UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA CASPAR, GLENNA DEJONG, CLINT MCCORMACK, BRYAN REAMER, FRANK COLASONTI, JR., JAMES BARCLAY RYDER, SAMANTHA WOLF, MARTHA RUTLEDGE, JAMES ANTEAU, JARED HADDOCK, KELLY CALLISON, ANNE CALLISON, BIANCA RACINE, CARRIE MILLER, MARTIN CONTRERAS, and KEITH ORR,

Plaintiffs,

v

RICK SNYDER, in his official capacity as Governor of the State of Michigan; MAURA CORRIGAN, in her official capacity as Director of the Michigan Department of Human Services; PHIL STODDARD, in his official capacity as Director of the Michigan Office of Retirement Services; and JAMES HAVEMAN, in official capacity as Director of the Michigan Department of Community Health;

Defendants.

No. 14-cv-11499

HON. MARK A. GOLDSMITH

DEFENDANTS' MOTION TO HOLD CASE IN ABEYANCE PENDING APPEAL OF RELATED CASE

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Defendants Governor Rick Snyder, Michigan Department of Human Services Director Maura Corrigan, Michigan Office of Retirement Services Director Phil Stoddard, and Michigan Department of Community Health Director James Haveman (State Defendants) respectfully move this Court to hold this case in abeyance pending the outcome of the State's appeal of the judgment in the related case, *DeBoer, et al. v. Snyder*, *et al.*, Case No. 12-CV-10285, which is currently pending in the United States Court of Appeals for the Sixth Circuit, Case No. 14-1341. In support of their motion, the State Defendants state as follows:

1. The undersigned counsel certifies that counsel communicated in writing with opposing counsel on June 2, 2014, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief.

2. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

3. On March 21, 2014, the United States District Court for the Eastern District of Michigan, Judge Bernard Friedman, issued its decision in *DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich. 2014), declaring Michigan's Marriage Amendment, Mich. Const. 1963, art. I, § 25, and its implementing statutes unconstitutional. The court also enjoined the State of Michigan from enforcing the law. *Id.* In its opinion, despite the State's oral motion, the court failed to address the State's request for stay pending appeal, thereby effectively denying the motion.

4. Within an hour of issuance of that opinion, the State had filed its notice of appeal and emergency motion for stay pending appeal with the Sixth Circuit.

5. Initially, on March 22, 2014, the Sixth Circuit simply ordered the *DeBoer* plaintiffs to respond to the motion for stay by Tuesday, March 25, 2014.

6. But a few hours later the Sixth Circuit, recognizing the appropriateness of at least a temporary stay, entered an order temporarily staying the district court's judgment in *DeBoer* until Wednesday March 26, 2014.

7. On March 25, 2014, the Sixth Circuit stayed the district court's judgment pending a final disposition of Michigan's appeal. The Sixth Circuit found no reason to balance the equities of a stay regarding *DeBoer* differently than the United States Supreme Court's recent decision to grant a stay pending appeal in *Kitchen v. Herbert*, 134 S. Ct. 893 (2014), Utah's same-sex marriage case.

8. Despite the State's immediate appeal and request for emergency stay, which were widely reported in the media, various local clerks around the State advertised that they would hold special office

hours on Saturday, March 22, in order to marry same-sex couples before a stay of the *DeBoer* opinion was issued.

9. More than 300 couples, including the 8 couples named as plaintiffs, received marriage licenses and were married because of the *DeBoer* decision.

10. Here, Plaintiffs' claims are premised on the existence of a legally valid marriage. But the stay orders issued by the Sixth Circuit rendered the *DeBoer* judgment and injunction unenforceable, thus suspending any authority or requirement to act pursuant to that judgment, reinstating Michigan's Marriage Amendment and its implementing statutes, and potentially calling into question the ultimate validity of Plaintiffs' marriages. *Nken v. Holder*, 556 U.S. 418, 428-29 (2009), (The legal effect of a stay is to take the parties back to the "state of affairs before the . . . order was entered.").

11. The reanimation of Michigan's constitutional and statutory provisions, limiting recognition of marriage to those between opposite-sex couples, prevents the State from conferring any right

or benefit dependent upon the existence of a legal marriage during the pendency of the State's appeal.

12. Thus, the ultimate resolution of *DeBoer* controls the disposition of this case. If *DeBoer* is affirmed, then Plaintiffs' same-sex marriages are valid and Plaintiffs may pursue benefits attendant to a legal marriage. Conversely, if *DeBoer* is reversed and Michigan's constitution and statutes permanently restored, Plaintiffs' marriages, which were grounded solely on the improper decision in *DeBoer*, are null and void ab initio, and Plaintiffs are not, and would never have been, entitled to the benefits they seek.

13. In light of the dispositive nature of *DeBoer*, judicial economy weighs in favor of awaiting an appellate resolution. Further, allowing this case to proceed creates a significant likelihood of confusion and the potential for harm to the parties and the public interest, should the appellate resolution in *DeBoer* require an outcome contrary to the ultimate decision in this case.

RELIEF REQUESTED

Governor Snyder, Maura Corrigan, Phillip Stoddard, and James Haveman, therefore, request the Court hold this case in abeyance

pending a final decision in *DeBoer, et al. v. Snyder, et al.,* Sixth Circuit Court of Appeals No. 14-1341, including a decision by the United States Supreme Court, if applicable, for the reasons set forth above and in the accompanying brief.

Respectfully submitted,

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Dated: June 5, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA CASPAR, GLENNA DEJONG, CLINT MCCORMACK, BRYAN REAMER, FRANK COLASONTI, JR., JAMES BARCLAY RYDER, SAMANTHA WOLF, MARTHA RUTLEDGE, JAMES ANTEAU, JARED HADDOCK, KELLY CALLISON, ANNE CALLISON, BIANCA RACINE, CARRIE MILLER, MARTIN CONTRERAS, and KEITH ORR,

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RICK SNYDER, in his official capacity as Governor of the State of Michigan; MAURA CORRIGAN, in her official capacity as Director of the Michigan Department of Human Services; PHIL STODDARD, in his official capacity as Director of the Michigan Office of Retirement Services; and JAMES HAVEMAN, in official capacity as Director of the Michigan Department of Community Health;

Defendants.

No. 14-cv-11499

HON. MARK A. GOLDSMITH

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO HOLD CASE IN ABEYANCE PENDING APPEAL OF RELATED CASE

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Dated: June 5, 2014

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CONCISE STATEMENT OF ISSUE PRESENTED

Should the Court hold this case in abeyance pending the appellate resolution of *DeBoer, et al. v. Snyder*, *et al.*?

Plaintiffs answer: "No"

Defendants answer: "Yes"

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Case Law:

DeBoer, et al. v. Snyder, et al., 973 F. Supp. 2d 757 (E.D. Mich. 2014).

DeBoer, et al. v. Snyder, et al., Case No. 14-1341, 6th Circuit Court of Appeals (2014).

Kitchen v. Herbert, 134 S. Ct. 893 (2014).

Landis v. N. Am. Co., 299 U.S. 248 (1936)

Monaghan v. Sebelius, 2013 WL 3212597 (E.D. Mich. 2013) (unpublished).

United States v. United Mine Workers of America, 330 U.S. 258 (1947).

Michigan Constitution:

Mich. Const. art. I, § 25

INTRODUCTION

Plaintiffs are 8 of the approximately 300 same-sex couples who married during the short time that Michigan's Marriage Amendment (MMA) was deemed unconstitutional by the decision in *DeBoer, et al. v. Snyder, et al.,* 973 F. Supp. 2d 757 (E.D. Mich. 2014).[1] Plaintiffs, who are not parties to the *DeBoer* case, claim they have been, or expect to be in the future, denied various benefits that depend upon the existence of a legal marriage by the continued enforcement of the Marriage Amendment.

Plaintiffs' due process and equal protection claims stand or fall on the validity of their marriages. However, that legal issue will ultimately be resolved by the Sixth Circuit in the *DeBoer* appeal. And while Plaintiffs likely hold a strong and fervent belief that *DeBoer* will be affirmed, this Court should reject Plaintiffs' invitation in this case to anticipate what that holding will be. Moreover, there is a strong likelihood that the constitutionality of defining marriage as between a man and woman will soon be before the United States Supreme Court,

[1] The MMA states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const., art. I, § 25.

and thus decided at the national level. This Court should therefore hold this case in abeyance pending the decision in *DeBoer*. Indeed, it makes more sense to hold to this case in abeyance than to add confusion by reviewing whether 8 of these couples are now entitled to benefits based on marriages that may be void depending on the outcome of *DeBoer*.

Holding this case in abeyance also accords with the stay pending appeal entered by the Sixth Circuit in *DeBoer*. The stay rendered the *DeBoer* judgment and permanent injunction unenforceable against the State, and restored the Marriage Amendment during the pendency of the appeal. In other words, the stay returned the law to the status quo before the *DeBoer* judgment, resurrecting the Amendment and its various related statutes, and preventing the State Defendants from currently recognizing Plaintiffs' same-sex marriages for any purpose during the pendency of the *DeBoer* appeal. The State should not be denied the specific relief it received through the stay. Compelling the State to now recognize Plaintiffs' marriages, which were a product of *DeBoer,* before the appellate resolution of *DeBoer*, contrary to the resurrected Marriage Amendment, violates the stay entered by the Sixth Circuit.

Thus, holding this case in abeyance during this interim period of uncertainty fosters judicial economy and is in the best interest of the parties and the public. It would, among other things, avoid the potential confusion and burden that would result from compelling the State Defendants, contrary to the stay, to provide Plaintiffs with benefits to which they may not ultimately be entitled, and the potential termination or retraction of those benefits should their marriages be rendered void by the final judgment in *DeBoer*. The Court should grant the State Defendants' motion to hold this case in abeyance.

STATEMENT OF FACTS

In 2004, the people of Michigan considered and debated how marriage should be defined. Exercising their basic democratic power to enact laws, they concluded that "[t]o secure and preserve the benefits of marriage for our society and for future generations of children," marriage in Michigan would continue to consist only of "the union of one man and one woman." Mich. Const. art. I, § 25.

In 2012, April DeBoer and Jayne Rowse, a same-sex couple from Hazel Park, Michigan, filed a federal district court complaint against Governor Snyder and Attorney General Schuette, alleging that Michigan's adoption laws, which prohibited joint adoptions by same-sex couples, violated the Fourteenth Amendment's Equal Protection Clause. *DeBoer, et al. v. Snyder, et al.,* Case No. 12-CV-10285. The complaint was later amended to include a separate count alleging that the Marriage Amendment was unconstitutional. The district court, the Honorable Judge Bernard Friedman presiding, denied the defendants' motion to dismiss the amended complaint, and the parties then filed cross-motions for summary judgment. The cross-motions were scheduled for October 16, 2013.

From the beginning, the case generated significant media attention and interest from groups on both sides of the same-sex marriage debate. As the October 16 hearing date drew near, there was some speculation that the district court might grant the plaintiffs' motion for summary judgment from the bench and enter a judgment that the Amendment was unconstitutional, thereby clearing the way for same-sex marriages absent a stay of the order or judgment. Indeed, several county clerks from around the State stated publicly that they would issue marriage licenses for same-sex couples if the district court granted plaintiffs' motion for summary judgment and did not stay its judgment.

These public statements resulted in a number of inquiries directed to the Department of Attorney General regarding whether the clerks could immediately issue marriage licenses to same-sex couples. The Department issued a letter to all 83 county clerks, advising clerks of the expected legal process and possible appeals. (Exhibit 1, Clerk letter). Ultimately, however, the district court denied the cross-motions for summary judgment, and scheduled the matter for a bench trial.

The trial took place in February 2014, and resulted in a judgment declaring the Marriage Amendment unconstitutional, and immediately enjoining the defendants from enforcing the Amendment or its implementing statutes. *DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich. 2014). The judgment was issued after 5:00 p.m. on Friday, March 21, 2014, and the district court did not address the defendants' request for a stay pending appeal. However, within an hour of the judgment, the defendants had filed their notice of appeal and emergency motion for stay pending appeal with the Sixth Circuit. (Exhibit 2, motion for stay).

Clerks in four counties – Muskegon, Ingham, Oakland, and Washtenaw – stated that they would hold special office hours on Saturday, March 22, 2014, in order to issue marriage licenses to same-sex couples.

Early on March 22nd, the Sixth Circuit simply advised the *DeBoer* plaintiffs to respond to the motion for stay by March 25, 2014. (Exhibit 3, Sixth Circuit order). But hours later, the Sixth Circuit issued a temporary stay pending appeal "[t]o allow a more reasoned consideration of the motion for stay." (Exhibit 4, temporary stay order).

Finding no reason to balance the equities of a stay regarding *DeBoer* differently than the Supreme Court had recently done in parallel circumstances when it granted a stay in *Kitchen v. Herbert*, 134 S. Ct. 893 (2014) (reversing the Tenth Circuit's decision to deny a stay in Utah's same-sex marriage case), the Sixth Circuit issued its stay pending appeal on March 25th. (Exhibit 5, stay order).

In the short window of time between the issuance of the *DeBoer* judgment and the initial stay entered by the Sixth Circuit, approximately 300 same-sex couples – including Plaintiffs –applied for, and received, marriage licenses. Notably, none of the Plaintiffs here are plaintiffs in *DeBoer*.

Plaintiffs assert they are now entitled to various benefits, such as health care, that depend upon the existence of a legally valid marriage. But because the fate of Plaintiffs' marriages, and the State's obligation to provide any benefits, are contingent upon the outcome of the appeal in *DeBoer*, Defendants respectfully request that this Court hold this case in abeyance until *DeBoer* is resolved.

LEGAL STANDARD

The decision to stay proceedings is entirely within the Court's discretion. *Clinton v. Jones,* 520 U.S. 681, 706-07 (1997). A district court can, at its discretion, stay an action pending the conclusion of an alternative proceeding that it believes will impact the applicable law, and control the outcome of the case for which the stay is sought. This is part of a court's traditional powers to issue injunctive relief or to stay court orders. This includes staying cases for the court's own reasons to control its docket and manage its own affairs. *Gray v. Bush,* 628 F.3d 779, 785 (6th Cir. 2010) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.") (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

A court considering a motion to stay should weigh the following factors: "[1] the potentiality of another case having a dispositive effect on the case to be stayed, [2] the judicial economy to be saved by waiting on a dispositive decision, [3] the public welfare, and [4] the

hardship/prejudice to the party opposing the stay, given its duration."[2] *Monaghan v. Sebelius*, 2013 WL 3212597 *1 (E.D. Mich. 2013) (unpublished) (quoting *Michael v. Ghee*, 325 F. Supp. 2d 829, 831 (N.D. Ohio 2004) (citing *Landis*, 299 U.S. at 255)).

ARGUMENT

I. A decision by the Sixth Circuit in *DeBoer*, regardless of which way the Court holds, will have a dispositive effect on the legal questions presented in this case.

The same-sex marriages Plaintiffs ask the State Defendants to recognize are a direct result of the district court's temporarily effective judgment in *DeBoer* declaring the Marriage Amendment unconstitutional. The merits of that judgment are pending in the Sixth

[2] Recently, this Court weighed similar factors in considering a motion for stay in *Bandit Industries, Inc. v. Blue Cross and Blue Shield of Michigan*, 2013 WL 5651444 (E.D. Mich. 2013). In granting a motion for stay pending the appellate resolution of case related to *Bandit Industries*, this Court cited, among other things, the similarity of the legal issues in the two cases, and went on to conclude, "the Sixth Circuit's decision may have a substantial impact on this relatively fresh case and, therefore, a stay pending that ruling is appropriate." *Id.* at *2. As will be discussed, the Sixth Circuit's decision in *DeBoer* will have a substantial impact on this relatively fresh case as well.

Circuit, which will decide whether the Amendment is constitutional. See *DeBoer, et al. v. Snyder, et al.,* Case No. 14-1341.[3]

Plaintiffs' due process and equal protection claims in this case depend on their marriages being "legally valid." But their marriages will only be valid if *DeBoer* is affirmed and the Amendment held unconstitutional. Conversely, if the judgment in *DeBoer* is reversed, Plaintiffs' marriages will be null and void ab initio. This is because a vacated or reversed judgment or order has no effect. "The effect of a general and unqualified reversal of a judgment, order, or decree by the court of appeals is to nullify it completely and to leave the cause standing as if it had never been rendered[.]" 36 C.J.S. Federal Courts § 712 (and cases cited therein). See also 5 Am. Jur. 2d Appellate Review § 803 (and cases cited therein). And "[a] lower court decree which is reversed generally does not protect parties acting pursuant to such decree prior to reversal." 36 C.J.S. Federal Courts § 712. See also *Balark v. City of Chicago*, 81 F.3d 658, 663 (7th Cir. 1996) ("If a district

[3] Defendants-Appellants Snyder and the Attorney General filed their brief on appeal in *DeBoer* on May 7, 2014. Appellee briefs are due June 9, and the defendants' reply brief is due June 26, 2014. The Sixth Circuit is considering scheduling oral argument in *DeBoer*, as well as the other same-sex marriage cases pending in this circuit, for August 2014.

court judgment is reversed on appeal, the effect of the appellate court ruling is that the judgment was never correct to begin with. If a judgment has been paid immediately, it must be refunded.").[4] Accordingly, if the *DeBoer* judgment is reversed, the reversal nullifies the judgment from its inception, and the marriages performed in reliance on the judgment are similarly null and void as having been performed contrary to Michigan law.

Under these circumstances, if *DeBoer* is affirmed, then Plaintiffs' as-applied constitutional challenge would be moot because their marriages would be entitled to recognition for purposes of seeking benefits. If *DeBoer* is reversed and the Marriage Amendment declared constitutional, then the marriages upon which Plaintiffs base their

[4] This principle is analogous to case law holding that parties cannot profit from federal injunctions that are subsequently reversed. See *United States v. United Mine Workers of America,* 330 U.S. 258, 295 (1947) ("The right to remedial relief falls with an injunction which events prove was erroneously issued."); *Latrobe Steel Co v. United Steelworkers of America, AFL–CIO*, 545 F.2d 1336, 1346 (3rd Cir. 1976) ("The United Mine Workers doctrine . . . recognizes that a private party should not profit as a result of an order to which a court determines, in retrospect, he was never entitled."); *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010); *Hampton Tree Farms Inc. v. Yuetter*, 956 F.2d 869, 871 (9th Cir. 1992); *Scott & Fetzer Co v. Dile*, 643 F2d 670 (9th Cir. 1981).

claims are null and void by operation of law. Thus, the decision in *DeBoer* will be dispositive of the legal issues presented here.

While Plaintiffs may believe that *DeBoer* will be affirmed and the Marriage Amendment rendered unconstitutional, such speculation should not displace the reasoned application of legal principles. And because the legal claims in this case will be disposed of by a decision in *DeBoer* regardless of the nature of that decision, the first prong of the test in favor of holding this case in abeyance is satisfied.

II. Proceeding with this case will not promote judicial economy or the public welfare.

Because a decision in *DeBoer* will be dispositive of the issues here, holding this case in abeyance pending that decision will save the parties from costly and lengthy legal proceedings. This is of particular import where, as here, legal defenses are funded with taxpayer money.

Furthermore, Plaintiffs essentially seek a duplicative declaration that the Marriage Amendment is unconstitutional. Where one judge in this district has already entered such a declaration and that judgment is on appeal, asking yet another judge to do so is plainly a misuse of judicial time and resources. It is also possible that these legal

proceedings could result in inconsistent decisions from the courts while the matter is pending before the Sixth Circuit, leading to more confusion. Thus, the interest in judicial economy is served by staying this case.[5]

And the public interest or welfare is also advanced by staying this case. As Kentucky District Court Judge John G. Heyburn, II wisely stated in Kentucky's same-sex marriage case:

> Perhaps it is difficult for Plaintiffs to understand how rights won can be delayed. It is a truth that our judicial system can act with stunning quickness, as this Court has; and then with sometimes maddening slowness. One judge may decide a case, but ultimately others have a final say. It is the entire process, however, which gives our judicial system and our judges such high credibility and acceptance. This is the way of our Constitution. It is that belief which ultimately informs the Court's decision to grant a stay. It is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes. That does not serve anyone well.

Bourke v. Beshear, 2014 WL 556729 *14 (W.D. Ky., 2014).

Here, the reaction to the judgment by the Plaintiffs and the other married same-sex couples, combined with the courts' failure to

[5] Indeed, the State similarly requested abeyance or a stay due to the judgment and appeal in *DeBoer* in another pending case, *Bassett, et al. v. Snyder*, Case No. 12-cv-10038 (Hon. David M. Lawson), which involves a challenge to 2011 P.A. 297, regarding domestic partner benefits.

immediately stay *DeBoer*, has already resulted in confusion, costs, and potential inequity. These issues will only be compounded should this Court decline to stay this case. For example, the Plaintiffs in this case are only 8 of the approximately 300 same-sex couples who married before the issuance of the stay by the Sixth Circuit. A decision by this Court against these State Defendants will not bind any local government or private benefit-providers, which remain subject to the Marriage Amendment and various statutes during the appeal. Thus a favorable decision by this Court on behalf of these 8 couples against these few Defendants would likely result in greater inequity than now exists among the group-at-large of 300 couples.

Furthermore, if benefits are awarded to these couples and the *DeBoer* decision is then reversed, the State would be in the difficult position of determining whether these public benefits should be recouped or whether these 8 couples should be allowed to retain benefits they were never entitled to receive in the first place. This is particularly complicated because the nature of the benefits involved – including health care, pension benefits, and adoption rights – are

subject to complex administrative or legal processes that do not favor short-term elections or oscillating decisions.

Neither judicial economy nor the public interest is advanced by allowing this case to proceed at this time. Plaintiffs' entitlement to benefits is speculative, as it is conditioned upon numerous factors, the most significant of which is the existence of a legal marriage. Awarding such benefits before appellate review of the legal issues underpinning Plaintiffs' claims would be imprudent. Therefore, the second and third prongs of the test weigh in favor of staying these proceedings.

III. On balance, the prejudice and hardship to the State outweighs that to Plaintiffs if a stay is denied.

Here, several Plaintiffs have alleged no more than speculative or hypothetical claims. Other Plaintiffs have failed to properly apply for the benefits they seek. Still others seek benefits from private employers that are not under the control of these State Defendants, or are contingent upon factors other than the existence of a legal marriage. And some of these Plaintiffs have the ability to mitigate any alleged harm by seeking alternative benefits or services. Because Plaintiffs have not suffered a concrete, particularized injury that will be remedied

by a favorable resolution in this case, they face no hardship or prejudice by staying these proceedings.

Furthermore, Plaintiffs' cannot reasonably believe they are immediately entitled to the benefits they seek. It was well publicized that the State would appeal an adverse decision in *DeBoer* and request immediate stay of the judgment, if the district court itself did not grant the stay the State had already requested. And the State did so less than an hour after the judgment issued. Despite the appeal, which rendered the future of the *DeBoer* decision uncertain, and the pending motion for stay, which was likely to be granted thereby reviving the Marriage Amendment, Plaintiffs moved forward with their marriages—marriages that may ultimately be void.

Plaintiffs cannot avoid federal law and basic rules of procedure regarding appeals and stays. Those rules rendered the *DeBoer* decision unenforceable and revived the Marriage Amendment and various statutes, thereby presently barring Plaintiffs' requested benefits, which are dependent upon, among other things, the enforceability of *DeBoer*.

In addition, the State of Michigan, through Defendant Snyder, who is also a defendant in *DeBoer*, is entitled to the protection of the

stay entered by the Sixth Circuit. A stay pending appeal is "[a]n historic procedure for preserving rights during the pendency of an appeal." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942). A "function of [a] stay is to avoid irreparable injury to the public interest sought to be vindicated by the appeal." *Id.* at 14. A "stay operates upon the judicial proceeding itself . . . by temporarily divesting an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 428 (2009) (citing Black's Dictionary, p 1413 (6th ed. 1990)). In this way a stay can have the "practical effect of preventing some action before the legality of that action has been conclusively determined," by suspending "'judicial alteration of the status quo[.]'" *Nken*, 556 U.S. at 428-29 (quoting *Ohio Citizens for Responsible Energy, Inc. v. N.R.C.*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

Like it or not, the Sixth Circuit's stay orders rendered the *DeBoer* judgment temporarily unenforceable, thereby lifting the injunction and returning the state of affairs to the status quo; meaning, the Marriage Amendment and its implementing statutes became enforceable the moment the stay was entered. Because the Amendment is in effect, and the judgment under which Plaintiffs were married has been stayed, the

recognition of Plaintiffs' same-sex marriages or unions for any purpose in Michigan is prohibited. Mich. Const., art. I, § 25. Neither Plaintiffs nor this Court can rely on the judgment to request or award benefits contrary to the constitution; indeed, not even the *DeBoer* plaintiffs may seek relief under the judgment at this time.

Likewise, the State Defendants cannot be compelled to comply with or honor the judgment during the stay. That would completely defeat the purpose of the stay. *Balark*, 81 F.3d at 663 ("devices such as . . . stays pending appeal exist [ ] so that the parties can protect their respective positions while the fate of the district court judgment is still uncertain"). To the extent Plaintiffs feel aggrieved by the change in circumstances, they are aggrieved by the stay, which was entered by the Sixth Circuit – not the State or these State Defendants.

No hardship, prejudice, or inequity now befalls Plaintiffs from their personal decisions to marry with the hope of immediately receiving benefits. Rather, greater harm results to the State and the State Defendants, who secured a stay in anticipation of just such circumstances, and to the public from attaching benefit determinations

to an uncertain legal right. Thus, the last prong of the test also weighs heavily in favor of staying these proceedings.

CONCLUSION AND RELIEF REQUESTED

Defendants request this case be stayed or held in abeyance pending resolution of the appeal in *DeBoer, et al. v. Snyder, et al.*, Case No. 14-1341.

Respectfully submitted,

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Dated: June 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2014, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

A courtesy copy of the aforementioned document was placed in the mail directed to:

Hon. Mark A. Goldsmith
U.S. District Court, Eastern Mich.
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/s/ Michael F. Murphy
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2004-0074408-A

Attachment 1

Slip Copy, 2013 WL 5651444 (E.D.Mich.)
(Cite as: 2013 WL 5651444 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Southern Division.
BANDIT INDUSTRIES, INC., et al., Plaintiffs,
v.
BLUE CROSS AND BLUE SHIELD OF MICHIGAN, Defendant.

Civil Action No. 4:13–cv–12922.
Oct. 15, 2013.

Perrin Rynders, Stephen F. MacGuidwin, Aaron M. Phelps, Varnum LLP, Grand Rapids, MI, for Plaintiffs.

G. Christopher Bernard, James J. Carty, Matthew R. Rechtien, Bodman PLC, Ann Arbor, MI, Michael R. Colasanti, Bodman PLC, Detroit, MI, for Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO STAY (DKT.12), ADMINISTRATIVELY CLOSING THE CASE, AND DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION TO DISMISS (DKT.17)

MARK A. GOLDSMITH, District Judge.

***1** This case arises out of an agreement between Plaintiffs and Defendant Blue Cross and Blue Shield of Michigan. According to Plaintiffs, Bandit Industries, Inc. ("Bandit") and Defendant entered into a boilerplate Administrative Services Contract ("ASC") wherein Defendant agreed to administer Bandit Industries, Inc. Welfare Benefit Plan by paying covered employee health care claims on behalf of Bandit. Compl., ¶¶ 10, 12 (Dkt.1). In exchange, Bandit would prepay the "pro rata cost of estimated Amounts Billed for that quarter, the pro rata cost of the estimated administrative charge for that contract year and the amount [Defendant] determined was necessary to maintain the prospective hospital reimbursement funding for that contract year." *Id.* at ¶ 19. Although Defendant was entitled to an administrative fee for its services, Plaintiffs allege that Defendant violated the Employee Retirement Income Security Act of 1974 (ERISA) by "skimming an additional administrative fee from the money Bandit provided to pay claims." *Id.* at ¶¶ 1, 16, 27 ("BCBSM implanted a scheme to secretly obtain more administrative compensation than it was entitled to."). As a result, Plaintiffs allege that, among other things, Defendant breached its fiduciary duty and engaged in prohibited self-dealing in violation of ERISA. *Id.* at ¶¶ 80–94.

This is not the only case in the Eastern District of Michigan concerning the same allegations of Defendant allegedly "skimming an additional administrative fee" beyond that permitted by the ASC. There appear to be over thirty nearly identical cases in this District filed by various plaintiffs against Defendant. Indeed, following a bench trial in one of these matters, Judge Roberts entered judgment for plaintiffs and against Defendant. *See Hi–Lex Controls, Inc. v. BCBSM,* No. 11–12557, 2013 WL 2285453, at ——30–31 (E.D.Mich. May 23, 2013). Defendant filed an appeal of that decision, which is currently pending before the Sixth Circuit.

Defendant believes that the instant matter may be resolved in its entirety depending on the disposition of its appeal in *Hi–Lex.* Accordingly, Defendant has filed a motion to stay the instant case pending resolution of that appeal. Def.'s Mot. at 4–5 (Dkt.12). Plaintiffs do not dispute Defendant's contention that the Sixth Circuit's decision may resolve some, or even all, of this case; indeed, Plaintiffs acknowledge that this case concerns the ***"same*** facts, ***same*** claims, and ***same*** applicable law" as *Hi–Lex.* Pl.'s Resp. at 10 (Dkt.14) (emphasis in original); *see also Lumbermen's Inc. v. BCBSM,* No. 12–15606, 2013 WL 3835339, at *1 (E.D.Mich. July 24, 2013) (Duggan, J.) ("[B]ecause any decision rendered by the Sixth Circuit Court of Appeals in BCBMS's appeal will surely influence,

if not govern, the outcome of Plaintiffs' claims here, it would be unwise to proceed with the instant action prior to the Sixth Circuit's review of Judge Roberts' decision in *Hi–Lex."*).[FN1] Rather, Plaintiffs argue that granting a stay is inappropriate for two reasons: (1) the Sixth Circuit's decision in *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Michigan,* 722 F.3d 861 (6th Cir.2013) already resolved nearly all of the issues identified by Defendant in its *Hi–Lex* appeal and (2) collateral estoppel from the *Hi–Lex* judgment bars re-litigation of most of the issues in the instant case. Pl.'s Resp. at 13–19.

> FN1. This is further highlighted by the fact that Judge Roberts has granted similar motions to stay in the cases before her pending the Sixth Circuit's decision on her rulings in the *Hi–Lex* case. *See, e.g., Borroughs Corp., et al. v. BCBSM,* No. 11–12565 (E.D.Mich. July 10, 2013) (Roberts, J.).

***2** The Court notes that, of all the motions to stay Defendant has filed in the other cases pending in the Eastern District of Michigan, more than twenty-five have been granted. These rulings make sense in light of Plaintiffs' own admission that the cases generally concern the same facts, claims, and applicable law as the *Hi–Lex* matter. While Plaintiffs try to avoid the implications of such a concession by arguing that Defendant's appeal in *Hi–Lex* is doomed in light of the Sixth Circuit's decision in *Pipefitters,* this is nothing more than an improper attempt to litigate the appeal in this Court. *See, e.g., Fisher & Co., Inc. v. BCBSM,* No. 13–13221, 2013 WL 5476240, at *1 (E.D.Mich. Oct.2, 2013) (citing *Baker College, et al. v. BCBSM,* No. 13–13226 (E.D.Mich. Sept. 11, 2013) (Plaintiff's argument that *Pipefitters* controls the appeal "is just an attempt to litigate the *Hi–Lex* appeal here")). Moreover, this case still is in its infancy and the Sixth Circuit has issued an order in *Hi–Lex* prohibiting any extensions in briefing "absent exceptional and extraordinary circumstances." *Hi–Lex Controls, Inc. v. BCBSM,* No. 13–1773/13–1859 (6th Cir. Aug. 27, 2013). Accordingly, the Court finds that a stay of this case pending the Sixth Circuit's decision in *Hi–Lex* best effectuates the goals of judicial economy and will not prejudice Plaintiffs.

In response to Plaintiffs' argument regarding collateral estoppel, the Court recognizes that the instant matter involves many of the same legal issues as those decided in the *Hi–Lex* case. But the fact that the Sixth Circuit's decision may affirm, clarify, or reverse some or all of those legal conclusions is a reason to grant the stay, not to rush a decision on collateral estoppel. *See, e.g., Lumbermen's Inc.,* 2013 WL 3835339, at *1. Suffice it to say, the Sixth Circuit's decision may have a substantial impact on this relatively fresh case and, therefore, a stay pending that ruling is appropriate. The Court consequently grants Defendant's motion to stay (Dkt.12).

Lastly, the Court notes that despite requesting a stay of the case, Defendant filed a motion to dismiss on September 27, 2013. Mot. to Dismiss (Dkt.17). Presumably, the arguments Defendant raises in that motion may be moot or need to be modified depending on the Sixth Circuit's resolution of the *Hi–Lex* matter. Accordingly, Defendant's motion to dismiss is denied without prejudice.

In conclusion:

Defendant's motion to stay (Dkt.12) is granted. This matter is stayed pending resolution of the *Hi–Lex* matter, including any appeal and proceeding on writ of certiorari to the United States Supreme Court;

Defendant's motion to dismiss (Dkt.17) is denied without prejudice;

The clerk is instructed to close the case without prejudice for administrative and statistical purposes. This closing is not a decision on the merits. Any party may file a motion to reopen the

matter upon the issuance of a mandate by the Court of Appeals in the *Hi–Lex* matter.

***3** SO ORDERED.

E.D.Mich.,2013.
Bandit Industries, Inc. v. Blue Cross and Blue Shield of Michigan
Slip Copy, 2013 WL 5651444 (E.D.Mich.)

END OF DOCUMENT

Attachment 2

Westlaw

--- F.Supp.2d ----, 2014 WL 556729 (W.D.Ky.)
(Cite as: 2014 WL 556729 (W.D.Ky.))

H
Only the Westlaw citation is currently available.

United States District Court, W.D. Kentucky,
at Louisiville.
Gregory BOURKE, et al., Plaintiffs
v.
Steve BESHEAR, et al., Defendants.

Civil Action No. 3:13–CV–750–H.
Signed Feb. 12, 2014.
Opinion Continuing Stay March 19, 2014.

Background: Four same-sex couples validly married outside Kentucky brought § 1983 action challenging constitutionality of Kentucky's denial of recognition for valid same-sex marriages.

Holdings: The District Court, John G. Heyburn II, J., held that:
(1) rational basis review applied;
(2) Kentucky's failure to recognize marriages of same-sex couples validly married outside of Kentucky treated gay and lesbian persons differently in a way that demeaned them; and
(3) Kentucky's interest in preserving "state's institution of traditional marriage," standing alone, was not rational basis.

Judgment for plaintiffs.

West Headnotes

[1] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases
Rational basis review applied in § 1983 action by same-sex couples validly married outside Kentucky, alleging Kentucky's denial of recognition for their marriages violated Fourteenth Amendment equal protection. U.S.C.A. Const.Amend. 14; Ky. Const. § 233A; 42 U.S.C.A. § 1983; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.

[2] Constitutional Law 92 ⚿3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Marriage 253 ⚿2

253 Marriage
253k2 k. Power to Regulate and Control. Most Cited Cases

Marriage 253 ⚿17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of Foreign Union. Most Cited Cases
Kentucky's failure to recognize marriages of same-sex couples validly married outside of Kentucky treated gay and lesbian persons differently in a way that demeaned them, for purposes of § 1983 action by same-sex couples, alleging violations of Fourteenth Amendment equal protection; Kentucky law identified subset of marriages and made them unequal, and law burdened same-sex spouses by preventing them from receiving certain state and federal benefits afforded to other married couples. U.S.C.A. Const.Amend. 14; Ky. Const. § 233A; 42 U.S.C.A. § 1983; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.

[3] Constitutional Law 92 ⚿3438

92 Constitutional Law

92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Marriage 253 ⚿2

253 Marriage
253k2 k. Power to Regulate and Control. Most Cited Cases

Marriage 253 ⚿17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of Foreign Union. Most Cited Cases

Kentucky's interest in preserving "state's institution of traditional marriage," standing alone, was not rational basis required to justify state's failure to recognize marriages of same-sex couples validly married outside of Kentucky, and, therefore, those provisions of Kentucky law were unconstitutional as in violation of Fourteenth Amendment equal protection; that governing majority traditionally viewed practice as immoral was not sufficient reason for upholding laws prohibiting that practice. U.S.C.A. Const.Amend. 14; Ky. Const. § 233A; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.

[4] Constitutional Law 92 ⚿2450

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 k. Nature and Scope in General. Most Cited Cases

It is emphatically the province and duty of the judicial department to say what the law is.

[5] Federal Courts 170B ⚿3463

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(F) Supersedeas or Stay of Proceedings
170Bk3463 k. Other Particular Cases. Most Cited Cases

Order overturning Kentucky's denial of recognition of valid same-sex marriages performed outside Kentucky would be stayed pending appeal to the Court of Appeals; implementing the order would have dramatic effects, and risk confusion if it were later reversed. Fed.Rules Civ.Proc.Rule 62, 28 U.S.C.A.

[6] Federal Courts 170B ⚿3461

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(F) Supersedeas or Stay of Proceedings
170Bk3461 k. In General. Most Cited

In determining whether to stay its own judgment or order, the court will consider the following factors: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (4) where the public interest lies. Fed.Rules Civ.Proc.Rule 62, 28 U.S.C.A.

[7] Federal Courts 170B ⚿3461

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(F) Supersedeas or Stay of Proceedings
170Bk3461 k. In General. Most Cited

The loss of a constitutional right for even minimal periods of time constitutes irreparable harm, in determining whether to stay an order or judgment pending appeal. Fed.Rules Civ.Proc.Rule 62, 28 U.S.C.A.

West Codenotes

--- F.Supp.2d ----, 2014 WL 556729 (W.D.Ky.)
(Cite as: 2014 WL 556729 (W.D.Ky.))

Held UnconstitutionalKy. Const. § 233A, KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.Dawn R. Elliott, Fauver Law Office, Daniel J. Canon, Laura E. Landenwich, Leonard J. Dunman, IV, Louis Paz Winner, Clay Daniel Walton Adams PLC, Shannon Renee Fauver, Fauver Law Office, Louisville, KY, for Plaintiffs.

Brian Thomas Judy, Clay A. Barkley, Kentucky Attorney General—Civil & Environmental Law Div., Frankfort, KY, for Defendants.

MEMORANDUM OPINION

JOHN G. HEYBURN II, District Judge.

***1** Four same-sex couples validly married outside Kentucky have challenged the constitutionality of Kentucky's constitutional and statutory provisions that exclude them from the state recognition and benefits of marriage available to similarly situated opposite-sex couples.

While Kentucky unquestionably has the power to regulate the recognition of civil marriages, those regulations must comply with the Constitution of the United States. This court's role is not to impose its own political or policy judgments on the Commonwealth or its people. Nor is it to question the importance and dignity of the institution of marriage as many see it. Rather, it is to discuss the benefits and privileges that Kentucky attaches to marital relationships and to determine whether it does so lawfully under our federal constitution.

From a constitutional perspective, the question here is whether Kentucky can justifiably deny same-sex spouses the recognition and attendant benefits it currently awards opposite-sex spouses. For those not trained in legal discourse, the questions may be less logical and more emotional. They concern issues of faith, beliefs, and traditions. Our Constitution was designed both to protect religious beliefs and prevent unlawful government discrimination based upon them. The Court will address all of these issues.

In the end, the Court concludes that Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review. Accordingly, Kentucky's statutes and constitutional amendment that mandate this denial are unconstitutional.

I.

No case of such magnitude arrives absent important history and narrative. That narrative necessarily discusses (1) society's evolution on these issues, (2) a look at those who now demand their constitutional rights, and (3) an explication of their claims. For most of Kentucky's history, the limitation of marriage to opposite-sex couples was assumed and unchallenged. Those who might have disagreed did so in silence. But gradual changes in our society, political culture and constitutional understandings have encouraged some to step forward and assert their rights.

A.

In 1972, two Kentucky women stepped forward to apply for a marriage license. The Kentucky Supreme Court ruled that they were not entitled to one, noting that Kentucky statutes included neither a definition of "marriage" nor a prohibition on same-sex marriage. *Jones v. Hallahan,* 501 S.W.2d 588, 589 (Ky.App.1973). The court defined "marriage" according to common usage, consulting several dictionaries. It held that no constitutional issue was involved and concluded, "In substance, the relationship proposed ... is not a marriage." *Id.* at 590. This view was entirely consistent with the then-prevailing state and federal jurisprudence. *See Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185, 187 (1971), *appeal dismissed for want of a substantial federal question,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *Anonymous v. Anonymous,* 67 Misc.2d 982, 325 N.Y.S.2d 499, 501 (N.Y.Spec. Term 1971). A lot has changed since then.

Twenty-one long years later, the Hawaii Supreme Court first opened the door to same-sex marriage. *See Baehr v. Lewin,* 74 Haw. 530, 852 P.2d

44, 61 (1993) (ruling that the state's prohibition on same-sex marriage was discriminatory under the Hawaii Constitution and remanding to allow the state to justify its position). The reaction was immediate and visceral. In the next few years, twenty-seven states passed anti-same-sex marriage legislation, [FN1] and Congress passed the Defense of Marriage Act (DOMA).[FN2]

***2** In 1998, Kentucky became one of those states, enacting new statutory provisions that (1) defined marriage as between one man and one woman, K.R.S. § 402.005; (2) prohibited marriage between members of the same sex, K.R.S. § 402.020(1)(d); (3) declared same-sex marriages contrary to Kentucky public policy, K.R.S. § 402.040(2); and (4) declared same-sex marriages solemnized out of state void and the accompanying rights unenforceable, K.R.S. § 402.045.[FN3]

Five years later, the Massachusetts Supreme Judicial Court declared that the state's own ban on same-sex marriage violated their state constitution. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 969 (2003). In May 2004, Massachusetts began marrying same-sex couples. In response, anti-same-sex marriage advocates in many states initiated campaigns to enact constitutional amendments to protect "traditional marriage." [FN4]

Like-minded Kentuckians began a similar campaign, arguing that although state law already prohibited same-sex marriage, a constitutional amendment would foreclose any possibility that a future court ruling would allow same-sex marriages to be performed or recognized in Kentucky. *See* S. DEBATE, 108TH CONG., 2ND SESS. (Ky. 2004), ECF No. 38–6. The legislature placed such an amendment on the ballot. It contained only two sentences:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

KY. CONST. § 233A. Consequently, the amendment and Kentucky's statutes have much the same effect. On November 2, 2004, approximately 74% of participating voters approved the Amendment.[FN5]

Kentucky's same-sex marriage legal framework has not changed since. In the last decade, however, a virtual tidal wave of legislative enactments and judicial judgments in other states have repealed, invalidated, or otherwise abrogated state laws restricting same-sex couples' access to marriage and marriage recognition.[FN6]

B.

In many respects, Plaintiffs here are average, stable American families.

Gregory Bourke and Michael Deleon reside in Louisville, Kentucky and have been together for 31 years. They were lawfully married in Ontario, Canada in 2004 and have two minor children who are also named Plaintiffs: a 14–year–old girl; and a 15–year–old boy. Jimmy Meade and Luther Barlowe reside in Bardstown, Kentucky and have been together 44 years. They were lawfully married in Davenport, Iowa in 2009. Randell Johnson and Paul Campion reside in Louisville, Kentucky and have been together for 22 years. They were lawfully married in Riverside, California in 2008 and have four minor children who are named Plaintiffs: twin 18–year–old boys; a 14–year–old boy; and a 10–year–old girl. Kimberly Franklin and Tamera Boyd reside in Cropper, Kentucky.[FN7] They were lawfully married in Stratford, Connecticut in 2010.

Collectively, they assert that Kentucky's legal framework denies them certain rights and benefits that validly married opposite-sex couples enjoy. For instance, a same-sex surviving spouse has no right to an inheritance tax exemption and thus must pay higher death taxes. They are not entitled to the same healthcare benefits as opposite-sex couples; a same-sex spouse must pay to add their spouse to

their employer-provided health insurance, while opposite-sex spouses can elect this option free of charge. Same-sex spouses and their children are excluded from intestacy laws governing the disposition of estate assets upon death. Same-sex spouses and their children are precluded from recovering loss of consortium damages in civil litigation following a wrongful death. Under Kentucky's workers compensation law, same-sex spouses have no legal standing to sue and recover as a result of their spouse's fatal workplace injury.

***3** Moreover, certain federal protections are available only to couples whose marriage is legally recognized by their home state. For example, a same-sex spouse in Kentucky cannot take time off work to care for a sick spouse under the Family Medical Leave Act. 29 C.F.R. § 825.122(b). In addition, a same-sex spouse in Kentucky is denied access to a spouse's social security benefits. 42 U.S.C. § 416(h)(1)(A)(i). No one denies these disparities.

Finally, Plaintiffs assert additional non-economic injuries as well. They say that Kentucky's laws deny them "a dignity and status of immense import," stigmatize them, and deny them the stabilizing effects of marriage that helps keep couples together. Plaintiffs also allege injuries to their children including: (1) a reduction in family resources due to the State's differential treatment of their parents, (2) stigmatization resulting from the denial of social recognition and respect, (3) humiliation, and (4) harm from only one parent being able to be listed as an adoptive parent—the other being merely their legal guardian.

C.

Plaintiffs advance six primary claims under 42 U.S.C. § 1983:(1) deprivation of the fundamental right to marry in violation of the Due Process Clause of the Fourteenth Amendment; (2) discrimination on the basis of sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment; [FN8] (3) discrimination against same-sex couples in violation of the freedom of association guaranteed by the First Amendment; (4) failure to recognize valid public records of other states in violation of the Full Faith and Credit Clause of Article IV, Section 1; (5) deprivation of the right to travel in violation of the Due Process Clause of the Fourteenth Amendment; and (6) establishment of a religious definition of marriage in violation of the Establishment Clause of the First Amendment.[FN9] Plaintiffs seek an order enjoining the State from enforcing the pertinent constitutional and statutory provisions.

While Plaintiffs have many constitutional theories, the Fourteenth Amendment's Equal Protection Clause provides the most appropriate analytical framework. [FN10] If equal protection analysis decides this case, the Court need not address any others. No one disputes that the same-sex couples who have brought this case are treated differently under Kentucky law than those in comparable opposite-sex marriages. No one seems to disagree that, as presented here, the equal protection issue is purely a question of law. The Court must decide whether the Kentucky Constitution and statutes violate Plaintiffs' federal constitutional rights.

II.

***4** [1] Before addressing the substance of equal protection analysis, the Court must first determine the applicable standard of review. Rational basis review applies unless Kentucky's laws affect a suspect class of individuals or significantly interfere with a fundamental right. *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) .

A.

The Kentucky provisions challenged here impose a classification based on sexual orientation. Barely seven months ago, the Supreme Court issued a historic opinion applying equal protection analysis to federal non-recognition of same-sex marriages. *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).[FN11] Although the majority opinion covered many topics, it never clearly explained the applicable standard of review. Some of Justice Kennedy's language corresponded

to rational basis review. *See id.* at 2696 ("no legitimate purpose overcomes the purpose and effect to disparage and to injure...."). However, the scrutiny that the Court actually applied does not so much resemble it. *See id.* at 2706 (Scalia, J., dissenting) (the majority "does not apply strict scrutiny, and [although] its central propositions are taken from rational basis cases ... the Court certainly does not *apply* anything that resembles that deferential framework.") (emphasis in original). So, we are left without a clear answer.

The Sixth Circuit has said that sexual orientation is not a suspect classification and thus is not subject to heightened scrutiny. *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir.2012) (citing *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.2006)). Though *Davis* concerned slightly different circumstances, it would seem to limit the Court's independent assessment of the question. *Accord Bassett v. Snyder,* 951 F.Supp.2d 939, 961 (E.D.Mich.2013).

It would be no surprise, however, were the Sixth Circuit to reconsider its view. Several theories support heightened review. *Davis* based its decision on a line of cases relying on *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which has since been overruled by *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (" *Bowers* was not correct when it was decided, and it is not correct today.").[FN12] Recently, several courts, including the Ninth Circuit, have held that classifications based on sexual orientation are subject to heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir.2014) (finding that *Windsor* employed heightened scrutiny).

Moreover, a number of reasons suggest that gay and lesbian individuals do constitute a suspect class. They seem to share many characteristics of other groups that are afforded heightened scrutiny, such as historical discrimination, immutable or distinguishing characteristics that define them as a discrete group, and relative political powerlessness. *See Lyng v. Castillo,* 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986). Further, their common characteristic does not impair their ability to contribute to society. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

***5** All of these arguments have merit. To resolve the issue, however, the Court must look to *Windsor* and the Sixth Circuit. In *Windsor,* no clear majority of Justices stated that sexual orientation was a suspect category.

B.

Supreme Court jurisprudence suggests that the right to marry is a fundamental right. *See Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our existence and survival" (quoting *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942))); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (the right to marry is a central part of Due Process liberty); *Maynard v. Hill,* 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888) (marriage creates "the most important relation in life"). The right to marry also implicates the right to privacy and the right to freedom of association. *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (marriage involves a "right of privacy older than the Bill of Rights"); *M.L.B. v. S.L.J.,* 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) ("Choices about marriage ... are among associational rights this Court has ranked 'of basic importance in our society' " and are protected under the Fourteenth Amendment (quoting *Boddie v. Connecticut,* 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971))).

Despite this comforting language, neither the Supreme Court nor the Sixth Circuit has stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex. Moreover, Plaintiffs do not seek the right to marry

in Kentucky. Rather, they challenge the State's lack of recognition for their validly solemnized marriages.[FN13]

To resolve the issue, the Court must again look to *Windsor*. In *Windsor*, the Supreme Court did not clearly state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right, much less significantly interfered with one. Therefore, the Court will apply rational basis review. Ultimately, the result in this case is unaffected by the level of scrutiny applied.

C.

***6** Under this standard, the Court must determine whether these Kentucky laws are rationally related to a legitimate government purpose. Plaintiffs have the burden to prove either that there is no conceivable legitimate purpose for the law or that the means chosen to effectuate a legitimate purpose are not rationally related to that purpose. This standard is highly deferential to government activity but is surmountable, particularly in the context of discrimination based on sexual orientation. "Rational basis review, while deferential, is not 'toothless.' " *Peoples Rights Org., Inc. v. City of Columbus,* 152 F.3d 522, 532 (6th Cir.1998) (quoting *Mathews v. Lucas,* 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976)). This search for a rational relationship "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Even under this most deferential standard of review, courts must still "insist on knowing the *relation* between the classification adopted and the object to be attained." *Id.* at 632, 116 S.Ct. 1620 (emphasis added).

III.

In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here. Whether enacted by a legislature or by public referendum, those laws are subject to the guarantees of individual liberties contained within the United States Constitution. *Windsor,* 133 S.Ct. at 2691; *see e.g., Loving,* 388 U.S. at 12, 87 S.Ct. 1817 (statute prohibiting interracial marriage violated equal protection).

Ultimately, the focus of the Court's attention must be upon Justice Kennedy's majority opinion in *Windsor*. While Justice Kennedy did not address our specific issue, he did address many others closely related. His reasoning about the legitimacy of laws excluding recognition of same-sex marriages is instructive. For the reasons that follow, the Court concludes that Kentucky's laws are unconstitutional.

A.

In *Windsor,* Justice Kennedy found that by treating same-sex married couples differently than opposite-sex married couples, Section 3 of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." *Windsor,* 133 S.Ct. at 2693. His reasoning establishes certain principles that strongly suggest the result here.[FN14]

[2] The first of those principles is that the actual purpose of Kentucky's laws is relevant to this analysis to the extent that their purpose and principal effect was to treat two groups differently. *Id.* As described so well by substituting our particular circumstances within Justice Kennedy's own words, that principle applies quite aptly here:

> [Kentucky's laws'] principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.

***7** *Id.* at 2694. The legislative history of Kentucky's laws clearly demonstrates the intent to permanently prevent the recognition of same-sex marriage in Kentucky.[FN15] Whether that purpose also demonstrates an obvious animus against same-sex couples may be debatable. But those two motivations are often different sides of the same coin.

The second principle is that such an amendment demeans one group by depriving them of rights provided for others. As Justice Kennedy would say:

> Responsibilities, as well as rights, enhance the dignity and integrity of the person. And [Kentucky's laws] contrive[ ] to deprive some couples [married out of state], but not other couples [married out of state], of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, [Kentucky's laws] force[ ] same-sex couples to live as married for the purpose of [federal law] but unmarried for the purpose of [Kentucky] law.... This places same-sex couples [married out of state] in an unstable position of being in a second-tier marriage [in Kentucky]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence,* 539 U.S. 558, 123 S.Ct. 2472.

Id. Under Justice Kennedy's logic, Kentucky's laws burden the lives of same-sex spouses by preventing them from receiving certain state and federal governmental benefits afforded to other married couples. *Id.* Those laws "instruct[ ] all ... officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Indeed, Justice Kennedy's analysis would seem to command that a law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality.

From this analysis, it is clear that Kentucky's laws treat gay and lesbian persons differently in a way that demeans them. Absent a clear showing of animus, however, the Court must still search for any rational relation to a legitimate government purpose.

B.

[3] The State's sole justification for the challenged provisions is: "the Commonwealth's public policy is rationally related to the legitimate government interest of preserving the state's institution of traditional marriage." Certainly, these laws do further that policy.

That Kentucky's laws are rooted in tradition, however, cannot alone justify their infringement on individual liberties. *See Heller v. Doe,* 509 U.S. 312, 326, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Williams v. Illinois,* 399 U.S. 235, 239, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack...."). Over the past forty years, the Supreme Court has refused to allow mere tradition to justify marriage statutes that violate individual liberties. *See, e.g., Loving,* 388 U.S. at 12, 87 S.Ct. 1817 (states cannot prohibit interracial marriage); *Lawrence,* 539 U.S. at 577–78, 123 S.Ct. 2472 (states cannot criminalize private, consensual sexual conduct); *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 733–35, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (states cannot act based on stereotypes about women's assumption of primary childcare responsibility). Justice Kennedy restated the principle most clearly: " '[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice....' " *Lawrence,* 539 U.S. at 577, 123 S.Ct. 2472 (quoting *Bowers,* 478 U.S. at 216, 106 S.Ct. 2841 (Stevens, J., dissenting)). Justice Scalia was more blunt, stating that " 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* at 601, 123 S.Ct. 2472 (Scalia, J., dissenting) (emphasis in original).

Usually, as here, the tradition behind the challenged law began at a time when most people did not fully appreciate, much less articulate, the individual rights in question. For years, many states had a tradition of segregation and even articulated reas-

ons why it created a better, more stable society. Similarly, many states deprived women of their equal rights under the law, believing this to properly preserve our traditions. In time, even the most strident supporters of these views understood that they could not enforce their particular moral views to the detriment of another's constitutional rights. Here as well, sometime in the not too distant future, the same understanding will come to pass.

C.

***8** The Family Trust Foundation of Kentucky, Inc. submitted a brief as *amicus curiae* which cast a broader net in search of reasons to justify Kentucky's laws. It offered additional purported legitimate interests including: responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage. These reasons comprise all those of which the Court might possibly conceive.

The State, not surprisingly, declined to offer these justifications, as each has failed rational basis review in every court to consider them post- *Windsor,* and most courts pre- *Windsor. See, e.g., Bishop v. United States ex rel. Holder,* 962 F.Supp.2d 1252, 1290–96 (N.D.Okla.2014) (responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the ideal family unit, and avoiding changes to the institution of marriage and unintended consequences); *Kitchen v. Herbert,* 961 F.Supp.2d 1181, 1211–14 (D.Utah 2013) (responsible procreation, optimal childrearing, proceeding with caution); *Obergefell v. Wymyslo,* 962 F.Supp.2d 968, 993–95 (S.D.Ohio 2013) (optimal childrearing). The Court fails to see how having a family could conceivably harm children. Indeed, Justice Kennedy explained that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex:

> [I]t humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.
>
> *Windsor,* 133 S.Ct. at 2694.

As in other cases that have rejected the amicus's arguments, no one in this case has offered factual or rational reasons why Kentucky's laws are rationally related to any of these purposes. Kentucky does not require proof of procreative ability to have an out-of-state marriage recognized. The exclusion of same-sex couples on procreation grounds makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds. After all, Kentucky allows gay and lesbian individuals to adopt children. And no one has offered evidence that same-sex couples would be any less capable of raising children or any less faithful in their marriage vows. Compare this with Plaintiffs, who have not argued against the many merits of "traditional marriage." They argue only that they should be allowed to enjoy them also.

Other than those discussed above, the Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review.

D.

***9** The Court is not alone in its assessment of the binding effects of Supreme Court jurisprudence, particularly Justice Kennedy's substantive analysis articulated over almost two decades.

Nine state and federal courts have reached conclusions similar to those of this Court. After the Massachusetts Supreme Judicial Court led the way by allowing same-sex couples to marry, five years later the Connecticut Supreme Court reached a similar conclusion regarding its state constitution on equal protection grounds. *Kerrigan v. Comm'r of Pub. Health,* 289 Conn. 135, 957 A.2d 407, 482 (2008). Other courts soon began to follow. *See*

Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (holding that banning same-sex marriage violated equal protection as guaranteed by the Iowa Constitution); *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 1003 (N.D.Cal.2010) (holding that the state's constitutional ban on same-sex marriage enacted via popular referendum violated the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution) *aff'd sub nom. Perry v. Brown,* 671 F.3d 1052 (9th Cir.2012) *vacated and remanded sub nom. Hollingsworth v. Perry,* —— U.S. ——, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013); *Garden State Equality v. Dow,* 434 N.J.Super. 163, 82 A.3d 336, 367–68 (2013) (holding that disallowing same-sex marriage violated the New Jersey Constitution, and the governor withdrew the state's appeal); *Griego v. Oliver,* 316 P.3d 865, 872 (N.M.2013) (holding that denying same-sex couples the right to marry violated the state constitution's equal protection clause).

Over the last several months alone, three federal district courts have issued well-reasoned opinions supporting the rights of non-heterosexual persons to marriage equality in similar circumstances. *See Bishop,* 962 F.Supp.2d at 1258–59 (holding that the state's ban on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment); *Obergefell,* 962 F.Supp.2d at 972–74 (holding that Ohio's constitutional and statutory ban on the recognition of same-sex marriages validly performed out-of-state was unconstitutional as applied to Ohio death certificates); *Kitchen,* 961 F.Supp.2d at 1187–88 (holding that the state's constitutional and statutory ban on same-sex marriage violated the Equal Protection and Due Process clause of the Fourteenth Amendment).

Indeed, to date, all federal courts that have considered same-sex marriage rights post- *Windsor* have ruled in favor of same-sex marriage rights. This Court joins in general agreement with their analyses.

IV.

***10** For many, a case involving these issues prompts some sincere questions and concerns. After all, recognizing same-sex marriage clashes with many accepted norms in Kentucky—both in society and faith. To the extent courts clash with what likely remains that majority opinion here, they risk some of the public's acceptance. For these reasons, the Court feels a special obligation to answer some of those concerns.

A.

Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused—even angry—when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.

Our religious beliefs and societal traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves, at issue here are laws that act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.

The beauty of our Constitution is that it accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it.

B.

Many others may wonder about the future of marriages generally and the right of a religion or an individual church to set its own rules governing it. For instance, must Kentucky now allow same-sex couples to marry in this state? Must churches now

marry same-sex couples? How will this decision change or affect my marriage?

First, the Court was not presented with the particular question whether Kentucky's ban on same-sex marriage is constitutional. However, there is no doubt that *Windsor* and this Court's analysis suggest a possible result to that question.

Second, allowing same-sex couples the state recognition, benefits, and obligations of marriage does not in any way diminish those enjoyed by opposite-sex married couples. No one has offered any evidence that recognizing same-sex marriages will harm opposite-sex marriages, individually or collectively. One's belief to the contrary, however sincerely held, cannot alone justify denying a selected group their constitutional rights.

Third, no court can require churches or other religious institutions to marry same-sex couples or any other couple, for that matter. This is part of our constitutional guarantee of freedom of religion. That decision will always be based on religious doctrine.

What this opinion does, however, is make real the promise of equal protection under the law. It will profoundly affect validly married same-sex couples' experience of living in the Commonwealth and elevate their marriage to an equal status in the eyes of state law.

C.

***11** Many people might assume that the citizens of a state by their own state constitution can establish the basic principles of governing their civil life. How can a single judge interfere with that right?

It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power. *See Barron v. City of Baltimore,* 32 U.S. 243, 250–51, 7 Pet. 243, 8 L.Ed. 672 (1833). However, in 1868 our country adopted the Fourteenth Amendment, which prohibited state governments from infringing upon our individual rights. Over the years, the Supreme Court has said time and time again that this Amendment makes the vast majority of the original Bill of Rights and other fundamental rights applicable to state governments.

In fact, the first justice to articulate this view was one of Kentucky's most famous sons, Justice John Marshall Harlan. *See Hurtado v. California,* 110 U.S. 516, 558, 4 S.Ct. 111, 28 L.Ed. 232 (1884) (Harlan, J., dissenting). He wrote that the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that ... 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' " *Plessy v. Ferguson,* 163 U.S. 537, 555, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (quoting U.S. CONST. amend. XIV).

[4] So now, the Constitution, including its equal protection and due process clauses, protects all of us from government action at any level, whether in the form of an act by a high official, a state employee, a legislature, or a vote of the people adopting a constitutional amendment. As Chief Justice John Marshall said, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Initially that decision typically rests with one judge; ultimately, other judges, including the justices of the Supreme Court, have the final say. That is the way of our Constitution.

D.

For many others, this decision could raise basic questions about our Constitution. For instance, are courts creating new rights? Are judges changing the

meaning of the Fourteenth Amendment or our Constitution? Why is all this happening so suddenly?

The answer is that the right to equal protection of the laws is not new. History has already shown us that, while the Constitution itself does not change, our understanding of the meaning of its protections and structure evolves.[FN16] If this were not so, many practices that we now abhor would still exist.

***12** Contrary to how it may seem, there is nothing sudden about this result. The body of constitutional jurisprudence that serves as its foundation has evolved gradually over the past forty-seven years. The Supreme Court took its first step on this journey in 1967 when it decided the landmark case *Loving v. Virginia,* which declared that Virginia's refusal to marry mixed-race couples violated equal protection. The Court affirmed that even areas such as marriage, traditionally reserved to the states, are subject to constitutional scrutiny and "must respect the constitutional rights of persons." *Windsor,* 133 S.Ct. at 2691 (citing *Loving*).

Years later, in 1996, Justice Kennedy first emerged as the Court's swing vote and leading explicator of these issues in *Romer v. Evans. Romer,* 517 U.S. at 635, 116 S.Ct. 1620 (holding that Colorado's constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons violated the Equal Protection Clause). He explained that if the " 'constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' " *Id.* at 634–35, 116 S.Ct. 1620 (emphasis in original) (quoting *Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)). These two cases were the virtual roadmaps for the cases to come next.

In 2003, Justice Kennedy, again writing for the majority, addressed another facet of the same issue in *Lawrence v. Texas,* explaining that sexual relations are "but one element in a personal bond that is more enduring" and holding that a Texas statute criminalizing certain sexual conduct between persons of the same sex violated the Constitution. 539 U.S. at 567, 123 S.Ct. 2472. Ten years later came *Windsor.* And, sometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.

So, as one can readily see, judicial thinking on this issue has evolved ever so slowly. That is because courts usually answer only the questions that come before it. Judge Oliver Wendell Holmes aptly described this process: "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *S. Pac. Co. v. Jensen,* 244 U.S. 205, 221, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting). In *Romer, Lawrence,* and finally, *Windsor,* the Supreme Court has moved interstitially, as Holmes said it should, establishing the framework of cases from which district judges now draw wisdom and inspiration. Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled.

The Court will enter an order consistent with this Memorandum Opinion.

MEMORANDUM OPINION AND ORDER

***13** [5] Defendant, the Governor of Kentucky, has moved for a stay of enforcement of this Court's February 27, 2014 final order, pending its appeal to the United States Court of Appeals for the Sixth Circuit. On February 28, the Court granted a stay up to and including March 20, 2014, in order to allow the state a reasonable time to implement the order. Defendant moved the Court for an extension of the stay on March 14, and the parties appeared before the Court for a telephonic hearing on the matter on March 17. Defendant filed a notice of appeal on March 18.

I.

[6] Federal Rule of Civil Procedure 62 em-

powers this Court to stay enforcement of its own orders and judgments. Particularly in civil matters, there are no rigid rules that govern such a stay, and courts have a fair amount of discretion. The Court will consider the following factors: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (4) where the public interest lies. *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987); *Baker v. Adams Cnty./Ohio Valley Sch. Bd.,* 310 F.3d 927, 928 (6th Cir.2002).

Here, the applicant has not made a strong showing of a likelihood of success on the merits. The district courts are so far unanimous, but no court of appeals has issued an opinion. So, one must admit that ultimate resolution of these issues is unknown.[FN1]

The applicant contends that the state will suffer irreparable harm—"chaos"—if the stay is not extended. It must demonstrate "irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n,* 388 F.3d 224, 227 (6th Cir.2004) (quoting *Baker,* 310 F.3d at 928) (internal quotation marks omitted). To illustrate the irreparable harm, the applicant cites the potential granting and then taking away of same-sex marriage recognition to couples. It also cites the potential impacts on "businesses and services where marital status is relevant, including health insurance companies, creditors, [and] estate planners...." This is a legitimate concern.

[7] On the other hand, Plaintiff same-sex couples argue that they would rather have their marriages recognized for a short amount of time than never at all. Plaintiffs contend that the irreparable harms cited by Defendant are actually minor bureaucratic inconveniences which cannot overcome their constitutional rights. The Court agrees that further delay would be a delay in vindicating Plaintiffs' constitutional rights and obtaining access to important government benefits. The loss of a constitutional right for even minimal periods of time constitutes irreparable harm. *See Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (citing *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).

Finally, the applicant argues that avoiding chaos and uncertainty is in the public's best interest. However, as the Court previously noted, the public interest is twofold: that the Constitution be upheld, and that changes in the law be implemented consistently and without undue confusion. The Court has concerns about implementing an order which has dramatic effects, and then having that order reversed, which is one possibility. Under such circumstances, rights once granted could be cast in doubt.

***14** In this Court's view, the application of these four factors is mixed.

II.

Another issue of great concern is the significance of the Supreme Court's stay of the district court's injunction in *Herbert v. Kitchen,* —— U.S. ——, 134 S.Ct. 893, 187 L.Ed.2d 699 (2014). Since then, three additional cases in which Plaintiffs sought the issuance of marriage licenses have entered stays on their rulings pending appeal. *See Bishop v. United States ex rel. Holder,* 962 F.Supp.2d 1252, 1295–96 (N.D.Okla.2014); *Bostic v. Rainey,* 970 F.Supp.2d 456, ——, 2014 WL 561978, at *23 (E.D.Va.2014); *De Leon v. Perry,* SA–13–CA–00982–OLG, —— F.Supp.2d ——, ——, 2014 WL 715741, at *28 (W.D.Tex. Feb. 26, 2014). The applicant says that it is precedential here.

Plaintiffs make a compelling argument that, at the time of the Supreme Court's guidance in *Kitchen,* the Tenth Circuit had already directed expedited briefing and argument. Here, there is no such guarantee of expedited briefing before the Sixth Circuit. It may be years before the appeals process

is completed. Also, our case is different than *Kitchen.* Nevertheless, the Supreme Court has sent a strong message by its unusual intervention and order in that case. It cannot be easily ignored.

Perhaps it is difficult for Plaintiffs to understand how rights won can be delayed. It is a truth that our judicial system can act with stunning quickness, as this Court has; and then with sometimes maddening slowness. One judge may decide a case, but ultimately others have a final say. It is the entire process, however, which gives our judicial system and our judges such high credibility and acceptance. This is the way of our Constitution. It is that belief which ultimately informs the Court's decision to grant a stay. It is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes. That does not serve anyone well.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the stay of this Court's February 27, 2014 final order is extended until further order of the Sixth Circuit.

FN1. *See* ALA.CODE § 30–1–19 (2013); ARIZ.REV.STAT. ANN. §§ 25–101, –125 (2013); ARK.CODE ANN. §§ 9–11–208(b), –107(b) (West 2013); COLO.REV.STAT. ANN. § 14–2–104 (West 2013); FLA. STAT. ANN.. § 741.212 (West 2013); GA.CODE ANN. § 19–3–3.1 (West 2013); HAW.REV.STAT. §§ 572–1, –1.6 (West 2013) (repealed 2011); IDAHO CODE ANN. § 32–209 (West 2013); 750 ILL. COMP. STAT. ANN.N. 5/212(a)(5), 5/213.1 (West 2013); IND.CODE ANN. § 31–11–1–1 (West 2013); KAN. STAT. ANN. . §§ 23–2501, 23–2508 (West 2013); LA. CIV.CODE ANN. art. 89, 3520 (2013); MICH. COMP. LAWS ANN. §§ 551.1, .271(2) (West 2013); MISS.CODE ANN. §§ 93–1–1(2) (West 2013); MO. ANN. STAT. § 451.022 (West 2013); MONT.CODE ANN. § 40–1–401(1)(d) (2013); N.C. GEN.STAT. ANN. § 51–1.2 (West 2013); N.D. CENT.CODE ANN. §§ 14–03–01, –08 (West 2013); OKLA. STAT. tit. 43, § 3.1 (2013); 23 PA. CONS.STAT. ANN. §§ 1102, 1704 (West 2013); S.C.CODE ANN. §§ 20–1–10, –15 (2013); S.D. CODIFIED LAWS §§ 25–1–1, –38 (2013); TENN.CODE ANN. § 36–3–113 (West 2013); TEX. FAM.CODE ANN. §§ 1.103, 2.001 (West 2013); UTAH CODE ANN. § 30–1–2 (West 2013), invalidated by *Kitchen v. Herbert,* 961 F.Supp.2d 1181 (D.Utah 2013); VA.CODE ANN. § 20–45.2 (West 2013); W. VA.CODE ANN. §§ 48–2–104, –401 (West 2013).

FN2. The bill included commentary that stated: "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits." H.R.REP. NO. 104–664, at 4–11, 1996 U.S.C.C.A.N. 2905, 2914 (1996).

FN3. The pertinent text of these provisions is:

> 402.005: As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman....
>
> 402.020:(1) Marriage is prohibited and void (d) Between members of the same sex.
>
> 402.040:(2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in K.R.S. 402.045.
>
> 402.045:(1) A marriage between members of the same sex which occurs in an-

> other jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.
>
> KY.REV.STAT. ANN. §§ 402.005 –.045 (West 2013).

FN4. States passing constitutional amendments banning same-sex marriage in 2004 include Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Other states followed suit: in 2005, Kansas and Texas; in 2006, Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin; in 2008, Arizona, California, and Florida; and in 2012, North Carolina. Alaska passed its constitutional ban in 1998, and Nebraska and Nevada did so in 2000. California's, Utah's, and Oklahoma's constitutional bans have since been overturned.

FN5. 53.6% of Kentucky's registered voters participated.

FN6. Recognition by legislation and by popular vote has occurred in Vermont (Apr. 7, 2009), New Hampshire (June 3, 2009), District of Columbia (Dec. 18, 2009), New York (June 24, 2011), Washington (Nov. 6, 2012), Maine (Nov. 6, 2012), Maryland (Nov. 6, 2012), Delaware (May 7, 2013), Minnesota (May 14, 2013), Rhode Island (May 2, 2013), Hawaii (Nov. 13, 2013), and Illinois (Nov. 20, 2013) (effective June 1, 2014). State and federal court judgments have occurred in Massachusetts, Connecticut, Iowa, California, New Jersey, New Mexico, Utah, and Oklahoma. The Utah and Oklahoma decisions are currently being appealed.

FN7. Plaintiffs Franklin and Boyd are residents of Shelby County and originally filed suit in the Eastern District of Kentucky. Judge Gregory Van Tatenhove granted Plaintiffs and Defendants' joint motion for change of venue pursuant to 28 U.S.C. § 1404 to the Western District of Kentucky. The case was assigned to Judge Thomas Russell, who transferred it here in the interest of judicial economy and to equalize the docket. Although the cases were not consolidated, Plaintiffs here subsequently added Franklin and Boyd to this action in their Second Amended Com- plaint.

FN8. In their Second Amended Complaint, Plaintiffs also alleged discrimination on the basis of sex. However, the current motion before the Court does not mention any such basis. Therefore, the Court will construe this claim to allege only discrimination based on sexual orientation.

FN9. Plaintiffs also seek a declaration that Section 2 of the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C, as applied to Plaintiffs and similarly situated same-sex couples violates the Due Process, Equal Protection, Freedom of Association, and Full Faith and Credit clauses of the United States Constitution. The Court finds that Section 2 of DOMA, as a permissive statute, is not necessary to the disposition of Plaintiffs' case and therefore will not analyze its constitutionality.

FN10. The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person with-

> in its jurisdiction the equal protection of the laws.
>
> U.S. CONST. amend. XIV § 1.

FN11. In *Windsor*, the state of New York enacted legislation recognizing same-sex marriages performed out of state and later amended its own laws to permit same-sex marriage. Section 3 of the Defense of Marriage Act (DOMA) denied recognition to same-sex marriages for the purposes of federal law. As a result of DOMA, a same-sex spouse did not qualify for the marital exemption from the federal estate tax. She brought an action challenging the constitutionality of Section 3 of DOMA in federal court. The *Windsor* Court applied Fifth Amendment due process and equal protection analysis to the plaintiff's challenge of a federal statute. Our case involves a challenge to a state constitutional provision and state statutes, thus falling under the protections of the Fourteenth Amendment, which is subject to the same substantive analysis.

FN12. Indeed, one district court in this Circuit has found that *Lawrence* destroyed the jurisprudential foundation of *Davis's* line of Sixth Circuit cases, thus leaving the level of scrutiny an open question for lower courts to resolve. *See Obergefell v. Wymyslo,* 962 F.Supp.2d at 986–87 (S.D.Ohio 2013).

FN13. Some courts have construed the right to marry to include the right to remain married. *See, e.g., Obergefell v. Wymyslo,* 962 F.Supp.2d 968 (S.D.Ohio 2013). The logic is that Kentucky's laws operate to render Plaintiffs' marriage invalid in the eyes of state law. This could amount to a functional deprivation of Plaintiffs' lawful marriage, and therefore a deprivation of liberty. *See id.* at 977–79.

FN14. Indeed, Justice Scalia stated that *Windsor* indicated the way the Supreme Court would view future cases involving same-sex marriage "beyond mistaking." 133 S.Ct. at 2709 (Scalia, J., dissenting).

FN15. Senate Bill 245 proposed the amendment to the Kentucky Constitution. The bill's sponsor, state senator Vernie McGaha said:

> Marriage is a divine institution designed to form a permanent union between man and woman.... [T]he scriptures make it the most sacred relationship of life, and nothing could be more contrary to the spirit than the notion that a personal agreement ratified in a human court satisfies the obligation of this ordinance.... [I]n First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have *his* own wife, and let every woman have *her* own husband.' The Defense of Marriage Act, passed in 1996 by Congress, defined marriage for the purpose of federal law as the legal union between one man and one woman. And while Kentucky's law did prohibit the same thing, in '98 we passed a statute that gave it a little more strength and assured that such unions in other states and countries also would not be recognized here. There are similar laws across 38 states that express an overwhelming agreement in our country that we should be protecting the institute [*sic*] of marriage. Nevertheless this institution of marriage is under attack by judges and elected officials who would legislate social policy that has already been in place for us for many, many years.... In May of this year, Massachusetts will begin issuing marriage licenses to same-sex couples.... We in the legislature, I think, have no other choice but

> to protect our communities from the desecration of these traditional values.... Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: the sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.
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> S. DEBATE, 108TH CONG., 2ND SESS. (Ky. 2004), ECF No. 38–6 at 1:00:30–1:05:10. Similarly, cosponsor state senator Gary Tapp proclaimed:
>
> For many years, Kentucky has had laws that define marriage as one man and one woman, and in 1998, the General Assembly did strengthen those laws ensuring that same-sex marriages performed in other states or countries would not be recognized here.... While we're not proposing any new language regarding the institution of marriage in Kentucky, this pro-marriage constitutional amendment will solidify existing law so that even an activist judge cannot question the definition of marriage according to Kentucky law.... [W]hen the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk, will be able to question their beliefs in the traditions of stable marriages and strong families.
>
> *Id.* at 1:05:43–1:07:45. The final state senator to speak on behalf of the bill, Ed Worley, said that the bill was not intended to be a discrimination bill. *Id.* at 1:26:10. However, he offered no other purpose other than reaffirming the historical and Biblical definition of marriage. *See, e.g., id.* at 1:26:20–1:26:50.
>
> One state senator, Ernesto Scorsone, spoke out against the constitutional amendment. He said:
>
> The efforts to amend the U.S. Constitution over the issue of interracial marriage failed despite repeated religious arguments and Biblical references.... The proposal today is a shocking departure from [our constitutional] principles.... To institutionalize discrimination in our constitution is to turn the document on its head. To allow the will of the majority to forever close the door to a minority, no matter how disliked, to any right, any privilege, is an act of political heresy.... Their status will be that of second-class citizens forever.... Discrimination and prejudices will not survive the test of time.
>
> *Id.* at 1:16:07–1:24:00.

FN16. The Supreme Court in *Lawrence v. Texas* explained:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.
>
> 539 U.S. at 578–79, 123 S.Ct. 2472.

FN1. The applicant cites a potential issue of the applicability of *Baker v. Nelson,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). However, *Baker* dismissed for

> want of a substantial federal question an action requesting the issuance of a same-sex marriage license, an issue that was not before the Court in our underlying case.

W.D.Ky.,2014.
Bourke v. Beshear
--- F.Supp.2d ----, 2014 WL 556729 (W.D.Ky.)

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Attachment 3

Slip Copy, 2013 WL 3212597 (E.D.Mich.)
(Cite as: 2013 WL 3212597 (E.D.Mich.))

H
Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Thomas MONAGHAN, and Domino's Farms Corp., Plaintiffs,
v.
Kathleen SEBELIUS, et al, Defendants.

No. 12–15488.
June 26, 2013.

Richard Thompson, Erin E. Mersino, Ann Arbor, MI, for Plaintiffs.

Bradley P. Humphreys, U.S. Department of Justice, Washington, DC, for Defendants.

OPINION AND ORDER

LAWRENCE P. ZATKOFF, District Judge.

***1** This matter is before the Court on Defendants' Motion to Stay Proceedings [dkt 43], which seeks to stay this case pending the Sixth Circuit Court of Appeals' decision in two related cases—*Autocam Corporation v. Sebelius,* No. 12–2673, and *Weingartz Supply Company v. Sebelius,* No. 13–1093. The parties have fully briefed the motion. The Court finds that the facts and legal arguments are adequately presented in the parties' papers such that the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. L.R. 7.1(f)(2), it is hereby ORDERED that the Motion be resolved on the briefs submitted, without oral argument. For the following reasons, Defendants' Motion is GRANTED.

I. LEGAL STANDARD

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936). A court considering a motion to stay should weigh the following factors: "[1] the potentiality of another case having a dispositive effect on the case to be stayed, [2] the judicial economy to be saved by waiting on a dispositive decision, [3] the public welfare, and [4] the hardship/prejudice to the party opposing the stay, given its duration." *Michael v. Ghee,* 325 F.Supp.2d 829, 831 (2004) (citing *Landis,* 299 U.S. at 255).

II. ANALYSIS

Defendants argue that the Court should stay the proceedings here pending the Sixth Circuit's decision in *Autocam Corporation v. Sebelius,* No. 12–2673 (6th Cir.), or *Weingartz Supply Company v. Sebelius,* No. 13–1093 (6th Cir.), whichever occurs first. *Weingartz* and *Autocam* reached differing results on the preliminary injunction issue, with the Eastern District of Michigan granting an injunction in *Weingartz,* and the Western District of Michigan denying the injunction in *Autocam.*

Plaintiffs argue that *Autocam* is not controlling because the Court previously found the facts in that case distinguishable from those in this case. Plaintiffs also argue that if the Sixth Circuit decides *Weingartz* before *Autocam,* that decision will do nothing to negate the unique factual circumstances of this case. Although these potential differences may give rise to different resolutions on the merits in *Weingartz* and *Autocam,* the factual circumstances and central legal issues in both cases are substantially similar to those in this case. The cases involve similar issues—namely plaintiffs from for-profit, secular corporations challenging the validity and constitutionality of the Preventive Services Mandate of the Affordable Care Act. In each case, the plaintiff represents a for-profit, secular company seeking not to comply on the grounds that to do otherwise would burden the religious beliefs of the company's owners. As in this case, the plaintiffs in *Weingartz* and *Autocam* do not qualify for any type of religious or other exemption from the Man-

date. As such, the Court finds *Weingartz* and *Autocam* to be substantially similar to this case and that the Sixth Circuit's decision in either one will likely provide guidance in the Court's decisions in this case and narrow the issues the Court must resolve.

***2** Given this, it would be at odds with the notion of judicial economy for this Court to proceed in this case and risk reaching an ultimate resolution that is inconsistent with precedent the Sixth Circuit creates shortly thereafter. The Court, therefore, will await the binding guidance of the Sixth Circuit's resolution of *Weingartz* or *Autocam.*

Last, Plaintiffs do not demonstrate any prejudice or hardship requiring the Court to deny Defendants' Motion to Stay. The status quo established through the Court's December 31, 2012, Order granting Plaintiffs' Motion for Temporary Restraining Order will remain in effect during the pendency of this case. *See* Dkt. 39 at 20. And, as noted, waiting for additional guidance from the Sixth Circuit promotes judicial economy and efficiency. Therefore, staying this case does not create an undue hardship on Plaintiffs.

Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Stay Proceedings [dkt 43] is GRANTED.

IT IS FURTHER ORDERED that this proceeding is stayed pending the Sixth Circuit's decision in *Autocam* or *Weingartz,* after which this proceeding shall resume upon motion by either party.

IT IS SO ORDERED.

E.D.Mich.,2013.
Monaghan v. Sebelius
Slip Copy, 2013 WL 3212597 (E.D.Mich.)

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Westlaw Delivery Summary Report for GROSSI,CHRISTINA

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Slip Copy, 2013 WL 5651444 (E.D.Mich.)
(Cite as: 2013 WL 5651444 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Southern Division.
BANDIT INDUSTRIES, INC., et al., Plaintiffs,
v.
BLUE CROSS AND BLUE SHIELD OF MICHIGAN, Defendant.

Civil Action No. 4:13–cv–12922.
Oct. 15, 2013.

Perrin Rynders, Stephen F. MacGuidwin, Aaron M. Phelps, Varnum LLP, Grand Rapids, MI, for Plaintiffs.

G. Christopher Bernard, James J. Carty, Matthew R. Rechtien, Bodman PLC, Ann Arbor, MI, Michael R. Colasanti, Bodman PLC, Detroit, MI, for Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO STAY (DKT.12), ADMINISTRATIVELY CLOSING THE CASE, AND DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION TO DISMISS (DKT.17)

MARK A. GOLDSMITH, District Judge.

***1** This case arises out of an agreement between Plaintiffs and Defendant Blue Cross and Blue Shield of Michigan. According to Plaintiffs, Bandit Industries, Inc. ("Bandit") and Defendant entered into a boilerplate Administrative Services Contract ("ASC") wherein Defendant agreed to administer Bandit Industries, Inc. Welfare Benefit Plan by paying covered employee health care claims on behalf of Bandit. Compl., ¶¶ 10, 12 (Dkt.1). In exchange, Bandit would prepay the "pro rata cost of estimated Amounts Billed for that quarter, the pro rata cost of the estimated administrative charge for that contract year and the amount [Defendant] determined was necessary to maintain the prospective hospital reimbursement funding for that contract year." *Id.* at ¶ 19. Although Defendant was entitled to an administrative fee for its services, Plaintiffs allege that Defendant violated the Employee Retirement Income Security Act of 1974 (ERISA) by "skimming an additional administrative fee from the money Bandit provided to pay claims." *Id.* at ¶¶ 1, 16, 27 ("BCBSM implanted a scheme to secretly obtain more administrative compensation than it was entitled to."). As a result, Plaintiffs allege that, among other things, Defendant breached its fiduciary duty and engaged in prohibited self-dealing in violation of ERISA. *Id.* at ¶¶ 80–94.

This is not the only case in the Eastern District of Michigan concerning the same allegations of Defendant allegedly "skimming an additional administrative fee" beyond that permitted by the ASC. There appear to be over thirty nearly identical cases in this District filed by various plaintiffs against Defendant. Indeed, following a bench trial in one of these matters, Judge Roberts entered judgment for plaintiffs and against Defendant. *See Hi–Lex Controls, Inc. v. BCBSM,* No. 11–12557, 2013 WL 2285453, at ——30–31 (E.D.Mich. May 23, 2013). Defendant filed an appeal of that decision, which is currently pending before the Sixth Circuit.

Defendant believes that the instant matter may be resolved in its entirety depending on the disposition of its appeal in *Hi–Lex.* Accordingly, Defendant has filed a motion to stay the instant case pending resolution of that appeal. Def.'s Mot. at 4–5 (Dkt.12). Plaintiffs do not dispute Defendant's contention that the Sixth Circuit's decision may resolve some, or even all, of this case; indeed, Plaintiffs acknowledge that this case concerns the ***"same*** facts, ***same*** claims, and ***same*** applicable law" as *Hi–Lex.* Pl.'s Resp. at 10 (Dkt.14) (emphasis in original); *see also Lumbermen's Inc. v. BCBSM,* No. 12–15606, 2013 WL 3835339, at *1 (E.D.Mich. July 24, 2013) (Duggan, J.) ("[B]ecause any decision rendered by the Sixth Circuit Court of Appeals in BCBMS's appeal will surely influence,

if not govern, the outcome of Plaintiffs' claims here, it would be unwise to proceed with the instant action prior to the Sixth Circuit's review of Judge Roberts' decision in *Hi–Lex."*).[FN1] Rather, Plaintiffs argue that granting a stay is inappropriate for two reasons: (1) the Sixth Circuit's decision in *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Michigan,* 722 F.3d 861 (6th Cir.2013) already resolved nearly all of the issues identified by Defendant in its *Hi–Lex* appeal and (2) collateral estoppel from the *Hi–Lex* judgment bars re-litigation of most of the issues in the instant case. Pl.'s Resp. at 13–19.

> FN1. This is further highlighted by the fact that Judge Roberts has granted similar motions to stay in the cases before her pending the Sixth Circuit's decision on her rulings in the *Hi–Lex* case. *See, e.g., Borroughs Corp., et al. v. BCBSM,* No. 11–12565 (E.D.Mich. July 10, 2013) (Roberts, J.).

***2** The Court notes that, of all the motions to stay Defendant has filed in the other cases pending in the Eastern District of Michigan, more than twenty-five have been granted. These rulings make sense in light of Plaintiffs' own admission that the cases generally concern the same facts, claims, and applicable law as the *Hi–Lex* matter. While Plaintiffs try to avoid the implications of such a concession by arguing that Defendant's appeal in *Hi–Lex* is doomed in light of the Sixth Circuit's decision in *Pipefitters,* this is nothing more than an improper attempt to litigate the appeal in this Court. *See, e.g., Fisher & Co., Inc. v. BCBSM,* No. 13–13221, 2013 WL 5476240, at *1 (E.D.Mich. Oct.2, 2013) (citing *Baker College, et al. v. BCBSM,* No. 13–13226 (E.D.Mich. Sept. 11, 2013) (Plaintiff's argument that *Pipefitters* controls the appeal "is just an attempt to litigate the *Hi–Lex* appeal here")). Moreover, this case still is in its infancy and the Sixth Circuit has issued an order in *Hi–Lex* prohibiting any extensions in briefing "absent exceptional and extraordinary circumstances." *Hi–Lex Controls, Inc. v. BCBSM,* No. 13–1773/13–1859 (6th Cir. Aug. 27, 2013). Accordingly, the Court finds that a stay of this case pending the Sixth Circuit's decision in *Hi–Lex* best effectuates the goals of judicial economy and will not prejudice Plaintiffs.

In response to Plaintiffs' argument regarding collateral estoppel, the Court recognizes that the instant matter involves many of the same legal issues as those decided in the *Hi–Lex* case. But the fact that the Sixth Circuit's decision may affirm, clarify, or reverse some or all of those legal conclusions is a reason to grant the stay, not to rush a decision on collateral estoppel. *See, e.g., Lumbermen's Inc.,* 2013 WL 3835339, at *1. Suffice it to say, the Sixth Circuit's decision may have a substantial impact on this relatively fresh case and, therefore, a stay pending that ruling is appropriate. The Court consequently grants Defendant's motion to stay (Dkt.12).

Lastly, the Court notes that despite requesting a stay of the case, Defendant filed a motion to dismiss on September 27, 2013. Mot. to Dismiss (Dkt.17). Presumably, the arguments Defendant raises in that motion may be moot or need to be modified depending on the Sixth Circuit's resolution of the *Hi–Lex* matter. Accordingly, Defendant's motion to dismiss is denied without prejudice.

In conclusion:

Defendant's motion to stay (Dkt.12) is granted. This matter is stayed pending resolution of the *Hi–Lex* matter, including any appeal and proceeding on writ of certiorari to the United States Supreme Court;

Defendant's motion to dismiss (Dkt.17) is denied without prejudice;

The clerk is instructed to close the case without prejudice for administrative and statistical purposes. This closing is not a decision on the merits. Any party may file a motion to reopen the

matter upon the issuance of a mandate by the Court of Appeals in the *Hi–Lex* matter.

*3 SO ORDERED.

E.D.Mich.,2013.
Bandit Industries, Inc. v. Blue Cross and Blue Shield of Michigan
Slip Copy, 2013 WL 5651444 (E.D.Mich.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA CASPAR, GLENNA DEJONG, CLINT MCCORMACK, BRYAN REAMER, FRANK COLASONTI, JR., JAMES BARCLAY RYDER, SAMANTHA WOLF, MARTHA RUTLEDGE, JAMES ANTEAU, JARED HADDOCK, KELLY CALLISON, ANNE CALLISON, BIANCA RACINE, CARRIE MILLER, MARTIN CONTRERAS, and KEITH ORR,

Plaintiffs,

v

RICK SNYDER, in his official capacity as Governor of the State of Michigan; MAURA CORRIGAN, in her official capacity as Director of the Michigan Department of Human Services; PHIL STODDARD, in his official capacity as Director of the Michigan Office of Retirement Services; and JAMES HAVEMAN, in official capacity as Director of the Michigan Department of Community Health;

Defendants.

No. 14-cv-11499

HON. MARK A. GOLDSMITH

INDEX OF EXHIBITS TO DEFENDANTS' MOTION TO HOLD CASE IN ABEYANCE PENDING APPEAL OF RELATED CASE

INDEX OF EXHIBITS

Exhibit 1

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

October 16, 2013

County Clerk

Re: Marriage Licenses and *DeBoer v. Snyder* (No. 12-cv-10285)

To the clerk:

As you may be aware, the Michigan law defining marriage as between one man and one woman under Article 1, § 25 and MCL 551.1 is subject to a constitutional challenge in federal district court. See *DeBoer v. Snyder* (E.D. Mich. No. 12-cv-10285). The matter is set for oral argument on cross motions for summary judgment on Wednesday, October 16, 2013.

As Chief Deputy Attorney General for the State, I have been asked whether county clerks may issue marriage licenses in the event that a federal district court rules that Michigan's definition of marriage is unconstitutional and must be expanded to include persons of the same sex. To be helpful and because it is incumbent upon each of you to understand the law, I am outlining the law in this area.

The short answer is that until the matter reaches final disposition on appeal from any adverse order, **you are forbidden by Michigan law from issuing a marriage license to same-sex couples during the pendency of the appeal**. Even where a court issues an adverse order about Michigan law, you do not have the legal authority to issue marriage licenses to same-sex couples where that order is subject to a stay. See Fed. R. Civ. P. 62(a), (c). Michigan law – its constitutional and statutory definitions – would continue to govern.

In 1996, the Michigan Legislature amended Michigan's statutes governing marriages to make it clear that marriage is only between one man and one woman in this State. Public Act 324 amended MCL 551.1 to provide as follows:

> Sec. 1. Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Likewise, in 2004, the people of Michigan enshrined this definition into Michigan's constitution. Mich. Const. 1963, art 1, § 25:

> Sec. 25. To secure and preserve the benefit of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

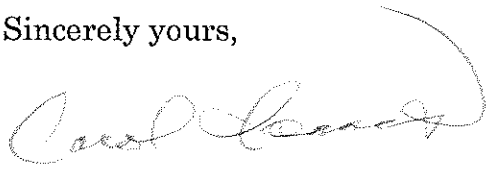
The licenses issued by the clerks reflect these definitions. MCL 551.2; MCL 551.102.

Although these definitions of marriage have been challenged in federal court, and although the federal court has not identified any timeline by which it will enter a decision, **any adverse decision is not subject to enforcement while the decision is stayed and subject to appeal** under the federal rules. Fed. R. Civ. P. 62(a), (c). For any adverse decision in the federal district court, our office plans to seek an appeal and a stay of that order. A stay order preserves Michigan law during the pendency of an appeal.

It is the duty of the Attorney General to defend Michigan law, which is the law ultimately enacted by the people. Because we are a nation of laws, it is imperative that we allow the legal process to unfold. When the decision is final, and all arguments are finished, all the citizens of the state will be bound to follow the decision, whatever its outcome.

If you require further information, please contact me at (517) 373-1110.

Sincerely yours,



Carol Isaacs
Deputy Chief Attorney General

Exhibit 2

No. 14-1341

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER, *et al.*,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Bernard A. Friedman

STATE DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR IMMEDIATE CONSIDERATION AND MOTION FOR STAY PENDING APPEAL

Defendants, Richard Snyder, in his official capacity as Governor of the State of Michigan, and Bill Schuette, in his official capacity as the Michigan Attorney General, move this Court, under Federal Rule of Appellate Procedure 8, for a stay of the district court's March 21, 2014 opinion and order pending appeal to this Court.

INTRODUCTION

Shortly after a two-week trial, the district court issued its opinion and order declaring that 2.7 million voters did not have a single rational

reason among them when they passed the Michigan Marriage Amendment, which memorialized the definition of marriage as a union between one man and one woman. The district court enjoined the State from enforcing this provision of its Constitution and effectively denied the State's motion for a stay pending appeal by not ruling on it in a timely manner, thereby allowing county clerks to immediately issue marriage licenses to same-sex couples for the first time in this State's history. In the wake of this unprecedented redefinition of marriage in Michigan, the State Defendants request that this Court stay the district court's decision to fully resolve the legal issues this case presents.

Indeed, every federal court that has struck down a marriage amendment has either granted a stay or been reversed by the U.S. Supreme Court for denying a stay. In *Herbert v. Kitchen*, the Supreme Court reversed the district court's denial of a stay in Utah's marriage case. Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Jan. 6, 2014), attached as Appendix A. Following the Court's lead, subsequent district courts have granted stays. *See De Leon v. Perry*, 2014 WL 715741, at *28 (W.D. Tex. Feb. 26, 2014); *Bostic v. Rainey*, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014); *Bishop v. U.S. ex rel. Holder*, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014). Those courts, including the Supreme

Court, have recognized that a stay is necessary given the important public interest in state constitutional amendments about marriage.

Given the monumental impact the district court's order would have on the institution of marriage in Michigan, especially amidst a national debate on the issue, a stay should be considered immediately. Further, a stay is necessary in this case to avoid confusion and to maintain the status quo while the appellate courts decide once and for all how Michigan, along with any other state, may define marriage.

STATEMENT OF FACTS

The plaintiffs, April DeBoer and Jayne Rowse, individually and as next friend of three minor children, originally filed this lawsuit against the State Defendants, alleging that Michigan's adoption law, Mich. Comp. Laws § 710.24, violates the U.S. Constitution's Equal Protection Clause. (Complaint, Doc. # 1.)

On August 29, 2012, the district court held oral argument on the State Defendants' motion to dismiss the plaintiffs' initial complaint. Following arguments, the district court invited the plaintiffs to amend their complaint to challenge Michigan's Constitutional Amendment, which defines marriage as "the union of one man and one woman."

Mich. Const. art. I, § 25. Despite the State Defendants' objection, the district court granted the plaintiffs leave to file an amended complaint to add a second count, challenging Michigan's Constitutional Amendment regarding marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution. The State Defendants moved to dismiss the amended complaint, but the court again denied dismissal. (Order, Doc. # 54.)

As matters progressed, the parties each moved for summary judgment, and the State Defendants moved for realignment of the parties, given Defendant Oakland County Clerk Lisa Brown's total support of the plaintiffs' request for relief and arguments. The district court denied the State Defendants' motion. (Order, Doc. # 103.)

Following oral arguments on the cross-motions for summary judgment, the district court denied the motions and scheduled a bench trial to begin Tuesday, February 25, 2014. (Order, Doc. # 89.)

In the interim, on November 24, 2013, the plaintiffs filed a motion to bifurcate proceedings, stating that a heightened standard of scrutiny applies in this case with respect to their equal-protection claim based on suspect or quasi-suspect class. In their motion, the plaintiffs requested that the trial be bifurcated into two phases. In Phase I of the trial, the

parties would offer evidence under the rational-basis standard. In Phase II of the trial, the parties would offer evidence and argument relating to the heightened-scrutiny standard. In addition, Phase II of the trial would proceed only if the district court determined that it is necessary or appropriate. Over the State's objection, the district court granted the plaintiffs' motion to bifurcate the proceedings. (Order, Doc. # 105.)

On February 25, 2014, the bench trial in this matter began. The plaintiffs presented their case-in-chief during the pendency of that week. On March 3, 2014, the bench trial continued with the State Defendants' case-in-chief. The State Defendants presented their final witness on March 6, 2014. The following day, closing arguments were made by all parties.

During closing arguments, the State Defendants requested that the district court enter a stay of its decision should it determine that either Michigan's adoption law or the Michigan Marriage Amendment violate the U.S. Constitution. *See* 3/7/14 Hr'g Tr. at __.

On March 21, 2014, the district court issued its decision, holding that Michigan's Marriage Amendment is unconstitutional under the Equal Protection Clause of the Constitution and enjoining enforcement

of the amendment. Additionally, the district court effectively denied the stay pending appeal by failing to rule on it.

ARGUMENT

A four-prong test is generally used to determine the appropriateness of a stay pending appeal. These four prongs are: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest. *Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001). The Supreme Court has already applied this test in precisely this context, and it concluded that the balance of the factors weighs in favor of a stay pending appeal. See Order, *Herbert v. Kitchen* (Appendix A).

I. The State Defendants are likely to succeed on appeal.

The Supreme Court's recent stay of an injunction against enforcement of a state marriage law supports the likelihood of success on appeal because the standard for grant of a stay by the Supreme Court is substantially similar. *Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curiam) (noting that a stay is appropriate if there is "a fair prospect that a majority of the Court will vote to reverse the

judgment below."). The Supreme Court or a Circuit Justice "rarely grant[]" a "stay application," but they will do so if they "predict" that a majority of "the Court would . . . set the [district court] order aside." *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302–03 (2006) (Kennedy, J., in chambers). On January 6, 2014, after Justice Sotomayor referred the stay application to all the Justices, the Court stayed the *Kitchen* district court's injunction, thereby signaling the Court's belief that it will ultimately set that order aside. *See* Appendix A, Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Jan. 6, 2014). Thus, the State Defendants are likely to succeed on the merits.

Further, the State Defendants are likely to succeed on appeal because (A) *Baker v. Nelson* forecloses the plaintiffs' claims; (B) the plaintiffs' claims do not implicate a fundamental right; (C) Michigan's Marriage Amendment does not discriminate based on gender or sexual orientation; and (D) Michigan's Marriage Amendment is rational.

A. *Baker v. Nelson* forecloses the plaintiffs' claims

Baker v. Nelson, 409 U.S. 810 (1972), is dispositive of this case. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) ("[L]ower courts are bound by summary decisions by this Court until such time as the Court

informs [them] that [they] are not") (quotation marks omitted). Perceived "doctrinal developments" do not undermine binding precedent. No doctrinal developments authorize lower courts to stray from *Baker*'s force as directly applicable binding precedent. Indeed, if Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quotation marks omitted). Because the Supreme Court has not directed otherwise, *Baker* is controlling and forecloses the plaintiffs' claims.

B. The plaintiffs' claims do not implicate a fundamental right.

Fundamental rights are those that "are objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotation marks and citation omitted). The right to marry that has been fundamental to our Nation (and Michigan) has not included same-sex marriage, as numerous courts have recognized. *See, e.g.*, *Andersen v. King Cnty.*, 138 P.3d 963, 979 (Wash. 2006) (en banc); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006);

Lewis v. Harris, 908 A.2d 196, 211 (N.J. 2006); *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995). In fact, "language in *Windsor* indicates that same-sex marriage [is] a 'new' right" rather than a fundamental one. *See Bishop v. United States*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *24 n.33 (N.D. Okla. Jan. 14, 2014), attached as Appendix B. The *Windsor* Court observed that "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire" to marry. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). The Supreme Court contrasted this with "marriage between a man and a woman," which has "been thought of . . . as essential to the very definition of that term and to its role and function throughout the history of civilization." *Id.* Thus, because the right to marry someone of the same sex is not deeply rooted in our Nation's history, the plaintiffs' claims do not implicate a fundamental right.

C. Michigan's Marriage Amendment does not discriminate based on gender or sexual orientation.

The Michigan Marriage Amendment does not discriminate based on gender. Rather, the amendment is gender-neutral on its face—the prohibition on same-sex marriage is applied equally to men and women.

See, e.g., Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1098–099 (D. Haw. 2012) (collecting cases). And to the extent that sexual orientation may be at issue, equal-protection claims involving sexual orientation are governed by rational-basis review. *Davis v. Prison Health Serv.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). This is because "homosexuality is not a suspect class in this circuit[.]" *Scarbrough*, 470 F.3d at 261.

D. Michigan's Marriage Amendment is rational.

Under rational-basis review, a court does not judge the perceived wisdom or fairness of a law, nor does it examine the actual rationale for the law when adopted, but asks *only* whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Rational-basis review is satisfied when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Thus, "the relevant question is whether an opposite-sex definition of marriage

furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson*, 884 F. Supp. 2d at 1107. Similarly, rational-basis review does not require narrow tailoring, so questions about whether marriage is over-inclusive (because it allows opposite-sex couples who cannot procreate to marry) or under-inclusive are beside the point. *See Vance v. Bradley*, 440 U.S. 93, 108 (1979) (stating that a classification may be "both underinclusive and overinclusive").

Here, the plaintiffs did not (and cannot) negate every conceivable basis Michigan voters may have had for retaining the definition of marriage. Retaining the definition of marriage between one man and one woman furthers State interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry, due to the unique relationship between men and women and their natural ability to bear children. It was rational, indeed reasonable, for the people of the State of Michigan to define marriage to promote this as the ideal setting for raising children. It was also rational for the people of the State of Michigan to proceed with caution in redefining marriage, especially when social science in this area is so unsettled. The district court erred in concluding to the contrary.

1. It was rational for the people of the State of Michigan to define marriage to encourage the ideal setting in which to raise children—a family with both a mom and a dad.

The bedrock of marriage in Michigan, along with dozens of other states, is a union between one man and one woman. Only this union reflects the unique ability for men and women to have children, to serve as role models for their children, and for parents to have a biological connection to their children. The definition corresponds to the reality of how children are most often born. Not surprisingly, federal and state courts have, *en masse*, agreed that responsible procreation and childrearing are well-recognized as legitimate state interests served by marriage.[1]

Thus, the district court erred in concluding that it was irrational for Michigan voters to decide that, all other things being equal, it is best for a child to be raised by his or her mom and dad.

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[1] *See, e.g., Jackson*, 884 F. Supp. 2d at 1113; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015–16 (D. Nev. 2012); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bankr. W.D. Wash. 2004); *Standhardt v. Super. Court*, 77 P.3d 451, 461–62 (Ariz. Ct. App. 2003); *Dean*, 653 A.2d at 333; *Baehr v. Lewin*, 852 P.2d 44, 55–56 (Haw. 1993).

2. It was rational—even prudent—for the people of the State of Michigan to proceed with caution in redefining marriage, given the scientific disagreement in the area of same-sex parenting.

At minimum, the social sciences indicate that research in this area is still in its infancy, which merits the people, and courts, proceeding with caution in redefining marriage in Michigan.

The U.S. Supreme Court has held that when there is disagreement in the sciences, states are permitted to set the bounds of its laws until the disagreements are resolved. When a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation," even if the judge is in a position to effectuate change. *Marshall v. United States*, 414 U.S. 417, 427 (1974). In essence, states may proceed with caution in areas of scientific uncertainty.

That is the case here. As the evidence adduced at trial shows, studies have come to differing conclusions on the issue of whether same-sex couples raise children as well as opposite-sex couples. (3/3/14 Trial Tr. at 29–30; *see also* 2/25/14 Trial Tr. at 14, 21–25 (Brodzinsky); 3/4/14 Trial Tr. at 46–48 (Price); 3/3/14 Trial Tr. at 107 (Regnerus); 3/5/14

Trial Tr. at 23–24 (Marks—conducting survey of 59 studies); Doc # 71-1 (Brief of Amicus Curiae Michigan Family Forum at 11–12, 15–19)). Ultimately, the testimony showed that this area is "fraught with . . . scientific uncertainties." *See Marshall*, 414 U.S. at 427. Accordingly, it was rational—even prudent—for the State to proceed with caution in this area by retaining the definition of marriage. Thus, the State Defendants are likely to succeed on the merits on appeal.

II. The threat of irreparable harm in the absence of a stay is real.

If the district court's decision is not stayed pending appeal, the threat of irreparable harm both to the State and to individuals who may wish to try to take advantage of the injunction is very real.

As to the harm to the State, "it is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). The Supreme Court recently affirmed a state's unique interests in its

marital statutes when it noted that "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *Windsor*, 133 S. Ct. at 2691. *Windsor* affirmed that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders'" and made clear that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* at 2675 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). Forcing Michigan to violate its "rightful and legitimate concerns in the marital status of persons" constitutes irreparable harm to the State's sovereignty. In addition, the State will face administrative burdens associated with issuing licenses under a cloud of uncertainty during appeal.

The recent case in Utah serves as an example of the practical harms that may occur to the State and to individuals absent a stay. In that case, the district court and circuit court declined to issue a stay. Order on Motion to Stay, *Kitchen v. Herbert*, No. 2:13-cv-00217-RJS (D. Utah Dec. 23, 2013); Order Denying Emergency Motion for Stay and Temporary Motion for Stay, *Kitchen v. Herbert*, 12-4178 (10th Cir. Dec.

24, 2013). As a result, many same-sex couples flocked to clerks' offices to obtain marriage licenses which were issued to them in accord with the district court's injunction. Brady McCombs, *Supreme Court Complicates Gay Marriages in Utah*, AP (Jan. 8, 2014), http://hosted.ap.org/dynamic/stories/U/US_GAY_MARRIAGE_UTAH?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-01-08-13-41-21.

Days later, however, the U.S. Supreme Court granted a stay of the injunction, and Utah's laws that recognize marriage as between a man and a woman institution went back into effect—thus, the state does not recognize the licenses that were issued prior to the Supreme Court's grant of the stay. Press Release, Office of the Utah Governor, *Governor's Office gives direction to state agencies on same-sex marriages* (Jan. 8, 2014), http://www.utah.gov/governor/news_media/article.html?article=9617. In addition to those whose licenses are no longer valid, individuals who planned ceremonies were not able to complete them, and financial and family planning decisions made upon the assumption that the state would recognize same-sex marriage licenses are now a nullity.

Since the State Defendants are likely to succeed on appeal, failure to stay the district court's injunction pending appeal would likely result in similar injuries. State officials and myriad administrative agencies would have to revise regulations to accommodate the injunction—but may have to revise them back if this Court, or the Supreme Court ultimately upholds Michigan's Marriage Amendment. The plaintiffs or others might obtain marriage licenses during the brief interim while the State Defendants appeal the district court's decision, only to have them rendered a nullity during or after the appeals process, thereby throwing their legal status into confusion. Indeed, Defendant Brown, the clerk for Oakland County, made clear at trial that she—and several other clerks—were ready, willing, and able to issue licenses immediately upon the district court's ruling. (2/25/14 Trial Tr (vol 1) pp 50, 54–55; 3/3/14 Trial Tr (vol 5) pp 17, 21, 23, 29).

The State's interests in enforcing its own laws and in ensuring administrative clarity, as well as individual interests in certainty regarding marriage plans, demonstrate the irreparable injury that is likely to occur in the absence of a stay.

III. Maintaining the status quo by granting a stay will not cause irreparable harm to the parties.

If the Court grants the requested stay, the only potential harm the plaintiffs may suffer is a delay in their ability to obtain marriage licenses in Michigan. This is the current status quo, and has been since the inception of the State, and this, therefore, does not impose an irreparable harm on the parties. Moreover, while violation of an established constitutional right may inflict irreparable harm, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976), that doctrine does not apply here, where the plaintiffs seek to establish a novel constitutional right through litigation. The plaintiffs suffer no constitutional injury from awaiting a final judicial determination of their claims before receiving the marriage licenses they seek. *Cf. Rostker v. Goldberg*, 448 U.S. 1306, 1310 (1980) (reasoning that the inconvenience of compelling respondents to register for the draft while their constitutional challenge is finally determined does not "outweigh[] the gravity of the harm" to the government "should the stay requested be refused.").

On the other hand, if a stay is not granted and the State Defendants are enjoined from enforcing state law pending appeal, irreparable harm will occur to the State, and may occur to the plaintiffs,

and other individuals seeking state marriage licenses in the interim given the uncertain status of the law pending further appeal.

IV. Maintaining the status quo serves the public interest.

Michigan citizens have an interest in deciding, through the democratic process, public policy issues of such societal importance as whether to retain the traditional definition of marriage. Removing the decision from the people is a harm to the public interest.

The public also has an interest in certainty and in avoiding unnecessary expenditures. As outlined above, should a stay *not* be granted, marriage licenses would be issued under a cloud of uncertainty, the State would face administrative burdens, and actions taken in reliance on the licenses would impact employers, creditors, and others.

A stay would serve the public interest by preserving the status quo and allowing the appeals process to proceed on an issue of substantial state and national importance while *preventing* irreparable injury to the state and its citizens in the interim.

RELIEF REQUESTED

The Supreme Court has already determined that a stay pending appeal is warranted when a district court strikes down a state constitutional amendment defining marriage. Accordingly, the State Defendants respectfully request that this Court: (1) grant immediate consideration and (2) enter an order staying the district court's opinion and order pending final resolution of the appeal in this Court.

Respectfully submitted,

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Dated: March 21, 2014

CERTIFICATE OF SERVICE

I certify that on March 21, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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Exhibit 3

No. 14-1341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER; JANE ROWSE, individually and as parents and next friend of N.D.-R, R.D.-R and J.D.-R, minors,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan; BILL SCHUETTE, in his official capacity as Michigan Attorney General,

Defendants-Appellants.

O R D E R

The plaintiffs are directed to file a response to the defendants' emergency motion for a stay on or before 12:00 noon on Tuesday, March 25, 2014.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Exhibit 4

No. 14-1341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER; JANE ROWSE, individually and as parents and next friend of N.D.-R, R.D.-R and J.D.-R, minors,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan; BILL SCHUTTE, in his official capacity as Michigan Attorney General,

Defendants-Appellants.

ORDER

FILED
Mar 22, 2014
DEBORAH S. HUNT, Clerk

The defendants appeal a judgment permanently enjoining the enforcement of the Michigan Marriage Amendment. They have filed an emergency motion for a stay pending appeal. The plaintiffs have been directed to respond to the motion by 12:00 noon on Tuesday, March 25, 2014. To allow a more reasoned consideration of the motion to stay, it is ORDERED that the district court's judgment is temporarily stayed until Wednesday, March 26, 2014.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Exhibit 5

No. 14-1341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER; JANE ROWSE, individually and as parents and next friend of N.D.-R, R.D.-R and J.D.-R, minors,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan; BILL SCHUETTE, in his official capacity as Michigan Attorney General,

Defendants-Appellants.

O R D E R

Before: ROGERS and WHITE, Circuit Judges; CALDWELL, District Judge*

The district court in this case enjoined the enforcement of Article I, § 25 of the Michigan Constitution, which provides that marriage is "the union of one man and one woman." In light of the Supreme Court's issuance of a stay in a similar case, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), a stay of the district court's order is warranted.

On March 21, 2014, the district enjoined the State of Michigan from enforcing the constitutional provision and its implementing statutes because the court concluded that those laws violate the Equal Protection Clause of the Fourteenth Amendment. *DeBoer v. Snyder*, No. 2:12-cv-10285, 2014 WL 1100794, at *17 (E.D. Mich. Mar. 21, 2014). Michigan filed a notice

* The Honorable Karen K. Caldwell, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

of appeal and made an emergency motion to stay the district court's order in this court the same day. This court temporarily stayed the district court's order so that it could more carefully consider Michigan's request and a response from the plaintiffs. The plaintiffs filed a response, and defendant Lisa Brown in her capacity as Clerk of Oakland County moved for leave to file a response to Michigan's motion.

Counsel for Michigan assert that during closing argument in the district court, counsel asked the district court to stay its order should the court rule in favor of the plaintiffs. The district court did not grant a stay. Federal Rule of Appellate Procedure 8(a) requires that a stay pending appeal be brought first in the district court. However, a court of appeals may grant a stay pending appeal if "the district court denied the motion or failed to afford the relief requested." Fed. R. App. P. 8(a)(2)(A)(ii). In the context of this case, the requirements of Rule 8 have been substantially met.

In deciding whether to grant a stay of a district court's grant of injunctive relief, "we consider (1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker v. Adams Cnty./Ohio Valley School Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). In this case, these factors balance no differently than they did in *Kitchen v. Herbert*. *Kitchen* involved a challenge to "provisions in the Utah Code and Utah Constitution that prohibited same-sex marriage." No. 2:13-cv-217, 2013 WL 6834634, at *1 (D. Utah Dec. 23, 2013). Like the decision below, the *Kitchen* court's order enjoined Utah from enforcing laws that prohibit same-sex marriage. 961 F. Supp. 2d 1181, 1216 (D. Utah 2013). And like the stay requested by Michigan before this court, the Supreme Court's order delayed the

applicability of the *Kitchen* court's order pending resolution by the Tenth Circuit. 134 S. Ct. 893 (2014). There is no apparent basis to distinguish this case or to balance the equities any differently than the Supreme Court did in *Kitchen*. Furthermore, several district courts that have struck down laws prohibiting same-sex marriage similar to the Michigan amendment at issue here have also granted requests for stays made by state defendants. *See Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Love v. Beshear*, No. 3:13-CV-750-H (W.D. Ky. Mar. 19, 2014) (order granting stay).

We GRANT Lisa Brown's motion to respond to Michigan's stay motion. We GRANT Michigan's motion to stay the district court's order pending final disposition of Michigan's appeal by this court.

WHITE, J., dissenting.

I agree that this court balances the traditional factors governing injunctive relief in ruling on a motion to stay a district court's decision pending appeal: (1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies. "In order to justify a stay of the district court's ruling, the defendant must 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." *Baker v Adams County/Ohio Valley School Bd*, 310 F3d. 927, 928 (6th Cir. 2012). Michigan has not made the requisite showing. Although the Supreme Court stayed the permanent injunction issued by the

Utah District Court in *Kitchen v. Herbert* pending final disposition by the Tenth Circuit, 134 S.Ct. 893 (2014), it did so without a statement of reasons, and therefore the order provides little guidance. I would therefore apply the traditional four-factor test, which leads me to conclude that a stay is not warranted.

ENTERED BY ORDER OF THE COURT

Clerk