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 WOLD, 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 DISMISS

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Defendants Richard Snyder, Governor of Michigan, Maura Corrigan, Director of Michigan Department of Human Services, Phil Stoddard, Director of Michigan Office of Retirement Services; and James Haveman, Director of Michigan Department of Community Health, by and through counsel, move under Fed. R. Civ. P. 12(b)(1) and (6), to dismiss Plaintiffs' Complaint and state:

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. Plaintiffs have failed to state a claim under 42 U.S.C. § 1983, because Defendants are jurisdictionally immune from liability and the relief sought is not available against these Defendants.

3. Declaratory relief is not available under the Declaratory Judgment Act.

4. Plaintiffs fail to state a claim as to a violation of substantive due process under the Fourteenth Amendment to the U.S. Constitution.

5. Plaintiffs fail to state a claim under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

6. Some Plaintiffs lack standing to maintain an action in federal court.

7. This action is not ripe for review by a federal court.

WHEREFORE, Defendants respectfully request that this Court grant their Motion to Dismiss the Complaint, award Defendants costs and attorney fees in defending this action, and deny Plaintiffs' claim for attorney fees and costs.

Respectfully submitted,

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Dated: June 5, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Are Plaintiffs' claims barred by Eleventh Amendment immunity?

2. Have Plaintiffs failed to state a claim under 42 U.S.C. § 1983?

3. Is declaratory relief available under the Declaratory Judgment Act?

4. Have Plaintiffs failed to state a claim for a violation of due process?

5. Have Plaintiffs failed to state a claim for a violation of equal protection?

6. Do some Plaintiffs lack standing to invoke this Court's jurisdiction?

7. Are Plaintiffs' claims ripe for adjudication?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

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

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

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INTRODUCTION

Plaintiffs are 8 of the approximately 300 same-sex couples who married in the short window of time between the issuance of the judgment in *DeBoer, et al. v. Snyder, et al.*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), which declared unconstitutional and enjoined the State from enforcing Michigan's Marriage Amendment, and the Sixth Circuit's stay of that judgment.[1] Plaintiffs, who are not parties to the *DeBoer* case, raise due-process and equal-protection claims, contending that they have been, or expect to be, denied benefits available to married couples based on the State's enforcement of the Marriage Amendment.

But the continued validity of Plaintiffs' marriages depends upon the ultimate decision in *DeBoer*, and compelling the State to recognize those conditionally valid marriages in the uncertain interim runs contrary to the public policy evidenced by the Marriage Amendment, which is once again effective by operation of the stay in *DeBoer*, and

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[1] The Marriage Amendment 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.

creates an additional layer of uncertainty by requiring the State to provide benefits to which Plaintiffs may not ultimately be entitled.

The stay, which restored the Marriage Amendment, clearly allows the State to continue enforcing its constitutional provision while the merits of the district court's judgment in *DeBoer* are contested. Any denial of benefits by the State stems from the effect of the stay, not any action by the State. It cannot be that the State has violated Plaintiffs' substantive-due-process or equal-protection rights by relying on relief provided in a subsequent, controlling superior court order. To determine otherwise requires this district court's decision to control over the Sixth Circuit's. It would create a troubling precedent allowing individuals disappointed by the proper use of court process the opportunity to defeat a legitimate court order that might negatively impact them.

STATEMENT OF FACTS

In 2004, 2.7 million Michigan voters approved the Marriage Amendment, a constitutional amendment that preserved the State's longstanding definition of marriage as between a man and a woman. Mich. Const., art. I, § 25.

In 2012, April DeBoer and Jayne Rowse, a same-sex couple from Hazel Park, 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. (*DeBoer* Compl., Doc. 1). The complaint was later amended, at the invitation of the district court, to include a separate count alleging that the Marriage Amendment was unconstitutional. (*DeBoer* First Amend. Comp., Doc. 38).

Trial took place in February 2014, and resulted in a judgment declaring the Marriage Amendment unconstitutional, and immediately and permanently enjoining the defendants from enforcing it 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, but failed to address the State defendants' request for a stay pending appeal that had been made at the close of trial. However, within an hour of the judgment, the State filed its notice of appeal and an emergency motion for stay pending appeal with the Sixth Circuit.

(*DeBoer* Notice of Appeal, Doc. 153); Sixth Circuit no. 14-1341, Order, RE 156, Page ID # 3982; Order, RE 162, Page ID # 4214).

Despite media coverage of the appeal and emergency motion for stay, as well as a prior letter to all county clerks from the Attorney General advising them of the expected legal process and anticipated appeal, (Exhibit 1, letter), 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. These clerks also waived the typical three-day waiting period for a marriage license, thereby thwarting the Sixth Circuit's emergency consideration of the stay motion.

Early on March 22nd, the Sixth Circuit advised the *DeBoer* plaintiffs to respond to the motion for stay by March 25, 2014. (Exhibit 2, 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 3, Temporary Stay Order). And ultimately the Sixth Circuit issued a stay pending appeal, finding no reason to balance the equities of a stay regarding *DeBoer* differently than the Supreme Court's recent decision to grant a stay in

Kitchen v. Herbert, 134 S. Ct. 893 (2014), Utah's same-sex marriage case. (Exhibit 4, Stay Order).

Between the issuance of the *DeBoer* judgment and the temporary stay entered by the Sixth Circuit, approximately 300 same-sex couples – including Plaintiffs – got married. Notably, none of the Plaintiffs here are plaintiffs in *DeBoer*, and not even Ms. DeBoer and Ms. Rowse sought to marry during the 24 hours or so that Michigan's Marriage Amendment was enjoined.

After entry of the Sixth Circuit's stay pending appeal, Governor Snyder offered public comment addressing the now existing controversy: while the judgment and permanent injunction may have supported the clerks' issuance of licenses to same-sex couples on March 22, 2014, the temporary stay entered the same day in *DeBoer* and subsequent stay pending appeal reinstated the Marriage Amendment, and any rights contingent on those same-sex marriages could not be recognized by the State during the stay.

In this action under 42 U.S.C. § 1983, which is effectively a collateral attack on the Sixth Circuit's stay order entered in *DeBoer,* Plaintiffs allege violations of substantive due process (Count I) and

equal protection (Count II). (Complaint, Doc #1, Pg ID 9-11, 29-33, ¶¶ 36-37, 90-102). They seek declaratory and permanent injunctive relief requiring Defendants to recognize their marriages and provide them benefits accorded married couples under Michigan law.

ARGUMENT

I. Plaintiffs' claims are barred by Eleventh Amendment immunity and fail to state a claim under 42 U.S.C. § 1983.

A. Plaintiffs' claims are barred by the Eleventh Amendment.

To state a claim under § 1983, Plaintiffs must set forth facts showing the deprivation of a right secured by the Constitution or laws of the United States by a person acting under color of state law. *Harris v. City of Circleville*, 583 F.3d 356, 364 (6th Cir. 2009). But where, as here, a suit is against a state official in his or her official capacity, the suit is the equivalent of suit against the State itself, which is barred by the Eleventh Amendment. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Therefore, as pleaded, this suit must be dismissed.

B. Plaintiffs have neither pleaded nor are entitled to relief under the *Ex parte Young* exception to Eleventh Amendment immunity against these Defendants.

Although not specifically pleaded in this case, an exception to Eleventh Amendment immunity set forth in *Ex parte Young*, 209 U.S. 123 (1908), allows for actions against officials in their official capacity for prospective declaratory and injunctive relief. *Will*, 491 U.S. at 71 n. 10; *Thiokol Corp. v. Michigan Department of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993). Therefore, to the extent Plaintiffs are attempting to invoke the *Ex parte Young* exception to Defendants' Eleventh Amendment immunity, the only relief available would be prospective. *Whitfield v. Tennessee*, 639 F.3d 253, 257 (6th Cir. 2011); *S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 508 (6th Cir. 2008). But, for the reasons to be discussed, no such relief is available against these Defendants.

1. The relief sought by Plaintiffs is not available prospectively.

The relief sought by Plaintiffs is that their same-sex marriages be recognized and that they be afforded benefits available to other couples married under Michigan law. But such relief is not available prospectively. Plaintiffs were married following the decision in *DeBoer* that invalidated the Marriage Amendment. The effect of the *DeBoer*

decision, however, has since been stayed by the Sixth Circuit. The effect of a stay is to "suspend the judicial alteration of the status quo" by "divesting an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 428, 429 (2009). Therefore, the decision in *DeBoer* has been divested of enforceability and the pre-*DeBoer* status quo remains unaltered. Since the pre-*DeBoer* status quo provides that "the only agreement recognized as a marriage or similar union for any purpose" is "the union of one man and one woman," Plaintiffs' same-sex marriages cannot be recognized for any purpose. Mich. Const. art. I, § 25.

Simply put, *Ex parte Young* allows one to obtain only prospective relief, but the specific relief sought by Plaintiffs here is unavailable prospectively so long as the *DeBoer* stay pending appeal is in effect. Consequently, Plaintiffs have failed to state a proper claim under the *Ex parte Young* exception to Eleventh Amendment immunity and dismissal of this action is warranted.

2. Plaintiffs have failed to plead the requisite causal connection between the alleged deprivation of rights and the actions of Defendants.

Regardless, even assuming some form of relief is available to Plaintiffs, they have failed to plead claims that would entitle them to relief against these Defendants.

To maintain a proper *Ex parte Young* action, there must be a "fairly direct" causal connection between the alleged violation of federal law and the named defendant. See e.g. *Association des Eleveurs de Canards et d'Oies du Quebec, et al. v. Harris, et al.*, 729 F.3d 937, 943 (9th Cir. 2013); *NCO Acquisition, LLC v. Snyder*, 2012 WL 2072668 (E.D. Mich. 2012). This is because the rationale underlying the exception is the notion that when a state officer violates federal law, he or she is stripped of his or her official character and thereby loses the cloak of state immunity. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). Here, Plaintiffs have failed to allege the requisite "fairly direct" causal connection to maintain an *Ex parte Young* action against the named Defendants.

a. Director Corrigan

Director Corrigan, of the Michigan Department of Human Services, is being sued only by Plaintiffs Clint and Bryan, who wish to jointly adopt, but allegedly cannot do so because of the statement made by Governor Snyder (Complaint, Doc #1, Pg ID 6, 15-17). But no facts are alleged to show that Director Corrigan played a role in precluding Plaintiffs Clint and Bryan from adopting; in fact, Plaintiffs Clint and Bryan do not even mention Director Corrigan in the recitation of their claim, let alone attribute any specific act of deprivation to her (Complaint, Doc #1, Pg ID 15-17). The causal connection to Director Corrigan is even more tenuous because the adoption decision requires judicial process, appropriate proofs, and ultimately a court judgment. Accordingly, Plaintiffs have failed to state a proper claim against Director Corrigan and she must be dismissed.

b. Director Stoddard

Director Stoddard, of the Office of Retirement Services, is being sued only by Plaintiffs Frank and James (Complaint, Doc #1, Pg ID 6, ¶ 20). Frank wants to adjust his pension to allow James to collect survivor's benefits in the event Frank dies, but Frank was allegedly told

by "ORS staff," not Director Stoddard, that he could not do so because of the stay entered in *DeBoer* and the statements made by Governor Snyder (Complaint, Doc #1 1, Pg ID 18-19). Again, the Complaint lacks any facts specific to Director Stoddard that establish the requisite causal connection. Plaintiffs have failed to state a claim against Director Stoddard and he must be dismissed.

c. Director Haveman

Director Haveman, of the Michigan Department of Community Health (MDCH), is being sued only by Plaintiffs Samantha and Martha (Complaint, Doc #1, Pg ID 6, ¶ 21). Samantha, who works for MDCH, alleges that she requested health insurance coverage for Martha as her spouse, and was informed that the request could not be honored because of the statements made by Governor Snyder (Complaint, Doc #1, Pg ID 20-21). But, once again, Plaintiffs have not alleged any facts to show that Director Haveman took any action to preclude the insurance coverage. Without attributing any specific act of deprivation to Director Haveman, Plaintiffs may not maintain an *Ex parte Young* action against him and he must be dismissed.

d. Governor Snyder

Governor Snyder is being sued by all Plaintiffs, and all Plaintiffs' claims against him arise solely out of his public statements on March 22, 2014, providing a general explanation of the status of recent events (Complaint, Doc #1, Pg ID 9-10). Beyond these explanatory statements though, Governor Snyder had no personal participation in the specific deprivations alleged by the Plaintiffs in this case. For example, Plaintiffs have failed to identify any official order or agency directive issued by Governor Snyder relating to the conduct about which they complain.

Further, to the extent Plaintiffs are attempting to raise claims of supervisory liability against Governor Snyder stemming from his public statements, those claims must fail as well. First, Marsha and Glenna, James and Jared, Kelly and Anne, Bianca and Carrie, and Martin and Keith have failed to allege any specific injury, or deprivation of right, that was caused by a subordinate of Governor Snyder. In particular, Marsha and Glenna take issue with the action of a private sector employer (Consumers Energy), and James and Jared and Kelly and Anne take issue with the benefit decision of a local school district

(Farmington Public Schools and Saline Public Schools), over which the Governor has no supervisory authority. And Bianca and Carrie and Martin and Keith have not yet been deprived of benefits by anyone, let alone suffered a deprivation by a subordinate of the Governor.

The remaining three couples challenge decisions made by state departments. While the Michigan Constitution grants the Governor "real control over the executive branch," with each principal department being "under the supervision" of the Governor, see *Michigan Farm Bureau v. Department of Environmental Quality*, 807 N.W.2d 866, 891 (Mich. Ct. App. 2011), neither the Governor's general supervisory status nor his general duty to enforce the laws establishes the requisite "fairly direct" causal connection. See *NCO Acquisition*, 2012 WL 2072668; *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992).[2] Thus,

[2] See also *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (stating the "mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute"); *Southern Pacific Trans. Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980) (holding that the Attorney General's "power to direct and advise" district attorneys "does not make the alleged injury fairly traceable to his action, nor does it establish sufficient connection with enforcement to satisfy *Ex parte Young* ").

Plaintiffs have failed to state a claim under *Ex parte Young* and the Governor must be dismissed.

II. Declaratory relief is unavailable under the Declaratory Judgment Act.

An award of declaratory relief is also improper under the Declaratory Judgment Act. 28 U.S.C. § 2201; *Public Service Comm of Utah v. Wycoff*, 344 U.S. 237, 241 (1952). The granting of a declaratory judgment rests in the discretion of the court. *Grand Trunk Western R.R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984).

In determining how to exercise that discretion, the court should consider: (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and, (5) whether there is a better or more effective alternative remedy. *Grand Trunk*, 746 F.2d at 326 (citation omitted).

Here, these factors counsel against granting declaratory relief. As to factors (1) and (2), a declaratory judgment would not settle this controversy or clarify the legal relations at issue because such clarity depends upon the outcome of *DeBoer*. In particular, if *DeBoer* is reversed, Plaintiffs' marriages would be void ab initio since they were based on an erroneous judgment, and Plaintiffs would not be, and would never have been, entitled to any benefits dependent upon a valid marriage.

Relatedly, factor (3) is also implicated. There is undoubtedly some degree of "procedural fencing" motivating this action as Plaintiffs desire a declaration that they are entitled to benefits before such entitlement is further called into question by an appellate decision in *DeBoer*. In fact, this action is, in essence, a collateral attack on the stay order issued by the Sixth Circuit in that case.

In applying factor (4), a significant consideration is whether there is a close nexus between underlying factual and legal issues and state law or public policy. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 559-560 (6th Cir. 2008). As the Supreme Court recently reiterated, the states have "broad authority" to regulate domestic relations, and "[t]he

recognition of civil marriages is central to state domestic relations law." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). The underlying legal issues presented herein implicate not only Michigan's broad authority over domestic relations law, but the public policy evidenced by the Marriage Amendment, thus creating friction between this Court and the State's broad authority and significant interests in regulating the subject matter of this action.

Additionally, awarding Plaintiffs relief would not only create friction between the federal courts and the State, but also within the federal court system itself. In particular, the State has sought and obtained a stay of the *DeBoer* decision, which reinstituted the Marriage Amendment and precludes the recognition of Plaintiff's marriages. Declaring the Amendment unconstitutional in this case denies the State the benefit of the stay and puts this Court at odds with the Sixth Circuit.

In light of the uncertainty created by the current procedural posture of *DeBoer*, the potential effects of a substantive decision on appeal, and the friction that would be created by a decision in this case, declaratory judgment is not an appropriate remedy for Plaintiffs.

III. Plaintiffs have failed to state a claim for a violation of due process and equal protection.

Dismissal is also warranted because Plaintiffs' due-process and equal-protection claims lack merit.

A. Due process

In Count I, Plaintiffs allege that Defendants are violating their right to substantive due process by retroactively invalidating their marriages and denying benefits attendant to those marriages (Complaint, Doc #1, Pg ID 31, ¶ 98). Plaintiffs' claim is flawed.

First, if *DeBoer* is reversed by the Sixth Circuit, Plaintiffs' marriages will be rendered void ab initio as a matter of law. This is because a vacated or reversed judgment has no effect, and does not protect parties who acted pursuant to the judgment. See 36 C.J.S. Federal Courts § 712 and Am. Jur. 2d Appellate Review § 803 (and cases cited therein). See also *Balark v. City of Chicago*, 81 F.3d 658, 663 (7th Cir., 1996). Thus, there would be no need for the State to "retroactively" invalidate Plaintiffs' already void marriages, and no legal obligation to recognize those marriages for any purpose.

Second, any denial of benefits by the State stems from the effect of the stay, not any state action. Because the Marriage Amendment is in

effect and the judgment under which Plaintiffs were married has been stayed, the recognition of Plaintiffs' marriages for any purpose is prohibited by order of the Sixth Circuit. In other words, Plaintiffs' claimed constitutional violations arise solely by operation of the Sixth Circuit's judicial decree and not by acts of Defendants.

And third, even if the State's good-faith reliance on the stay can be construed as state action, Plaintiffs' claim fails because no "fundamental rights" are at stake. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). There is no constitutionally grounded fundamental right to receive benefits such as pensions and healthcare, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 956 (E.D. Mich. 2013), or to adopt children. *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989); 2 Am. Jur. 2d, Adoption, § 5. And the denial of such benefits does not infringe on the fundamental right to marry or form relationships as recently held in *Bassett,* 951 F. Supp. 2d 939.

Here, as in *Bassett,* Plaintiffs are already in committed relationships, and similar to *Bassett,* the Marriage Amendment is not preventing these couples from remaining in their committed relationships, nor is it likely that a denial of benefits would result in the

dissolution of the Plaintiffs' relationships. Thus, the Amendment does not impermissibly burden the intimate relationship itself and cannot support a substantive-due-process claim. *Id.* at 957.[3]

B. Equal protection

In Count II, Plaintiffs allege that Defendants are violating or will violate their equal protection rights by denying their marriages the same recognition and benefits afforded heterosexual couples who were legally married in Michigan (Complaint, Doc #1, Pg ID 32, ¶ 102). This claim too is flawed.

First, as discussed above, whether Plaintiffs have legally recognizable marriages depends on the outcome of *DeBoer*. If *DeBoer* is

[3] In *Evans v. Utah*, 2014 WL 2048343 (D.C. Utah, May 19, 2014), the Plaintiffs were married in the time between Utah's state laws banning same sex marriages being deemed unconstitutional in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (Utah 2013), and the United States Supreme Court staying that decision, *Kitchen v. Herbert*, 134 S. Ct. 893 (2014). The Plaintiffs in *Evans* moved for a preliminary injunction requiring the state to recognize their marriages, despite the stay. In granting the injunction, the district court found that the Plaintiffs were likely to succeed on their substantive-due-process claims. But *Evans* is obviously not binding on this Court, and is, in any event, not currently effective as it was stayed for a period of 21 days to allow the Defendants an opportunity to obtain a stay from the Tenth Circuit. Regardless, the State will address and distinguish *Evans* in more detail in responding to Plaintiffs' recently filed motion for a preliminary injunction.

reversed, Plaintiffs' marriages are void ab initio, and any refusal to recognize them could not form the basis of an equal-protection claim.

Second, any current denial of benefits is based on, and supported by, the stay pending appeal. The State's reliance on the stay, issued by a superior federal court, cannot be said to evidence any discriminatory intent toward, or disparate impact on, Plaintiffs. Such a finding by this Court would defeat the process available to the State to obtain relief from an erroneous decision, and place this Court in direct conflict with the intent and effect of the Sixth Circuit's stay order.

Third, the threshold element of an equal-protection claim is disparate treatment; there must be some plausible allegation that similarly situated individuals have not been subject to the same treatment as the plaintiff. *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). Plaintiffs cannot show the requisite disparate treatment here.

Contrary to Plaintiffs' allegations, they are not "similarly situated" to heterosexual couples legally married under Michigan law. Rather, Plaintiffs' same-sex marriages are only conditionally valid during the pendency of the appeal in *DeBoer*, and the reinstatement of

the Marriage Amendment by operation of the stay precludes recognition of same-sex marriages in that interim. No such bar exists with respect to heterosexual marriages. Plaintiffs are instead similarly situated to the other same-sex couples that were married in Michigan on March 22, 2014, and there is no allegation that Plaintiffs are being treated any differently than those couples. Accordingly, in the absence of disparate treatment to those similarly situated, Plaintiffs' equal-protection claim fails as a matter of law.[4]

IV. Some Plaintiffs lack standing to invoke this Court's jurisdiction.

Under Article III of the Constitution, Plaintiffs must establish that they have standing to sue to secure the court's jurisdiction. *Clapper v Amnesty International*, *USA*, 133 S. Ct 1138, 1146 (2013). To establish standing, a plaintiff must show: (1) that he or she personally has suffered, or will imminently suffer, a concrete, particularized, injury; (2) as a result of the putatively illegal conduct of the defendant,

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[4] In *DeBoer*, the Marriage Amendment was declared unconstitutional on equal protection grounds. Therefore, even if this Court was persuaded that Plaintiffs have a viable equal-protection claim, the prudent course of action would be to hold this case in abeyance pending the appellate resolution of *DeBoer*. In fact, the State has filed a separate motion requesting this Court do just that.

and that the injury is; (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Heckler v Mathews*, 465 U.S. 728, 738 (1984). In the case at bar, not all Plaintiffs meet these requirements.

First, not every Plaintiff has suffered an actual or imminent injury, as some of the alleged injuries are merely conjectural or hypothetical. For example: (1) Marsha wants to add Glenna to her health insurance plan, but since "no decision [on her request] has been made," no injury has occurred (Complaint, Doc #1, Pg Id 14); (2) Clint and Bryan want to adopt children, but they have not yet begun the process, let alone been formally denied, and admit that some of the children they wish to adopt cannot be adopted because the biological parents' rights have not been terminated (Complaint, Doc #1, Pg Id 15-17); (3) Bianca and Carrie allege nothing more than hypothetical concerns about possible financial difficulties in the fall of 2014 and starting a family (Complaint, Doc #1, Pg ID 26-28); and (4) Martin and Keith similarly allege generalized disappointment, confusion, and worry as to the status of their marriage, as opposed to any particularized

injury (Complaint, Doc #1, Pg ID 28-29). Such allegations fail to state sufficient injury for purposes of standing.

In regard to the causation requirement, as discussed, no Plaintiff has alleged any specific conduct on the part of Defendants Corrigan, Stoddard or Haveman that resulted in any of the alleged injuries. (Complaint, Doc #1, Pg ID 12-29.) Further, many of the benefits allegedly "denied" are contingent on factors other than the recognition of a valid marriage; for example, the granting of an adoption and financial aid are dependent on many considerations independent of marital status. Therefore, it is unlikely that a favorable decision in this case will redress Plaintiffs' alleged injuries.

In sum, several Plaintiffs are lacking a particularized injury that will be redressed by a favorable decision and/or the necessary relationship between their alleged injury and the conduct of a Defendant. Accordingly, these Plaintiffs lack standing and have failed to state a claim upon which relief can be granted.

V. Plaintiffs' claims are not ripe for a decision by this Court.

The concept of ripeness is closely related to the standing requirement, both being drawn from Article III limitations on, and

prudential considerations for refusing, jurisdiction. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n 18 (1993). "The ripeness inquiry arises most clearly when litigants seek to enjoin the enforcement of statutes, regulations, or policies that have not yet been enforced against them." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003).

Here, as discussed in the context of standing, several Plaintiffs have not suffered a particularized injury as a result of the reinstatement of the Marriage Amendment and related laws. The reason those Plaintiffs have not suffered particularized injury is the same reason the claims of those Plaintiffs are not ripe; the Amendment and related laws have not actually been enforced against them.

Also, ripeness requires the court to determine whether judicial resolution is desirable under the circumstances. *Adult Video Association v. United States Department of Justice*, 71 F.3d 563, 567 (6th Cir. 1995). The basic rationale is to avoid premature adjudication and abstract disagreements. *Id*. (citations omitted). To assess ripeness, the court should consider the likelihood harm will ever come to pass, the sufficiency of the current factual development, and the hardship to the parties if relief is denied at this stage of the proceedings. *Id*. at 568.

As previously discussed, several Plaintiffs have not taken steps to obtain any benefits, some of which are dependent upon factors other than a valid marriage. Therefore, the current record is insufficient to establish that Plaintiffs have been denied benefits solely because they are not legally married. At this point, this case presents nothing more than an abstract disagreement, the adjudication of which is premature. Accordingly, dismissal is warranted.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request this Court grant their Motion to Dismiss the Complaint, award Defendants costs and attorney fees in defending this action, and deny Plaintiffs' claim for attorney fees and costs.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Michael F. Murphy
Assistant Attorney General
Attorneys for Defendants
State Operations Division
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Lansing, MI 48909
(517) 373-1162
murphym2@michigan.gov
P29213

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.
600 Church St., Rm. 132
Flint, MI 48502

/s/ Michael F. Murphy
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P29213

2014-0074408-A

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 DISMISS

INDEX OF EXHIBITS

Exhibit 1: Attorney General's letter to 83 county clerks

Exhibit 2: 6th Circuit's 3/22/14 Order advising Plaintiffs to respond

Exhibit 3: 6th Circuit's 3/22/14 Temporary Stay Order

Exhibit 4: 6th Circuit's 3/25/14 Stay Order pending appeal

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.

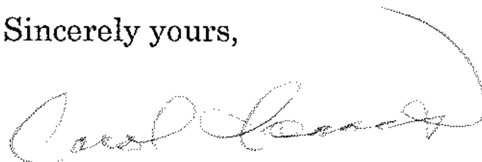
The licenses issued by the clerks reflect these definitions. MCL 551.2; MCL 551.102.

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,

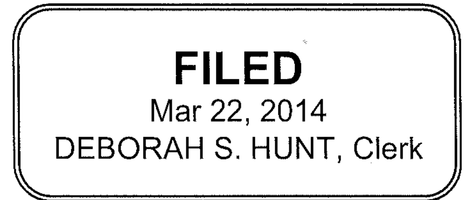


Carol Isaacs
Deputy Chief Attorney General

Exhibit 2

No. 14-1341

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 3

No. 14-1341

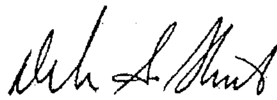
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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 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 4

No. 14-1341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 25, 2014
DEBORAH S. HUNT, Clerk

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.)

ORDER

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

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* 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