IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ELECTRONICALLY FILED

TIMOTHY LOVE, ET AL. INTERVENING PLAINTIFFS

v. CIVIL ACTION NO.

3:13-CV-750-JGH

STEVE BESHEAR, ET AL. INTERVENING DEFENDANTS

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PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

This Court correctly declared that "Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law." (Pg. ID #725.) Defendants, through newly retained private counsel, nevertheless ask this Court to stay that order, thereby allowing the Commonwealth to continue enforcing an unconstitutional law during the pendency of appeals that could take months or years to resolve.

That stay motion is remarkably devoid of any serious discussion of the merits of this case. Nor does it acknowledge the real and meaningful harm visited each day on Plaintiffs, who continue to be denied equal protection of the laws. Indeed, the Commonwealth's attorneys go out of their way to minimize that constitutional harm, arguing that it "is unclear what, if any, harm would come to Plaintiffs in this matter if a stay is granted pending appeal." (Pg. ID #834.)

At bottom, the state's argument boils down to a simple assertion that a stay is warranted in order to "preserve the status quo"—which, as this Court held, is unconstitutional. If that argument were sufficient to carry the day, then a stay pending appeal would always be warranted whenever a plaintiff prevailed in challenging the constitutionality of a law in district court. But, as the Supreme Court and the Sixth Circuit have explained, that is not the law.

"The issuance of a stay pending appeal 'is not a matter of right,' but 'an exercise of judicial discretion.'"[1] A court must "determine whether to exercise [its] discretion by considering '(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'"[2]

The Sixth Circuit "has interpreted these factors to require the applicant, '[i]n order to justify a stay of the district court's ruling,' to 'demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.'"[3] Moreover, the Sixth Circuit has required parties seeking stays pending appeal to "address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist."[4] Only upon such a showing can a court "develop[] an adequate record from which [it] can determine the merits of the motion."[5]

Here, the Commonwealth's motion does not come close to showing either "serious questions going to the merits" or "irreparable harm that decidedly outweighs the harm that will

[1] *Green Party of Tenn. v. Hargett*, 493 Fed. Appx. 686, 689 (6th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

[2] *Id.* (quoting *Nken*, 556 U.S. at 434).

[3] *Id.* (quoting *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004)).

[4] *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991).

[5] *Id.*

be inflicted on others if a stay is granted."[6] Nor has it supported its stay motion with "specific facts and affidavits supporting assertions that these factors exist."[7] Thus, a stay pending appeal is not warranted.

I. Defendants Have Not Shown The Existence of "Serious Questions" Going to the Merits.

The Commonwealth has not and cannot show that there is a "serious question" about the constitutionality of Kentucky's same-sex marriage ban. Since the Supreme Court held in *United States v. Windsor* that Section 3 of the Defense of Marriage Act is unconstitutional, this Court and seven of its fellow district courts have struck down same-sex marriage bans on the grounds that they violate the Constitution's Equal Protection Clause. "These courts have uniformly . . . found that *Windsor* protects the rights of same-sex couples in various contexts, notwithstanding earlier Supreme Court and circuit court precedent that arguably suggested otherwise."[8]

The Commonwealth's stay motion largely ignores these cases, except to note that some of them have stayed their rulings pending appeal. Defendants offer no compelling argument for why this Court should discard the consistent reasoning of eight federal courts, each of which has found that *Windsor* compelled it to hold that same-sex marriage bans are unconstitutional. Absent some showing that there is a "serious question" as to whether these unanimous post-*Windsor* holdings are erroneous, a stay is not appropriate.[9]

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[6] *Family Trust Found.*, 388 F.3d at 227.

[7] *Michigan Coalition*, 945 F.2d at 154.

[8] *Tanco v. Haslam*, __ F. Supp. 3d __, 2014 U.S. Dist. LEXIS 33463, at *19 (D. Tenn. Mar. 14, 2014); *see also De Leon v. Perry*, __ F. Supp. 3d __, 2014 U.S. Dist. LEXIS 26236, at *78 (W.D. Tex. Feb. 26, 2014); *Bostic v. Rainey*, 2014 U.S. Dist. LEXIS 19110, at *67-68 (E.D. Va. Feb. 13, 2014); *Bishop v. United States ex rel. Holder*, __ F. Supp. 3d __, 2014 U.S. Dist. LEXIS 4374, at *120-121 (N.D. Okla. Jan. 14, 2014); *Lee v. Orr*, __ F. Supp. 3d __, 2014 U.S. Dist. LEXIS 21620, at *3 (N.D. Ill. Feb. 21, 2014); *Obergefell v. Wymyslo*, __ F. Supp. 3d. __, 2013 U.S. Dist. LEXIS 179550, at *71-72 (S.D. Ohio Dec. 23, 2013); *Kitchen v. Herbert*, __ F. Supp. 3d __, 2013 U.S. Dist. LEXIS 179331, at *54-55 (D. Utah Dec. 20, 2013).

[9] *See Nken v. Holder*, 556 U.S. at 433; *Green Party of Tenn.*, 493 Fed. Appx. at 689; *Family Trust Found.*, 388 F.3d at 227.

II. Defendant Cannot Show That It Will be Irreparably Harmed Absent a Stay.

The Commonwealth also cannot show that it will suffer any harm absent a stay pending appeal. As an initial matter, Defendant has failed to meet its burden of "providing specific facts and affidavits supporting" the assertion that "chaos" will result (Pg. ID #833) if this Court does not stay its order pending appeal.[10] Thus, there is no basis for this Court, or the Sixth Circuit Court of Appeals, to credit that hyperbolic assertion. Moreover, the "chaos" posited by the Commonwealth is nothing more than the administrative process that will eventually be required when this Court's order is put into effect. The administrative steps needed to effectuate the Court's order should be at or near completion based upon the representations of the Commonwealth during the hearing on the last request for a stay.

The Commonwealth's argument also ignores the fact that the state can have no legitimate interest in enforcing an unconstitutional law. "[A] state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional."[11]

III. A Stay Pending Appeal Would Irreparably Injure the Plaintiffs.

Plaintiffs, on the contrary, will be harmed if a stay pending appeal is granted. Courts routinely have held that the loss of a constitutional right, "for even minimal periods of time," constitutes irreparable harm.[12] The Commonwealth is therefore incorrect to argue that there is no irreparable harm simply because, "[a]t most, Plaintiffs would have to endure a delay in having their marriages recognized by the Commonwealth." (Pg. ID #834).

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[10] *Michigan Coalition*, 945 F.2d at 154.

[11] *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotations and citations omitted).

[12] *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

This delay will have real and permanent consequences for Plaintiffs and others similarly situated. Among the most concrete harms is the looming tax deadline for 2013. Even if Plaintiffs are able to amend their returns by the time the stay is lifted, the time value of money and expenses associated with amendment are lost forever. Furthermore, there is the concrete and real ongoing cost of not having access to a family health insurance policy resulting in the real expense of separate premiums and separate deductibles. There is no way to recoup these expenses that are incurred over the course of a stay.

Turning to the more meaningful deprivations, Plaintiffs in this case range in age from mid forties to early seventies (See affidavits, DN 38-3--38-6). Death or serious illness could strike any of these Plaintiffs. A stay could well result in a spouse being denied access by a hospital or funeral home. There cannot be a more irreparable harm than the exclusion from those moments in life or death. In addition, there are others affected by this stay who will similarly suffer the harm of being excluded from their families. Attached as Exhibit 1 is the Affidavit of Cristal Fox, an attorney, same-sex spouse, and soon to be mother. This Court's decision on a stay will determine whether her child is born to a single mother or a married couple. As any parent knows, those first moments are humbling, monumental, and irreplaceable.

These harms are real and concrete, and outweigh the Commonwealth's "chaos."

IV. The Public Interest Requires Immediate Enforcement of This Court's Order.

It is well-established that "[t]he public has no interest in enforcing an unconstitutional [law]."[13] On the contrary, and as the Sixth Circuit has held, "[i]t is in the public interest *not to* perpetuate the unconstitutional application of a statute."[14] In its last Order, the Court noted that the public interest is, in fact, twofold: "that the Constitution be upheld; and that changes in the

[13] *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).
[14] *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (emphasis added).

law be implemented consistently and without undue confusion." (Page ID#777) The limited scope of the issue currently before the Court, the recognition of out of state marriages, limits the potential confusion that might be associated with implementing the Court's Order. The Commonwealth does not have to issue marriage licenses, it simply has to include Plaintiffs in the numbers of Kentuckians who receive benefits for out of state marriages. And the Commonwealth is already preparing for this implementation.

V. Stay Orders Issued by Other Courts Do Not Force This Court to Indefinitely Stay Its Ruling.

At bottom, the Commonwealth's argument boils down to an assertion that the Supreme Court's decision to stay the district court's ruling in *Kitchen v. Herbert* pending a decision by the Tenth Circuit requires all district courts to stay their same-sex marriage cases pending appeal. That is not the case, however.

In *Kitchen v. Herbert*, the U.S. District Court for the District of Utah enjoined the state's same-sex marriage ban on December 20, 2013.[15] Four days later, the Tenth Circuit denied the state's request for a stay pending appeal in a short order that did not include any analysis of the stay factors. At the same time, however, the court directed expedited briefing and argument of the case. Subsequently, the court issued a highly expedited briefing schedule. Appellate argument has since been scheduled for April 10, 2014.

Because the Supreme Court did not state its reasons for entering a stay pending appeal in *Kitchen* on January 6, 2014, it is impossible to discern why the Court believed that stay appropriate. Nevertheless, there are several unique aspects of that case that suggest the Court is not bound to do the same thing here.

[15] *See Kitchen*, __ F. Supp. 3d __, 2013 U.S. Dist. LEXIS 179331, at *54-55.

First, much has changed since January 6, 2014. At that time, *Kitchen* was one of only two courts (along with the Southern District of Ohio on a much narrower issue) to hold that same-sex marriage bans violate the equal protection principles laid out in *Windsor*. Since that time, however, six other courts—including this Court—have reached the same conclusion. There has yet to be a dissent. It is impossible to predict what the Supreme Court would have done in *Kitchen* if it were considering the unanimous wave of decisions that has been issued since that time instead of what could have been an outlier.

Second, when the Supreme Court issued the stay in *Kitchen*, it knew the Tenth Circuit would issue a decision soon. As noted, the case had already been set for expedited briefing so that it could be argued this spring. The same is not true here. The Commonwealth has not even filed a notice of appeal. As this Court is well-aware, resolution of the Plaintiffs' appeal could be months or even years away. Faced with that sort of uncertainty, the Supreme Court might not have stayed the decision in *Kitchen*.

Third, the Tenth Circuit provided no meaningful analysis of its reasons for denying the stay in *Kitchen*. Here, by contrast, this Court has the opportunity—indeed, the responsibility—to address each of the stay factors and consider whether the Commonwealth has met them (it has not). If this Court holds that a stay is not warranted under the traditional analysis, the Sixth Circuit might well decline to enter a stay. And it is far from certain that the Supreme Court would take the unusual step of staying a case pending appeal where there

This Court should deny the Commonwealth's attempt to delay justice further, and find that a stay pending appeal is not warranted here.

Respectfully submitted,

s/*Laura E. Landenwich*

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all parties having entered their appearance herein.

/s/ Laura E. Landenwich

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	)	
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AFFIDAVIT

Comes the affiant, Cristal J. Fox after first being duly sworn, states and deposes:

1. I married my wife Lori McConnell Fox in New York on December 24, 2013.
2. It was an awesome day but a little bitter-sweet because we knew as soon as we came home to Kentucky; our status was little more than print on a piece of official paper.
3. That status of being married is very important to us for numerous reasons.
4. My wife and I want to live the "American Dream" as so many others get to and share a life and family.
5. We both are like everyone else in so many ways, I served in the Military for 6 years, we went to college and got degrees and are working productive members of society yet when our child is born my wife won't have any more rights than our next door neighbor.
6. I am currently a little over 8 months pregnant and how Kentucky rules on same sex marriage will change my family's life in a matter of seconds.
7. My wife and I tried to become pregnant and have a family for many months and it would mean the world to both of us if the birth of our son could be treated the same as the birth of a child in any other marriage.

our son will be born with either one or two parents.

9. Should the stay be allowed to expire both myself and my wife will be allowed to be on the birth certificate.

10. Should the stay be allowed to expire my wife and I won't have to endure the legal maneuvering to ensure that if something were to happen to me our son will be able to cared for by his other parent.

11. Allowing the stay to expire will simply allow us the same life and experience as any other heterosexual married couple.

Further the affiant sayeth naught.

CRISTAL J. FOX

SUBSCRIBED AND SWORN to before me by 17th, this 17th day of March, 2014.

My commission expires: Notary Public, State at Large, KY My commission expires Nov. 22, 2014.

Notary Public, State-at-Large, KY