay by this Court: 1) there must be a reasonable probability that certiorari will be granted; 2) there must be a significant possibility that the judgment below will be reversed; and 3) there must be a likelihood of irreparable harm if the judgment below is not stayed. *Edwards v. Hope Medical Group For Women*, 512 U.S. 1301, 1302, 115 S.Ct. 12 (1994) (Scalia, Circuit Justice). The applicants in the present case are unable to meet these criteria, and their motion to stay should be denied.

A. There is No Reasonable Probability That Certiorari Will Be Granted.

It is well established in this Court that: "the threshold barrier confronting all stay applications [is whether there is] reasonable likelihood that the petition for certiorari will be granted." *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346, 97 S.Ct. 773 (1977)(Rehnquist, Circuit Justice).

There is no reasonable likelihood or probability that certiorari will be granted in the present case for several reasons: 1) This Court has previously denied certiorari in a nearly identical case; 2) There is no split in authority among the Circuit Courts of Appeal on any issue presented by this case; 3) Both the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska have considered and rejected the Petitioners' motions to stay in those courts; and 4) The case presents no question worthy of certiorari.

1. This Court previously denied certiorari in a nearly identical case.

It is undisputed that a nearly identical state constitutional provision was invalidated by the Eighth Circuit Court of Appeals in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), and that this Court denied certiorari in that case at 541 U.S. 1037 (2004). No Justices indicated dissent from the denial of certiorari. Thus, it is not probable the Court would grant certiorari in the present case. *See South Park Indep. School Dist. v. United States*,

453 U.S. 1301, 1303, 102 S.Ct. 1, 2 (1981) (Powell, Circuit Justice) ("I cannot conclude that there is a 'reasonable probability' four members of the Court will vote to grant certiorari. The issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari.").

2. There is no split in authority among the Circuit Courts of Appeal on any issue presented by this case.

The Petitioners' motion in this Court, like those motions previously filed in the Eighth Circuit and in the District Court below, fails to identify any federal circuit court or state supreme court decision with which the Eighth Circuit's opinion conflicts. Respondents' counsel in this case have carefully reviewed the prevailing federal circuit and state supreme court decisions in this area, and are not aware of any decisions that conflict with Eight Circuit's carefully researched opinion. Therefore, it is not probable the Court would grant certiorari in this case. *See Curry v. Baker*, 479 U.S. 1301, 1302, 107 S.Ct. 5, 7 (1986) (Powell, Circuit Justice) ("There is no conflict among the Circuits.").

3. Both the Eighth Circuit and the District Court considered and rejected similar motions to stay filed by the Petitioners.

The applicants would appear to face "an especially heavy burden" in that the Eighth Circuit Court of Appeals has already considered and rejected a motion to stay filed. *Compare Edwards*, 512 U.S. at 2, 115 S.Ct. at 1302. The Eighth Circuit reviewed Petitioners' Motion to Stay under F.R.A.P. 41(d). Under the plain terms of F.R.A.P. 41(d) a movant seeking to stay issuance of a mandate from a Circuit Court pending consideration of a petition for writ of certiorari by the United States Supreme Court must show: 1) that the certiorari petition would present a substantial question and 2) there is good cause for a stay. *See John Doe I v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005). In determining such a motion the Eighth Circuit considers "whether there is a reasonable probability that the Supreme Court will grant certiorari, whether

there is a fair prospect that the movants will prevail on the merits, whether the movants are likely to suffer irreparable harm in the absence of a stay, and the balance of the equities, including the public interest." *Id.* The Defendants were unable to meet this standard in the Eighth Circuit, and their motion was denied.

4. This case presents no question worthy of certiorari.

The Petition for Writ of Certiorari presents several issues, including: whether Plaintiffs had standing to bring a Commerce Clause claim; whether Initiative 300 discriminates against interstate commerce; and whether the unconstitutional portion of Initiative 300 could have been severed from the remainder of the amendment. The Petitioners failed to convince the Eighth Circuit that these are substantial questions or that there was good cause for a stay of the mandate. *See* 8th Cir. IOP IV.F ("the court usually denies a stay unless the panel concludes there is a reasonable chance certiorari will be granted."). Furthermore, the Petitioners have failed to explain why the standing of the Plaintiffs and the severability of the unconstitutional portion of the amendment (both of which were addressed and decided unanimously in favor of the Plaintiffs by two federal courts) are worthy of consideration by the United States Supreme Court. Given the lack of a split in the circuits on any issue in this case and given the small number of cases taken by the Supreme Court, there is simply not a likelihood that certiorari will be granted in this case.

B. There is Not a Significant Possibility The Judgment Below Will be Reversed.

The assessment of this factor is the province of the reviewing Circuit Justice, and not the litigants. However, given the lack of a split in authority among the Circuit Courts of Appeal on any issue presented by this case, and in light of the unanimous and well-reasoned opinion of the Eighth Circuit, it would appear there is not a significant possibility the judgment below would be

reversed. *See Rubin v. United States of America*, 524 U.S. 1301, 1302, 119 S.Ct. 1, 2 (1998) (Rehnquist, Circuit Justice)

C. No Irreparable Harm Will Occur if the Judgment Below is not Stayed.

The Petitioners have failed to demonstrate that irreparable harm will occur if the judgment below is not stayed. On the contrary, if a stay is issued the constitutional rights of the Respondents, as adjudicated by two federal courts, will be impaired.

III. CONCLUSION

For the above reasons the Petitioners' fourth attempt to stay the judgment in this case should be denied. The Plaintiffs/Respondents have pursued their constitutional rights in the federal courts now for over two years, and are entitled to prompt relief.

DATED this 6th day of February, 2007.

Respectfully submitted,

JIM JONES, TERRENCE M. SCHUMACHER; HAROLD G. RICKERTSEN; TODD EHLER; SHAD DAHLGREN and ROBERT E. BECK, III, Respondents

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served via United States mail, postage prepaid, this 6th day of February, 2007, upon:

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