

No. 14-2526

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VIRGINIA WOLF, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

WISCONSIN STATE APPELLANTS' MOTION TO JOIN INDIANA STATE
APPELLANTS' PETITION FOR INITIAL HEARING *EN BANC*

Wisconsin State Appellants¹ join Indiana State Appellants' petition for initial hearing *en banc* in *Baskin v. Bogan*, Case No. 14-2386 (7th Cir.), because this case presents a question of exceptional importance in the Seventh Circuit and nationally. For the reasons identified in the Indiana State Appellants' well-reasoned petition, and as further discussed below, Wisconsin State Appellants respectfully request that this Court grant an initial hearing *en banc*.

¹Defendants-Appellants Scott Walker, J.B. Van Hollen, and Oskar Anderson are collectively referred to as the Wisconsin State Appellants and individually by last name. Plaintiffs-Appellees will be referred to collectively as Plaintiffs.

PROCEDURAL HISTORY

On July 10, 2014, Wisconsin State Defendants filed their notice of appeal and docketing statement with the United States District Court for the Western District of Wisconsin, appealing the district court's judgment in *Wolf v. Walker*, Case No. 14-C-64. The next day, this Court granted Plaintiffs' motion to expedite and consolidate (Case No. 14-2526, 7th Cir. Dkt. 3), consolidating this case with *Baskin* for argument and disposition, and providing Wisconsin State Appellants twelve days to file their opening appellate brief.² Before the Court consolidated these two cases, the Indiana State Appellants filed their petition for initial hearing *en banc* (Case No. 14-2386, 7th Cir. Dkt. 26). Wisconsin State Appellants join the Indiana State Appellants' petition, adopt it by reference, and request that this Court grant an initial hearing *en banc*.

RULE 35(B) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(b), an initial hearing *en banc* is warranted because this case presents a national question of exceptional importance for the reasons discussed by the Indiana State Appellants. Wisconsin State Appellants, therefore, adopt and join all of the argument asserted by the Indiana State Appellants in their petition.

²Contemporaneous with this motion, Wisconsin State Appellants are filing an objection to the Court's expedition order, requesting an additional five days to file their opening brief and leave to file a reply brief.

STATEMENT OF FACTS AND PROCEEDINGS

The following is a short statement of facts and proceedings relating to the present case.

Plaintiffs are challenging the constitutionality of Wisconsin's traditional definition of marriage under article XIII, § 13 of the Wisconsin Constitution (the "Wisconsin Marriage Amendment") and "any and all provisions of Wisconsin's marriage statutes (Wis. Stat. ch. 765) refer[ring] to marriage as a relationship between a 'husband and wife,' if and to the extent that such provisions constitute a statutory ban on marriage for same-sex couples" (Dist. Ct. Dkt. 26:2, ¶ 1) (collectively referred to with the Wisconsin Marriage Amendment as the "Wisconsin Marriage Laws"). Plaintiffs' theory is based on an alleged fundamental right to marry the person of one's choice irrespective of gender and an alleged fundamental right to remain married. The eight Plaintiff couples claim that the Wisconsin Marriage Laws violate their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

On June 6, 2014, the district court entered a declaration that the Wisconsin Marriage Laws were unconstitutional (Dist. Ct. Dkt. 118; *Wolf v. Walker*, Case No. 14-C-64, 2014 WL 2558444 (W.D. Wis. June 6, 2014)). On June 13, 2014, the district court entered a permanent injunction, generally prohibiting Anderson or Walker from enforcing the Wisconsin Marriage

Laws (Dist. Ct. Dkt. 134). On June 19, 2014, the district court entered judgment (Dist. Ct. Dkt. 136).

Wisconsin State Appellants timely filed their notice of appeal and docketing statement with the district court on July 10, 2014 (Dist. Ct. Dkt. 143, 144).

On July 11, 2014, Plaintiffs filed their motion to expedite and consolidate (Case No. 14-2526, 7th Cir. Dkt. 3). The Court granted Plaintiffs' motion the same day in a summary order, before Wisconsin State Appellants responded, consolidating the present case (Case No. 14-2526) with *Baskin* (Case No. 14-2386) for argument and disposition (Case No. 14-2526, 7th Cir. Dkt. 6). The order specified that if Wisconsin State Appellants' object to the expedited briefing schedule, they may file a response; otherwise, extensions "will not be granted absent extraordinary circumstances" (*Id.*). The order did not contemplate a reply brief and did not schedule oral argument (*Id.*) Even if the Court grants Wisconsin State Appellants a short, five-day extension as requested by a separate motion, and provides time and leave to file a reply brief, briefing will likely be completed in this case by mid-August 2014.

ARGUMENT

The Constitutional Validity of States' Traditional Marriage Amendments is an Issue of Exceptional Importance Warranting Initial Consideration *En Banc*

Indiana State Appellants, in their petition, discussed the exceptional national importance of this and other same-sex marriage litigation and explained how this case satisfies Federal Rule of Appellate Procedure 35. Wisconsin State Appellants agree, join Indiana's petition, and adopt it by reference.

Since the Indiana State Appellants filed their petition, the Court has ordered consolidation of their cases (Case No. 14-2526, 7th Cir. Dkt. 6; Case No. 14-2386, 7th Cir. Dkt. 27). The Indiana State Appellants stated that, "if the same panel considers both cases, that circumstance would only reinforce concerns that circuit precedent on one of the most fundamental and monumental constitutional issues of our time has been made by but one-third of the Court's members." (Case No. 14-2386, 7th Cir. Dkt. 26:6-7). This potential concern is now reality.

This Court's decision, as recognized by the Indiana State Appellants, will impact the national discussion and Supreme Court resolution of same-sex marriage rights. The State of Utah has already reported that it will forego *en banc* review before the Tenth Circuit in *Kitchen v. Herbert*, No. 13-4178 (10th Cir. June 25, 2014), instead opting to immediately petition the United

States Supreme Court for certiorari. See Tribune wire reports, “Utah to appeal gay marriage ruling directly to Supreme Court,” Chicago Tribune, July 9, 2014, available at http://articles.chicagotribune.com/2014-07-09/news/chi-utah-gay-marriage-supreme-court-20140709_1_gay-marriage-ruling-traditional-marriage-highest-court (last visited July 14, 2014). If the Supreme Court grants Utah’s petition for a writ of certiorari, this will likely be the only opportunity for this full Court to address same-sex marriage issues and explain its reasoning to the litigants and the country before the Supreme Court decides this nationally important issue.

CONCLUSION

For the foregoing reasons, and for the reasons discussed by the Indiana State Appellants in their petition for initial hearing *en banc*, Wisconsin State Appellants respectfully request that the Court grant initial hearing *en banc*.

Dated this 14th day of July, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

s/Timothy C. Samuelson
TIMOTHY C. SAMUELSON
Assistant Attorney General
State Bar #1089968

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

Attorneys for Defendants,
Scott Walker, J.B. Van Hollen,
and Oskar Anderson

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542 (Samuelson)
(608) 266-8690 (Bellavia)
(608) 266-7477 (Kawski)
(608) 267-2223 (fax)
samuelsontc@doj.state.wi.us
bellaviatc@doj.state.wi.us
kawskicp@doj.state.wi.us

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, I electronically filed Wisconsin State Appellants' Motion to Join Indiana State Appellants' Petition for Initial Hearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

All parties are registered CM/ECF users and are being served by the CM/ECF system.

Dated this 14th day of July, 2014.

s/Timothy C. Samuelson
TIMOTHY C. SAMUELSON
Assistant Attorney General