No. 15-1452

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUSAN WATERS, et al.,
Plaintiffs-Appellees.

v.

PETE RICKETTS, in his official capacity as Governor of Nebraska, et al.,
Defendants-Appellants.

INTERLOCUTORY APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA (Hon. Joseph F. Bataillon; No. 8:14cv356)

PETITION FOR REHEARING EN BANC

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COME NOW the State of Nebraska Appellants (hereinafter "Nebraska") and, pursuant to Fed. R. App. P. 35, petition this Court to rehear this appeal *en banc*. The proceedings for which rehearing is requested include those on Nebraska's suggestion of mootness (filed Jun. 26, 2015) which culminated in the panel's per curiam opinion on August 11, 2015. Nebraska seeks rehearing *en banc* of both the panel's denial of Nebraska's suggestion of mootness and of the panel's affirmance of the district court's preliminary injunction.

RULE 35(b)(1) PRELIMINARY STATEMENT

Rehearing *en banc* is warranted to bring clarity to an issue of exceptional importance: Is a plaintiff entitled to a final judgment when, during the pendency of the plaintiff's lawsuit, the plaintiff's claimed injuries have disappeared and there is no reasonable expectation that the defendants' allegedly wrongful behavior will recur? Or, is such a case rendered moot by the absence of an injury and, therefore, the absence of a case or controversy?

The panel's decision results in the "capable of repetition yet evading review" exception to the mootness rule consuming the rule itself. The ultimate result is that the Plaintiff-Appellees will achieve prevailing party status and Nebraska will be punished financially for having defended its law in reliance on the decision of *this* Court, only to fully and immediately comply with a superseding Supreme Court holding during the pendency of this appeal.

While the Appellees' challenge to Nebraska's previous prohibition and non-recognition of same-sex marriages was being litigated, the Supreme Court issued its decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which rendered Nebraska's marriage law unconstitutional and void. Nebraska registered its immediate compliance with *Obergefell* and demonstrated with overwhelming evidence, not disputed by any evidence from Appellees, that the Appellees' injuries had evaporated and that their claims were accordingly moot. The panel concluded, despite the specific broad language of *Obergefell*, that *Obergefell* did not invalidate Nebraska's law, characterized Nebraska's resulting compliance steps as "voluntary", and held that Nebraska had failed to bear its burden of demonstrating mootness. *See* Per Curiam Opinion of Aug. 11, 2015.

If the compliance steps of which Nebraska provided uncontested evidence are insufficient to demonstrate the absence of an injury and the resulting mootness of a plaintiff's claims, it is difficult to conceive what any defendant *could ever* take to so demonstrate. The result is that the panel has issued a holding which leads to the needless extension of cases in the absence of a live case or controversy, which clearly conflicts with this Court's and the Supreme Court's precedents. Clarifying this issue is undoubtedly of exceptional importance and worthy of this Court's *en banc* review, pursuant to Fed. R. App. P. 35(b)(1)(A-B).

LEGAL STANDARD

This Court has stated:

> Federal courts are courts of limited jurisdiction and can only hear actual "cases or controversies" as defined under Article III of the Constitution. The "case or controversy" requirement applies at all stages of review. When a case on appeal no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it.

Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172 (8th Cir. 1994).

ARGUMENT

I. THE PANEL DECISION EFFECTIVELY RENDERED THE MOOTNESS RULE AS UNATTAINABLE.

Nebraska disavows any efforts deny same-sex married couples benefits otherwise afforded to opposite-sex couples. To the contrary, Nebraska is seeking recognition of the fact that it is doing exactly what *Obergefell* requires by recognizing same-sex marriages in full.

Until *Obergefell v. Hodges*, Nebraska principally relied upon *this* Court's ruling in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), in defense of Nebraska's marriage laws.[1] Within an hour of the Supreme Court's release of its *Obergefell* decision, Nebraska made the following series of filings in this Court to confirm Nebraska's recognition of *Obergefell*'s requirements and,

[1] The *Bruning* Court specifically upheld the same provision originally challenged in this case and reversed a decision of the same district judge from whose order this appeal sprung. Indeed, until the moment *Obergefell* was issued, Nebraska proceeded on the basis of this Court's specific approval of the constitutionality of its marriage law.

consequently, that the Plaintiff-Appellees' alleged injuries had evaporated, and that their claims were moot:

- The Declaration of the Nebraska Attorney General, the State's chief law officer, with charge and control of all the legal business of the State, declaring that Nebraska officials will not enforce any Nebraska laws that are contrary to *Obergefell*. *See* Declaration of Douglas J. Peterson (on file).
- Evidence that the only two plaintiffs who were not yet married in another state and whose alleged injury was their inability to obtain a Nebraska marriage license *had obtained a Nebraska marriage license. See* Declaration of David A. Lopez (on file).
- The Declaration of the acting Nebraska Tax Commissioner confirming that a prior Revenue Ruling which prohibited the filing married-filing-jointly tax returns by same-sex couples *had been formally rescinded* and further indicating that a new Revenue Ruling had been promulgated which allows same-sex-married couples to file amended returns for *all open tax years*. *See* Declaration of Leonard J. Sloup (on file).
- The Declaration of the Director of the Nebraska Public Employees Retirement System ("NPERS") confirming that in any retirement plan

administered by NPERS, any public employee married to a same-sex spouse shall not be distinguished from or treated differently than any public employee married to an opposite-sex spouse. *See* Declaration of Phyllis Chambers (on file)

- The Declaration of a Nebraska Attorney General's Office confirming that the Nebraska Department of Administrative Services had formally announced that a same-sex spouse now meets the spouse eligibility requirements for employee health benefit plans. *See* Declaration of Ryan Post (on file).
- A Suggestion of Mootness made by the undersigned State counsel indicating that in each and every one of the marriage-related benefit/privilege scenarios alleged by Appellees in their amended complaint, they were now afforded exactly the same treatment in Nebraska to which only opposite-sex married couples were entitled prior to *Obergefell*. *See* Suggestion of Mootness (on file).

In the face of this demonstration of total and immediate compliance, Appellees submitted no evidence to suggest that Nebraska would deny them any benefit or privilege of marriage. Nevertheless, the panel held in that "Nebraska's assurances of compliance with *Obergefell* do not moot this case." Per Curiam Op. at 5. The panel relied on the rule that, "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." *Friends of the Earth, Inc. v. Laidlaw v. Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

The "capable of repetition yet evading review" exception to the mootness rule has been described by this Court as follows: "In order to fall within this exception (1) there must be a reasonable expectation that the same complaining party would be subjected to the same action again (the 'capable of repetition' prong); and (2) the action must be in duration too short to be fully litigated prior to cessation or expiration (the 'evading review' prong)." *Pena*, 42 F.3d at 1172.

Here, it is difficult to conceive of what other evidence Nebraska could have marshaled to demonstrate not only its compliance with *Obergefell*, but the permanent nature of such compliance. Senior Nebraska officials -- from the Governor and Attorney General to administrators with responsibility over taxes, public employee benefits, and retirement systems -- confirmed these steps. Nebraska's tax scheme was modified with the issuance of authoritative Revenue Rulings (*see* Sloup Declaration). This is not the stuff of passing, short-term compliance subject to possible reversal at the whim of some future administration.

The Appellees' substantive argument in opposition to mootness was pure speculation that maybe future Nebraska governments could in some unspecified

way violate their rights as determined by *Obergefell*. The Appellees' arguments were devoid of any description of *present* injuries and/or how they would be afforded relief by a final judgment or permanent injunction. *See Pena*, 42 F.3d at 1172 (where an order enjoining prior injurious conduct "would serve no purpose and afford plaintiffs no relief", the case was moot).

By rejecting Nebraska's mootness arguments in the context of such one-sided evidence, the panel has allowed the mootness exception to consume the rule. This is particularly true for governmental defendants who, during the course of litigation, responsibly cease enforcement of laws rendered unconstitutional by binding Supreme Court precedent applied to "all states." *See Obergefell*, 135 S. Ct. at 2607. Responsible, and immediate, compliance with binding Supreme Court precedent should be encouraged in this Circuit, not discouraged.

The panel also erred to the extent it characterized Nebraska's compliance as "voluntary." Appellees' claims were not rendered moot because Nebraska decided suddenly to recognize their marriages in a vacuum. The United States Supreme Court declared that the Constitution requires such recognition and Nebraska immediately complied with this new requirement.

For these reasons, the panel's decision -- which, given its publication, is binding precedent in this Circuit -- should not stand as written. *At minimum*, the

issue should have been remanded to the district court for factual findings on the issue of mootness.

Policy Ramifications

The outcome of the panel's opinion is that a case will go forward toward a final judgment and a permanent injunction in the complete absence of present injury to the plaintiffs. This is inconsistent with this Court's requirements for a justiciable controversy.

Even though the panel contemplated that prospective injunctive relief may be unnecessary and instructed the district court to consider "Nebraska's assurances and actions," the panel entered the inconsistent order directing the district court to enter "final judgment on the merits in favor of the plaintiffs." Per Curiam Op. at 5. The panel decision did not require any injury or ongoing violation of federal law in order to enter final judgment.

The Opinion stated that "Nebraska has not repealed or amended the challenged constitutional provision." Per Curiam Op. at 4. This sentence illustrates the importance of requiring an ongoing violation. The panel's decision suggests that even in the absence of an ongoing violation or injury, states must immediately repeal or amend unenforced and unconstitutional statutes and constitutional provisions or face liability until they do so. Not only is immediate repeal following binding Supreme Court precedent virtually impossible, but it contemplates that all

that is required to maintain a challenge to the constitutionality of a statute or constitutional provision is text on a page and a cause. The panel's decision has eliminated the requirement of an injury.

* * *

One final point is warranted. The practical result of Nebraska's foregoing arguments is sensible and consistent with justice: Appellees will be deemed to have obtained precisely the relief they sought by virtue of a controlling ruling of the Supreme Court in a separate case brought by separate plaintiffs and their separate attorneys. Their case will be dismissed as moot for the same reason other cases are dismissed when alleged injuries disappear during the course of litigation. But they will proceed secure in the knowledge that Nebraska has come into concrete compliance with the ruling which eliminated such injuries, and that in the unlikely event they experience any State action to the contrary, they could effectively seek review in federal court.

The practical result of Appellees' arguments and the panel's decision, on the other hand, is essentially punishment for responsible governance. Despite overwhelming evidence that a final judgment will provide Appellees no benefit given their now-absent injuries, such judgment and injunction will be entered by the district court. And then Appellees' attorneys will no doubt seek from Nebraska taxpayers the reimbursement of their fees on the basis that their clients are

"prevailing parties", even though their clients' relief was brought about by the work of the lawyers in *Obergefell*, a wholly separate case. If granted, Appellees' attorneys will realize a windfall made possible only by the work of others. This is, candidly, not a just result.

The people of Nebraska should not suffer potentially significant financial consequences because their government maintained a vigorous and principled defense of their duly enacted Constitutional provision (which defense was based specifically on a direct ruling by *this* Court) up to the moment the Supreme Court abrogated that ruling, at which point Nebraska immediately complied with the Supreme Court's new holding.

Accordingly, rehearing *en banc* is warranted.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Court should rehear this issue *en banc*.

Respectfully submitted August 25, 2015.

PETE RICKETTS, DOUG PETERSON, LEONARD J. SLOUP, and COURTNEY PHILLIPS, State of Nebraska Appellants.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2015, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on Appellees' counsel of record.

By: *s/ David A. Lopez*