

RECENT DEVELOPMENTS

*Preliminary Injunctions / Arkansas Appellate Procedure—
Arkansas Supreme Court Upholds District Court’s Denial
of Motion to Dissolve a Stipulated Preliminary Injunction*

United Food and Commercial Workers Int’l Union v. Wal-Mart Stores, Inc.,

2014 Ark. 517, ___ S.W.3d ___.

This case came before the Arkansas Supreme Court after a group of Wal-Mart associates, organized as OURWalMart, appealed an order by the Benton County Circuit Court denying their motion to dissolve or modify a stipulated preliminary injunction. Wal-Mart sought the injunction following a series of “flash mob” protests by the union at stores in Northwest Arkansas. The demonstrations involved several individuals wearing lime-green shirts singing or chanting at the front of the stores while banging on pans and plastic pails. The demonstrations lasted approximately three minutes each and included the distribution of handbills by demonstrators. The protesters intended to use the demonstrations as a means to persuade Wal-Mart to improve working conditions and to end retaliation against associates who advocated for better working conditions. After Wal-Mart sent cease-and-desist letters to OURWalMart, the union continued to organize the “flash mobs.”

Wal-Mart first filed an unfair-labor-practice (“ULP”) charge with the National Labor Relations Board on March 1, 2013, claiming the National Labor Relations Act (NLRA) prohibited such demonstrations. The ULP charge alleged that the union violated the NLRA by planning “unauthorized and blatantly trespassory” in-store demonstrations. In addition, Wal-Mart’s ULP charge listed seventy events in which union participants “invad[ed]” stores and refused to leave after directed to do so by store management. OURWalMart also filed complaints with the NLRB, and Wal-Mart ultimately filed suit

in Benton County Circuit Court on May 14, 2013, seeking only injunctive relief. On June 3, 2013, Wal-Mart petitioned for a temporary restraining order (“TRO”). Following a brief hearing, the court entered the TRO the same day. OURWalMart postponed the evidentiary hearing for later in the week after Wal-Mart delivered a large quantity of paperwork at the TRO hearing. OURWalMart later agreed to allow the circuit court to convert the TRO into a preliminary injunction, but no evidentiary hearing was ever held.

OURWalMart filed a motion to dissolve or modify the preliminary injunction on October 4, 2013, conceding that nothing had changed since the court entered the preliminary injunction. However, OURWalMart argued that Wal-Mart’s ULP charge preempted the state court action. Wal-Mart asserted that the union could not “recant” its stipulation to the preliminary injunction and that the union was judicially estopped from seeking to dissolve the injunction. A circuit court denied the OURWalMart’s motion to dissolve the preliminary injunction, noting that it was entered following stipulation by both parties. OURWalMart appealed.

The Arkansas Supreme Court noted that an injunction may be granted if a petitioner makes four showings: (1) the petitioner is threatened with irreparable harm; (2) the harm outweighs any injury that may be inflicted on other parties should the injunction be granted; (3) the petitioner is likely to succeed on the merits; and (4) the public interest weighs in favor of the injunction. OURWalMart argued that the circuit court erred by refusing to set aside or modify the preliminary injunction on two grounds. First, the organization alleged that Wal-Mart failed to prove a likelihood of irreparable harm because the corporation did not present evidence of any harm. Second, OURWalMart claimed that Wal-Mart failed to prove a substantial likelihood of success on the merits because the NLRA preempted the suit in state court. Wal-Mart advanced several arguments in opposition, most notably that OURWalMart’s motion was barred by the principle of judicial estoppel. The corporation also “challenged the merits of the union’s preemption argument.”

Because the circuit court’s written order stated only that it was “persuaded by the arguments advanced by [Wal-Mart] and accordingly orders that [OURWalMart’s] Motion to Dissolve

should be and hereby is denied,” the Arkansas Supreme Court found that Wal-Mart’s judicial estoppel argument and merit-based preemption argument both served as bases for affirming the circuit court’s decision. Indeed, OURWalMart had failed to address judicial estoppel in its opening brief. Because the circuit court based its decision on more than one independent ground not challenged by OURWalMart on appeal, the Arkansas Supreme Court concluded that it must summarily affirm the denial of OURWalMart’s motion to dissolve the preliminary injunction.

Special Justice John V. Phelps concurred with the majority.¹ He wrote separately to emphasize the language of Arkansas Rule of Civil Procedure 65, which “provide[d] the umbrella under which [Wal-Mart’s] proof and evidence was submitted.” Special Justice Phelps believed that Wal-Mart was not entitled to relief outside the evidentiary demands of Rule 65. The concurring opinion also called attention to the limitations of stand-alone injunctive orders.

1. The opinion indicated that Chief Justice Hannah also concurred with the majority, but he did not author a separate concurring opinion.

*Criminal Law—Arkansas Supreme Court Overturns
Sentences of Life with the Possibility of Parole for Inmate
Convicted in 1978*

Hale v. Hobbs,

2014 Ark. 405, ___ S.W.3d ___.

In 1978, Billy Ray Hale entered negotiated pleas of guilty to one count of first-degree murder, four counts of aggravated robbery, and one count of first-degree battery. Hale received concurrent sentences of life imprisonment for the first-degree murder charge and each aggravated-robbery charge and a sentence of twenty years for the battery charge. The sentencing orders each stated, in part, “Defendant is to serve one-third (1/3) of said sentence(s) before becoming eligible for parole.”

In 1996, Hale sought a declaratory judgment in Lincoln County Circuit Court stating that he was eligible for parole despite receiving life sentences. The court denied his petition for relief, concluding that persons receiving life sentences are not eligible for parole pursuant to Arkansas Code Annotated section 16-93-604. The Arkansas Supreme Court affirmed.

Hale filed a petition for a writ of habeas corpus on January 31, 2013 in Lee County Circuit Court, arguing that the sentencing orders in his case were facially invalid, that he had involuntarily entered his negotiated guilty pleas, that he had ineffective assistance of counsel at trial, that the prosecution violated *Brady v. Maryland*,² and that the life sentences for murder and robbery were unconstitutional because he was a minor when sentenced. The circuit court denied his petition. Hale made three arguments on appeal: (1) the trial court lacked the authority to sentence him to a term of life imprisonment with the possibility of parole after one-third of the term of imprisonment was served; (2) the four sentences of life with the possibility of parole for the robbery charges constituted the cruel and unusual punishment in violation of the Eighth Amendment

2. *Brady* held that a criminal defendant’s due process rights are violated where the prosecution withholds evidence that “is material either to guilt or to punishment.” See 373 U.S. 83 (1963).

because Hale was a minor when he received them;³ and (3) the life sentence for the first-degree murder charge similarly violated the Eighth Amendment.⁴

On appeal, the Arkansas Supreme Court first reiterated that sentencing in Arkansas is entirely a matter of statute and that a sentence is illegal if the law does not authorize the particular sentence imposed. At the time Hale committed the offenses, aggravated robbery and first-degree murder were both punishable by a sentence of not less than five years nor more than fifty years or life under the relevant sentencing provisions. The parole-eligibility statute then in effect stated that “individuals sentenced to life imprisonment . . . shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency.”

The court then pointed out that, as a general rule, “life means life” and “the legislature has not provided for sentence of life with the possibility of parole in over forty years.” In each of the three sentencing orders, Hale was sentenced to life with the possibility of parole. Therefore, the court held that the sentencing court exceeded its statutory authority by sentencing Hale to life *with* the possibility of parole. Accordingly, the sentencing orders were facially invalid, and the court reversed the circuit court’s denial of Hale’s petition. The case was remanded for resentencing.

3. Hale made this argument pursuant to the United States Supreme Court’s holding in *Graham v. Florida*. See 560 U.S. 48 (2010).

4. Hale also made this contention pursuant to a recent opinion issued by the Court. See *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

*Arkansas Civil Procedure—Arkansas Supreme Court
Declares Service of Process by Electronic Mail Insufficient
on the Facts of a Particular Case*

Steward v. Kuettel,

2014 Ark. 499, ___ S.W.3d ___.

After the death of his niece, James L. Steward, Jr. created a website to express his dissatisfaction with the investigation of her death. In February 2012, Adam Kuettel sued Steward, alleging that Steward published several defamatory statements about him on the website. Kuettel contended that each statement was false, and he requested an injunction ordering Steward to remove the website and any other online postings made by Steward about Kuettel.

Kuettel’s lawyer obtained a Tennessee address for Steward and attempted to serve him at that address on two occasions. However, Steward no longer lived at the address and further attempts to ascertain a correct address proved unsuccessful. Kuettel filed a “Motion for Service Under Rule 4(e)(5)” on April 13, 2012, requesting the court permit service of process via electronic mail. The proposed service of process would be sent to the email address listed on the website created and maintained by Steward—an address a local news reporter had used to communicate with Steward on a previous occasion. The motion proposed for the inclusion of the summons and complaint as attachments and the use of Cyber Investigation Services, LLC to ensure Steward received the email, summons, and complaint. The email would also include a tracking pixel that would transmit a confirmation to the sender when the email was opened and when the attachments were viewed.

The trial court granted Kuettel’s motion on April 17, 2012 in an order that stated, “when Plaintiff receives confirmation via tracking pixel that the email giving notice of this lawsuit has been opened, sufficient service of process on [Defendant] will have occurred.” Kuettel then filed a motion for default judgment on June 21, 2012, arguing he was entitled to default judgment under Arkansas Rule of Civil Procedure 55(a)(1) because he successfully served Steward on April 27, 2012 and the deadline to respond—May 29, 2012—had passed. In the

filing, Kuettel submitted detailed tracking information, such as the number of times the email was read, read duration, the recipient's IP address, and the recipient's location and internet service provider. The circuit court granted a default judgment in favor of Kuettel on June 28, 2012.

On June 17, 2013, Steward filed a motion to set aside the default judgment pursuant to Arkansas Rule of Civil Procedure 55(c)(2). He contended that the judgment was void due to insufficient service of process, or alternatively, that it should be set aside due to mistake or excusable neglect under Rule 55(c)(1). Steward stated that he received thousands of emails at the address in question. Steward also claimed that he vaguely remembered receiving an email from someone claiming to be an attorney in Ohio but he discarded the email after he was unable to open the message or any attachments. Kuettel argued the service was valid because the tracking pixel confirmed the email was successfully read on April 27, 2012.

At the hearing on the motion, Steward asserted that the tracking pixel did not confirm whether the attachments had been opened, so no proof existed that he had ever received sufficient service of process. The court then provided Kuettel with more time to determine whether the attachments were opened. Further investigation revealed that the tracking pixel on the attachments indicated that the recipient of the email did not try to open the attachments. Ultimately, the court denied the motion to set aside the default judgment, and Steward appealed.

Before the Arkansas Supreme Court, Steward argued that the default judgment was void for insufficient service of process. After noting general disfavor of default judgments, the court pointed out that service requirements must be strictly construed and compliance must be exact. Rule 4(e) states, in relevant part, "[w]henever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made . . . [a]s directed by the court." The method of service ordered by the court must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The Arkansas Supreme Court ultimately held that "we cannot say, under the facts of this case, the alternative method of service crafted by the circuit court was reasonably calculated to

give actual notice of the lawsuit.” However, the court apparently assumed, without deciding, that service of process by electronic mail may be permissible under Rule 4(e)(5). However, the court found the alternative service of process to be insufficient in this case because it was not reasonably calculated to give Steward actual notice. Therefore, the default judgment was void, and the circuit court’s ruling was reversed.

Attorney's Fees—Fees May Be Awarded Under Arkansas Deceptive Trade Practices Act Regardless of Overall Prevailing Party

G & K Services Co., Inc. v. Bill's Super Foods, Inc.,

766 F.3d 797 (8th Cir. 2014).

G & K Services, a Minnesota corporation, sued Bill's Super Foods, an Arkansas corporation, seeking liquidated damages following an alleged breach of contract. Bill's counterclaimed, asserting both common-law claims and an alleged violation of the Arkansas Deceptive Trade Practices Act (ADTPA). Following a trial in May 2013, a jury awarded G & K \$50,837.92 in liquidated damages on its breach of contract claim. The jury also found in favor of G & K on Bill's common-law counterclaims. However, the jury returned a verdict in favor of Bill's on the ADTPA counterclaim.

After trial, G & K moved for attorney's fees pursuant to language in the underlying contract between the parties and Arkansas Code Annotated section 16-22-308, the state's "prevailing party rule." Bill's moved for attorney's fees under the ADTPA. A federal district court found that G & K was eligible to recover fees as the prevailing party under the prevailing party statute, and it awarded \$82,766.50 in attorney's fees.⁵

Bill's moved for reconsideration, arguing it was entitled to attorney's fees under the ADTPA even though it was not the prevailing party in the overall action. The federal district court denied Bill's motion because Bill's failed to provide any direct, binding authority that required an award of attorney's fees under the ADTPA. The court also held that no authority supported Bill's argument that the "prevailing party rule" is trumped by the ADTPA. Bill's appealed.

The Eighth Circuit Court of Appeals ultimately rejected Bill's challenge to the district court's award of attorney's fees to G & K, holding that the documentation was sufficient to support such an award and the district court did not abuse its discretion.

5. This amount reflected a reduction in the requested amount for time devoted by G & K to unsuccessful causes of action and excessive time spent on jury instructions.

However, the court also conducted an extensive examination of attorney's fees under the ADTPA. The relevant statutory language, found at Arkansas Code Annotated section 4-88-113(f), states "[a]ny person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney's fees."

The court first looked to Arkansas Supreme Court rulings on the issue, citing *FMC Corp. v. Helton*,⁶ a case in which the court stated in dicta that "a trial court is not required to award attorney's fees." After comparing this language to that of the relevant statutory provisions, the Eight Circuit concluded that attorney's fees are not mandatory under the ADTPA, but are permitted. The appeals court concluded that the district court interpreted the "prevailing party rule" to mean there can only be one prevailing party in the litigation and that only the prevailing party is entitled to attorney's fees.

While the district court concluded that Bill's was not entitled to fees because the ADTPA did not "trump" the "prevailing party rule" and G & K was the prevailing party, the Eighth Circuit disagreed. The court found that the ADTPA "establishes an independent basis for awarding fees, and [section] 4-88-113(f) does not restrict awards to a party that prevails in whatever larger litigation involves a claim under the Act." Therefore, any party who prevails on a cause of action under the ADTPA is eligible for an award of attorney's fees, even if another party prevails in the overall action. The court affirmed the award of attorneys fees to G & K but remanded the case for consideration on the award of fees to Bill's under the ADTPA.

6. 360 Ark. 465, 202 S.W.3d 490 (2005).

*Federal Civil Procedure—Prosecutorial Immunity Cannot
Serve as Grounds for a Section 1915(g) “Strike”*

Castillo-Alvarez v. Krukow,

768 F.3d 1219 (8th Cir. 2014).

Juan Humberto Castillo-Alvarez, a Minnesota inmate, sought leave to proceed *in forma pauperis* in an action brought under Title 42, Section 1983 of the United States Code. A federal district court concluded that Castillo-Alvarez had three “strikes” within the meaning of Title 28, Section 1915(g), which led the district court to deny *in forma pauperis* status and dismiss Castillo-Alvarez’s complaint. Section 1915(g) defines a “strike” as “an action or appeal . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim.”

The Eighth Circuit Court of Appeals examined the disposition of Castillo-Alvarez’s cases labeled by the district court as “strikes.” Two cases were dismissed based on grounds explicitly addressed by Section 1915(g). One case was dismissed for failure to state a claim, and a second case was dismissed because all of Castillo-Alvarez’s alleged causes of action either failed to state a claim or were deemed frivolous. Castillo-Alvarez’s third case, however, was dismissed pursuant to Title 28, Section 1915A(b)(2) after the court concluded that the only named defendant was entitled to prosecutorial immunity.

Clarifying what types of dismissals count as a “strike” under Section 1915(g), the Eighth Circuit held that “[d]ismissals based on immunity are not among the types of dismissals listed as strikes in [S]ection 1915(g).” Therefore, because the district court in Castillo-Alvarez’s third case did not state that the action failed to state a claim or was frivolous or malicious, the dismissal was not a strike under Section 1915(g). The court granted leave for Castillo-Alvarez to proceed *in forma pauperis* on the appeal, vacated the district court’s dismissal based on Section 1915(g), and remanded the case for further proceedings.

*Constitutional Law / Same-Sex Marriage—United States
District Judge Kristine Baker Declares Arkansas’s
Marriage Laws Unconstitutional*

Jernigan v. Crane,

No. 4:13-cv-00410 KGB, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014).

Two lesbian couples living in Arkansas, each in an exclusive, long-term relationship, challenged Arkansas’s laws prohibiting same-sex marriage.⁷ The plaintiffs pleaded six claims in their complaint: (1) deprivation of the fundamental right to marry; (2) deprivation of a liberty interest in valid marriages entered into under the laws of other states; (3) deprivation of autonomy, family privacy, and association; (4) deprivation of the fundamental right to travel; (5) discrimination on the basis of sexual orientation; and (6) discrimination on the basis of gender. Specifically, the plaintiffs asserted that they could not receive surviving-spouse benefits under each other’s retirement plans and could not obtain a family health insurance plan because they could not legally marry under Arkansas law. The plaintiffs alleged that Arkansas’s laws prohibiting same-sex marriage excluded same-sex couples from marriage and forbade the recognition of legitimate same-sex marriages established under the laws of other states, both of which violated the United States Constitution.

Amendment 83 to the Arkansas Constitution defines marriage as “consist[ing] only of the union of one man and one woman.” Arkansas Code Annotated section 9-11-109 defines marriage in similar terms and declares that all marriages of same-sex couples shall be void. While Arkansas law recognizes marriages entered into in other states, it specifically excludes same-sex marriages under section 9-11-107. Finally, section 9-11-208 only recognizes marriages between “man and woman,” prohibits clerks from issuing marriage licenses to same-sex couples, forbids recognition of same-sex marriages entered into in other states, and declares unenforceable any contractual or

7. See ARK. CONST. amend. 83; ARK. CODE. ANN. §§ 9-11-107, -109, -208 (Repl. 2013).

other rights established by a same-sex marriage organized under the law of another state.

The Pulaski County Circuit Clerk denied the plaintiffs' applications for marriage licenses. The clerk's office refused to issue the marriage licenses because amendment 83 and Arkansas Code Annotated section 9-11-108 prohibited the issuance of a marriage license to a same-sex couple. In response, the plaintiffs sued the Pulaski County Clerk Larry Crane and various other state officials. The defendants promptly filed a motion to dismiss the lawsuit. The defendants also moved for summary judgment. A federal district court held a hearing on all motions on November 20, 2014.

The defendants advanced four arguments in support of their motion to dismiss. First, they argued the claims against two defendants should be dismissed for insufficient service of process. Second, they contended the abstention doctrine from *Younger v. Harris*⁸ directed the district court to refrain from exercising jurisdiction because a similar suit was then-pending before the Arkansas Supreme Court. Third, the defendants asserted that the court lacked jurisdiction because the doctrine of state sovereign immunity barred the claims against them. Fourth, the defendants sought to dismiss the lawsuit for failure to state a claim upon which relief could be granted. The court quickly dismissed the defendants' service of process contention and proceeded to the remaining three arguments.

The defendants pointed to *Wright v. Smith* as a parallel action pending before the Arkansas Supreme Court. While the abstention doctrine authorizes a federal court to decline jurisdiction if adjudication in federal court would unduly interfere with the state court proceedings, abstention is a disfavored exception to the duty of a federal court to adjudicate the case before it. Abstention is required under *Younger* if the following elements are present: (1) an ongoing state judicial proceeding involving the federal plaintiffs exists; (2) that proceeding implicates important state interests; and (3) the proceeding allows the federal plaintiff an adequate opportunity to assert federal claims. Judge Baker concluded that abstention under *Younger* was not appropriate for two reasons. First, the plaintiffs were not a party in *Wright* and could not assert their

8. 401 U.S. 37 (1971).

constitutional claims in that litigation. Second, none of the “exceptional circumstances” to which *Younger* applies were present in the case. Accordingly, the court declined to apply *Younger* and exercised jurisdiction in the case.

The district court next addressed abstention under *Railroad Commission of Texas v. Pullman Co.*,⁹ a case which held that federal courts should not exercise jurisdiction “when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.”¹⁰ The court concluded that *Pullman* abstention did not apply to the instant case because the challenged laws could not be interpreted to “avoid or modify the federal constitutional questions raised by plaintiffs.” The court then looked to the abstention doctrine under *Colorado River Water Conservation District v. United States*.¹¹ The court acknowledged that the *Colorado River* factors should be considered but determined that it had not “assumed concurrent jurisdiction over the same res as any Arkansas state court.” Thus, the court held that *Colorado River* abstention did not apply. The court also discussed abstention under *Burford v. Sun Oil Co.*,¹² which held that federal district courts should dismiss cases that present questions of complex state administrative procedure and thus require centralized decision making. Judge Baker ruled that the case involved federal constitutional questions “squarely within the province and competence of a federal court.” Therefore, the court declined to abstain under *Burford*.

Finally, the court examined abstention under the *Rooker-Feldman* doctrine,¹³ a rule of law that provides that the United States Supreme Court is the only federal court that can directly review state court decisions. Courts limit the doctrine to cases in which a losing party in a state court case brings a federal suit alleging that the state court ruling was unconstitutional.¹⁴ Concurrent state and federal litigation involving similar issues, however, does not trigger dismissal pursuant to the *Rooker-Feldman* doctrine. Because the plaintiffs had not lost in state

9. 312 U.S. 496 (1941).

10. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

11. 424 U.S. 800 (1976).

12. 319 U.S. 315 (1943).

13. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

14. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

court at the time of the litigation, their constitutional challenges were permissible under *Rooker-Feldman*. Accordingly, the court denied the defendants' motion to dismiss on abstention grounds.

Regarding the defendants' sovereign immunity argument, the district court confirmed that state officials may be sued to enjoin the enforcement of an allegedly unconstitutional state law if the particular state official sued has a connection with the enforcement of the law. Because each defendant in the case satisfied this requirement, Judge Baker ruled that they were proper defendants and declined to dismiss them pursuant to state sovereign immunity.

The court next turned to the merits. The defendants argued that two cases controlled the outcome of the case. First, the defendants argued *Baker v. Nelson*¹⁵ served as controlling precedent that required dismissal. In *Baker*, the United States Supreme Court summarily dismissed a case that upheld a ban on same-sex marriage "for want of a substantial federal question."¹⁶ However, Judge Baker recognized that opinions issued by the Court in the years following *Baker* demonstrated significant "doctrinal developments" with respect to constitutional issues involving same-sex relationships. The court then cited *United States v. Windsor*,¹⁷ a landmark decision by the Court in 2013, for the proposition that the states maintain the power to regulate domestic relationships, but must do so subject to, and within the confines of, "the constitutional rights of persons." After observing trends across the federal judicial system, the court concluded that *Baker* was no longer controlling in light of recent doctrinal developments.

Second, the defendants noted that *Citizens for Equal Protection, Inc. v. Bruning*¹⁸ held that an equal protection challenge to Nebraska's marriage laws failed on the merits. The court, however, distinguished *Bruning* on multiple grounds, including the fact that it was decided prior to *Windsor* and that the plaintiffs in *Bruning* did not assert a legal right to marry or enter a same-sex union. The court determined that it was only

15. 409 U.S. 810 (1972).

16. *Id.*

17. 133 S. Ct. 2675 (2013).

18. 455 F.3d 859 (8th Cir. 2006).

bound by *Bruning* to the extent that the plaintiffs claim of discrimination on the basis of sexual orientation.

With respect to the plaintiffs' alleged deprivation of the fundamental right to marry, the district court looked to the Fourteenth Amendment Due Process Clause. By the time the case was heard, it was well settled that the "liberty" interests protected by the Due Process Clause included the right to marry, but few binding cases had described this right with any further specificity. The court concluded that the right to marry was indeed fundamental and applied strict scrutiny. The defendants advanced several arguments before the court to uphold Arkansas's marriage laws. However, the court rejected this argument:

These rationales can neither justify infringement of fundamental rights nor strip this Court of the duty to decide all cases within its jurisdiction that are brought before it, including controversial cases that arouse the most intense feelings in the litigants."¹⁹

Specifically, the court found that the defendants' federalism arguments failed because Arkansas must comport with the United States Constitution's guarantee of individual liberties and protection of fundamental rights before it may regulate marriage. Concerning the issue of procreation, the court found that Arkansas law allowed others who cannot procreate to marry. Therefore, the state could not infringe upon the exercise of a fundamental right for some, but not all, of the individuals who shared a relevant characteristic. Doing otherwise would violate the constitutional guarantee of equal protection. The defendants also argued that Arkansas's marriage laws protected the best interests of the state's children. The court pointed out that allowing same-sex marriage does not prevent heterosexual spouses from caring for their own children and that same-sex couples could already adopt children in Arkansas. The defendants' arguments concerning the preservation of the purposes and social norms of traditional marriage were deemed insufficient to pass even rational-basis review under the Equal Protection Clause, much less strict scrutiny. In sum, the court found that the rationale of the state defendants was legally

19. The court quoted *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), for this proposition.

untenable. Ultimately, the court concluded that the three challenged provisions “unconstitutionally den[ied] consenting adult same-sex couples their fundamental right to marry in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”

The court then turned to the alleged deprivation of the right to travel. It recognized that the right to travel is a fundamental right and noted that the plaintiffs, two lesbian couples living in Arkansas, traveled to Iowa to marry. Arkansas refused to recognize their marriages not based on their status as residents, but rather based on their participation in a same-sex marriage. Therefore, the court concluded that Arkansas’s laws prohibiting same-sex marriage did not violate the plaintiffs’ right to travel.

The plaintiffs also argued that Arkansas’s laws discriminated on the basis of sexual orientation by defining marriage as between one man and one woman, which therefore violated the Equal Protection Clause. Based on *Bruning*, the court determined that sexual orientation was not a suspect class, and mere rational-basis review applied to this claim. According to Judge Baker, the binding authority from the Eighth Circuit Court of Appeals was clear—laws prohibiting same-sex marriage pass rational-basis review.

Finally, the plaintiffs raised an equal protection claim predicated on alleged gender-based discrimination. Because Arkansas’s laws regarding same-sex marriage restricted marriage based on the gender of the marital parties, the court found the restriction to be a gender-based classification. Simply because the restriction imposed “identical disabilities on men and women,” the claim that the laws discriminated based on gender was not foreclosed. Judge Baker subjected the alleged gender-based discrimination to intermediate scrutiny under the Equal Protection Clause, and the defendants’ arguments failed to meet the burden imposed under intermediate scrutiny. Therefore, the court found that Arkansas’s laws “impose[d] unconstitutional classifications on the basis of gender in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”

Concluding that Arkansas’s marriage laws violated both the Due Process Clause and Equal Protection Clause, the court found that the plaintiffs succeeded on the merits of their case.

Therefore, the court ruled that the plaintiffs were entitled to the permanent injunctive relief sought in their complaint. The court stayed the ruling pending final disposition of any appeal to the Eighth Circuit. Arkansas Attorney General Dustin McDaniel filed a timely notice of appeal in December 2014.

BRITTA PALMER STAMPS