

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

GREGORY BOURKE, et al.)	
Plaintiffs)	
and)	
)	
TIMOTHY LOVE, et al.)	CASE No. 3:13-CV-750 (JGH)
Intervening Plaintiffs)	
v.)	
)	<i>Electronically filed</i>
STEVE BESHEAR, et al.)	
Defendants)	

MEMORANDUM OF DEFENDANT STEVEN L. BESHEAR,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY
IN SUPPORT OF MOTION FOR
EXPEDITED ORDER EXTENDING STAY PENDING APPEAL

* * * *

Comes Defendant Steven L. Beshear, in his official capacity as Governor of Kentucky (“Governor Beshear”), by counsel, and provides this memorandum in support of his motion, pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a), for an expedited order extending stay of enforcement of the Memorandum Opinion of this Court and Order entered February 12, 2014 (Doc. Nos. 47 and 48) and the Final Order entered February 27, 2014 (Doc. No. 55) pending appeal to the United States Court of Appeals for the Sixth Circuit.

PROCEDURAL HISTORY

On December 16, 2013, Plaintiffs Gregory Bourke, Michael Deleon, Jimmy Lee Meade, Luther Barlowe, Kimberly Franklin, Tamera Boyd, Randell Johnson, and Paul Campion (“Plaintiffs”) filed a Motion for Summary Judgment and Immediate Injunctive Relief (Doc. No. 38). Opposing briefs were filed by Defendant Jack Conway, in his official capacity as Attorney

General of the Commonwealth of Kentucky (“Attorney General”) and Governor Beshear (Doc. No. 39) (collectively “Defendants”) and by *amicus curiae*, the Family Trust Foundation of Kentucky (Doc. No. 41). After full briefing of Plaintiffs’ motion, this Court entered a Memorandum Opinion (Doc. No. 47) and non-final Order (Doc. No. 48) on February 12, 2014, granting Plaintiffs’ motion.

The February 12 Order was made final and appealable by Final Order dated February 27, 2014 (“Injunction Order”). (Doc. 55). On the same day, Defendants moved to stay the effective date of any final order to provide “Defendants time to determine if they will appeal the order, and the Executive Branch time to determine what actions must be taken to implement the Court’s Order if no appeal is taken.” (Doc. No. 52, p. 2). Defendants specifically stated their intention to “reserve the right to seek a stay for the duration of an appeal” if an appeal from the final Order was taken. *Id.* On February 28, 2014, this Court granted a stay of enforcement of the Injunction Order for a limited period of 20 days. (Doc. No. 58). The stay expires on March 20, 2014, eight days before the deadline to appeal the Injunction Order.

Governor Beshear, in his official capacity as Governor of Kentucky, now moves for continued stay of the Injunction Order pending his appeal to the United States Court of Appeals for the Sixth Circuit and for the duration of any further appeals until the appeals process has been fully exhausted. The Governor is prepared to seek appeal of the Injunction Order to the Court of Appeals for the Sixth Circuit and will do so immediately upon resolution of this motion or by no later than March 18, 2014, whichever occurs first.

SIGNIFICANT PRECEDENT
FOR MAINTAINING STATUS QUO PENDING APPEAL

The potential for legal and actual chaos upon expiration of the stay is clear. Issuing a continuing stay of the Court’s Orders would preserve the status quo of the parties while this

complex and significant constitutional issue is resolved on appeal. *See U.S. v. State of Mich.*, 505 F.Supp. 467, 472 (W.D. Michigan 1980) (“The purpose of the stay is to preserve, not change, the status quo pending the outcome of an appeal.”). Any harm that may result to Plaintiffs by a stay pending appeal, if any, is minor compared to the significant impact enforcement of the Injunction Order will have on the public if there is a later reversal on appeal.

The Supreme Court’s stay of the district court’s injunction in *Herbert v. Kitchen*, 134 S.Ct. 893 (Jan. 6, 2014), demonstrates the appropriateness of a stay. Like Plaintiffs and Intervening Plaintiffs in this action, the *Kitchen* plaintiffs were same-sex couples who either desired to be married in Utah or were already legally married elsewhere and wished to have their marriage recognized in Utah. *Kitchen v. Herbert*, 2013 WL 6697874 (D. Utah Dec. 20, 2013). As in this case, the Utah federal district court granted summary judgment to the plaintiffs and entered an order enjoining the State of Utah from enforcing specific state statutes and the marriage amendment to the Utah Constitution to the extent inconsistent with the district court’s order. The same standard applied by the Supreme Court in granting the stay in *Kitchen* is applicable in this case. The issues in *Kitchen* and posture of the case when the stay was sought are virtually identical to this case.

District courts in three jurisdictions addressing cases similar to this one have relied upon *Kitchen* in granting stay of injunctions pending final disposition on appeal. The plaintiffs in these cases included same-sex couples who sought to be married or who sought to have their marriage from another state recognized by a state with statutory and constitutional provisions banning same-sex marriages. Each district court had entered injunctions in favor of the plaintiffs. Although each district court determined that the state statutes and constitutional provisions under review were unlawful, each recognized and took note of the Supreme Court’s stay of

enforcement in *Kitchen*. These cases are: *Bishop v. United States ex rel. Holder*, 2014 WL 116013 at *33(N.D. Okla. Jan. 14, 2014) (“In accordance with the U.S. Supreme Court’s issuance of a stay in a nearly identical case on appeal [in *Kitchen*], the Court stays execution of this injunction pending the final disposition of any appeal to the Tenth Circuit Court of Appeals); *Bostic v. Rainey*, 2014 WL 561978 at *23 (E.D. Va. Feb. 13, 2014) (“In accordance with the Supreme Court’s issuance of a stay in *Herbert v. Kitchen*, and consistent with the reasoning provided in *Bishop*, this Court s[t]ays execution of this injunction pending the final disposition of any appeal to the Fourth Circuit Court of Appeals”); *De Leon v. Perry*, 2014 WL 715741 at *28 (W.D. Tex. Feb. 26, 2014) (“In accordance with the Supreme Court’s issuance of a stay in *Herbert v. Kitchen*, and consistent with the reasoning provided in *Bishop* and *Bostic*, this Court stays execution of this preliminary injunction pending the final disposition of any appeal to the Fifth Circuit Court of Appeals.”). *See also Wolf v. Walker*, 3:14-cv-00064-bbc (W.D. Wisc. Mar. 4, 2014) (holding that any preliminary injunction granted on similar issues would be stayed based upon the Supreme Court’s stay in *Kitchen*). (Copies of unpublished opinions are attached.)

STANDARD FOR ENTRY OF A STAY

This Court recognized in its February 28, 2014 Memorandum and Order that “in civil matters, there are no rigid rules that govern” a district court’s stay of enforcement of its own orders and judgments, but that the following factors should be considered: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure other parties interested in the proceedings; and (4) where the public interest lies.” (Doc. No. 58, p. 1).

ANALYSIS

The factors the Court should consider “are not prerequisites that must be met, but are interrelated considerations that must be balanced together. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). On balance, these factors favor entry of a stay. Each will be analyzed in turn.

Likelihood of Success on the Merits

Although the Court granted Plaintiffs’ motion for summary judgment, the law surrounding the issues raised in this case is far from being well-settled or definitively established.. Neither the United States Supreme Court nor the Sixth Circuit Court of Appeals has issued a decision holding that the constitutional right to marry encompasses same-sex marriage. Issues involving same-sex marriage recognition are currently being litigated in a multitude of forums throughout the United States and are at varying stages of completion. In short, the jurisprudence related to this controversial issue is rapidly evolving, and existing precedent reflects that the potential for success on appeal is high. See *Nevada v. Hall*, 440 U.S. 410, 422 (1970) (“the Full Faith and Credit Clause does not require a State to apply another State’s law in violation of its own legitimate public policy”).

The issue of the applicability of *Baker v. Nelson*, 409 U.S. 810 (1972), and whether the decision is upon the Sixth Circuit has not been addressed by that court. While the issue in *Baker* involved the issuance of marriage licenses to same-sex couples, equal protection arguments raised in *Baker* apply equally to the issue of whether non-recognition of out of state same-sex marriages violates equal protection rights. Likewise, neither the Supreme Court nor the Sixth Circuit Court of Appeals has declared that *Windsor v. United States*, 113 S.Ct. 2675 (2013), compels the conclusion that Kentucky’s non-recognition of out of state same-sex marriages

violates the United States Constitution's guarantee of equal protection under the law. In fact, the *Windsor* Court expressly recognized that the issue of whether States could refuse to recognize same-sex marriages performed under the laws of other States was not before it. *Id.* at 2682-83. Justice Scalia strongly cautioned in his dissent against using *Windsor* as a basis to set aside state denial of marital status to same-sex couples:

I do not mean to suggest disagreement with THE CHIEF JUSTICE'S view, *ante*, pp. 2696-2697 (dissenting opinion) that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples – or even that this Court could *theoretically* do so. Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

Id. at 2709. Thus, despite this Court's finding in favor of Plaintiffs, the issues remain to be decided by the Sixth Circuit Court of Appeals and ultimately the Supreme Court of the United States.

Threat of Irreparable Harm

Dramatic changes to long-standing rules and expectations will result from implementation of the Injunction Order. Requiring administrative agencies to implement these rules and granting marital status recognition to same-sex couples, only to be invalidated upon reversal by the Court of Appeals will cause chaos and irreparable and real harm to all concerned, including the prevailing parties. The only way to eliminate the risk of this irreparable harm is to maintain the status quo. Furthermore, failing to stay a ruling that is ultimately reversed on appeal could have wide ranging impacts on those businesses and services where marital status is relevant, including health insurance companies, creditors, estate planners, and a litany of others.

By entering a stay pending appeal, the Court can ensure that uncertainty for all involved, directly and collaterally, is avoided.

Harm to Opposing Parties

It is unclear what, if any, harm would come to Plaintiffs in this matter if a stay is granted pending appeal. At most, Plaintiffs would have to endure a delay in having their marriages recognized by the Commonwealth. As the Western District of Michigan noted, “the purpose of a stay is to preserve, not change, the status quo.” *State of Mich.*, 505 F.Supp. at 472. Moving forward with recognition of same-sex marriage in Kentucky is decidedly a change of the status quo. As such, a stay is appropriate.

Harm to the Public Interest

The public has an interest in avoiding uncertainty and chaos. As noted, *supra*, there would exist a great deal of uncertainty with regard to recognition of same-sex marriages while this action is pending on appeal. *See De Leon*, 2014 WL 715741 at *30 (holding that the Court would “stay execution of this order pending appeal to prevent any legal and practical complications.”) This uncertainty extends from the Commonwealth to same-sex partners, and to third parties who request information on marital status. Entry of a stay avoids this uncertainty of the threat to the public interest. Likewise, chaos will certainly result if the validity of marriages out-of-state marriages are in a state of flux.

CONCLUSION

In light of the Supreme Court’s stay in *Kitchen*, the lack of a definitive decision from the Sixth Circuit or the Supreme Court of the United States on the issues before the Court, and given the uncertainty and chaos that will result if the Injunction Order is not stayed pending appeal,

Defendant Steven L. Beshear, in his capacity as Governor of Kentucky, respectfully requests continuance of the stay of execution of the Injunction Order pending completion of appeals in this matter. A proposed Order is attached.

Respectfully submitted,

VanAntwerp, Monge, Jones, Edwards, &
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/s/ Leigh Gross Latherow
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CERTIFICATE OF SERVICE

It is hereby certified that on March 14, 2014, the foregoing was filed with the clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all parties.

/s/ Leigh Gross Latherow
Leigh Gross Latherow