UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN, *et al.*, Plaintiffs, v. PENNY BOGAN, in her official capacity as Boone County Clerk, *et al.*, Defendants.	))))))))))	Case No. 1:14-cv-00355-RLY-TAB

EMERGENCY MOTION FOR STAY PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c), Defendants Greg Zoeller, William C. VanNess II, M.D., Penny Bogan, and Peggy Beaver respectfully move this Court to stay the enforcement of its Entry on Cross-Motions for Summary Judgment [hereinafter "MSJ Entry"], Final Judgment, and all related injunctions entered on June 25, 2014, pending appeal to the United States Court of Appeals for the Seventh Circuit. Defendants-Appellants have this day filed their Notice of Appeal from the Court's final judgment as well as their Docketing Statement.

Until the United States Supreme Court determines that traditional marriage laws such as Indiana's are unconstitutional, it is premature to require Indiana to change its definition of marriage and abide by this Court's conception of marriage. Nonetheless, marriages in violation of Indiana's existing law have taken place, are taking place, and will continue to take place pursuant to this Court's order. Time is of the essence to stop these marriages by staying this Court's final judgment and all related injunctions pending appeal in order to maintain the historic status quo of man-woman marriage that Indiana and its citizens have adopted.

STANDARD FOR GRANTING A STAY

Federal Rule of Civil Procedure 62(c) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants . . . an injunction, the court may suspend [that] injunction . . . ." The purpose of a stay is to "maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal[.]" *In re CGI Indus., Inc.*, 27 F.3d 296, 299 (7th Cir. 1994). If a stay is not granted and action is taken in reliance on the judgment, "the positions of the interested parties have changed, and even if it may yet be *possible* to undo the transaction, the court is faced with the unwelcome prospect of 'unscrambl[ing] an egg.'" *Id.* (citation omitted).

In considering whether to issue a stay, the Court must "consider the relative hardships to the parties of the relief sought, in light of the probable outcome of the appeal," and "should grant the stay" if the party seeking it "both has a good chance of winning the appeal and would be hurt more by the injunction than the [opposing party] would be hurt by a stay of the injunction pending appeal." *Indianapolis Colts v. Mayor & City Council of Baltimore*, 733 F.2d 484, 486 (7th Cir. 1984).

The nature of the showing required to justify a stay pending appeal varies with the facts of each case. The "[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (per curiam) (granting stay of injunction against federal do-not-call law and holding that if the moving party can establish "that

the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed").

With respect to success on the merits, the Supreme Court has held that there must be a "strong showing" of likely success, not necessarily a definitive "likelihood of success" as in the preliminary injunction context. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Indeed, "the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992) (citations and internal quotations omitted).

ARGUMENT

I. The Injunction Issued by This Court Should, Like All Other Contested Same-Sex Marriage Injunctions to Date, Be Stayed

To date, in light of Supreme Court guidance on the issue, in *no case* does a fully contested final permanent injunctive decree precluding enforcement of traditional marriage definitions remain in effect. The thrust of these cases is difficult to miss: The traditional definition of marriage has been around a long time. Its validity is hotly contested, but the outcome of these legal disputes is uncertain, such that the status quo should remain until the Supreme Court squarely addresses the issue.

On January 6, 2014, the Supreme Court stayed a *permanent* injunction issued by the United States District Court for the District of Utah in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), pending final disposition of an appeal to the Tenth Circuit. *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014). In that case, three same-sex couples challenged Utah's constitutional amendment and statutes upholding the traditional definition of marriage. *Kitchen*, 961 F. Supp. 2d at 1187. The district court entered a permanent injunction that required officials

to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other States. *Id.* at 1215. Although the Tenth Circuit upheld the permanent injunction, it has, "[i]n consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal[,] conclude[d] it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari." *Kitchen v. Herbert*, No. 13-4178, slip op. at 64-65 (10th Cir. June 25, 2014).

Federal courts across the country have fallen into line by staying injunctions involving traditional marriage definitions, both with respect to licensure of same-sex marriages within a State and recognition of same-sex marriages performed in other jurisdictions. *Wolf v. Walker*, No. 14-cv-64-bbc, 2014 WL 2693963, at *6 (W.D. Wis. June 13, 2014) ("[S]ince [*Kitchen*], every statewide order enjoining the enforcement of a ban on same-sex marriage has been stayed, either by the district court or the court of appeals, at least when the state requested a stay."); *see, e.g.*, *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (licensure); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014) (licensure and recognition); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at * 28 (W.D. Texas Feb. 26, 2014) (licensure and recognition); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at * 14 (W.D. Ky. Mar. 19, 2014) (recognition); *DeBoer v. Snyder*, No. 14-1341, Doc. 22-1 at 3 (6th Cir. Mar. 25, 2014) (licensure).

Indeed, the Sixth Circuit reversed the district court's denial of a stay of its injunction in *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 1117069, at *5 (M.D. Tenn. Mar. 20, 2014), that barred defendants from "enforcing" Tennessee's anti-recognition statute and constitutional amendment against the six named plaintiffs in that case. Order, *Tanco v. Haslam*, No. 14-5297, Docket No. 29, at 2 (6th Cir. Apr. 25, 2014) (per curiam). The court found persuasive the district

court's grant of stay of its own injunction in *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1512541, at *1 (S.D. Ohio Apr. 16, 2014), explaining that "[r]ecognition of same-sex marriages is a hotly contested issue in the contemporary legal landscape, and, if [the state's] appeal *is* ultimately successful, the absence of a stay as to [the district court's] ruling of facial unconstitutionality is likely to lead to confusion, potential inequity, and high costs." *Tanco*, Order at 2. The court ruled that, "[b]ecause the law in this area is so unsettled, in our judgment the public interest and the interests of the parties would be best served by this Court imposing a stay on the district court's order until this case is reviewed on appeal." *Id.*

Similarly, the Ninth Circuit granted a temporary stay in *Latta v. Otter*, where the district court denied an emergency motion for a stay, Order, *Latta v. Otter*, No. 1:13-cv-00482-CWD, Docket No. 100, at 3 (D. Idaho May 14, 2014), while it fully considered an emergency motion for stay. Order, *Latta v. Otter*, No. 14-35421, Docket No. 109, at 2 (10th Cir. May 15, 2014).

The Supreme Court "sent a strong message" with its "unusual intervention" in *Kitchen v. Herbert* that stayed a final, permanent injunction against enforcement of traditional marriage definitions. *Bourke*, 2014 WL 556729, at *14. This Court should heed that message and stay enforcement of its Final Judgment and all related injunctions pending appeal.

II. The Injury to Defendants, Public Policy, and Balance of Hardships Weigh in Favor of a Stay

The MSJ Entry permanently enjoins "Defendant Clerks, their officers, agents, servants, employees and attorneys, and all those acting in concert with them . . . from denying a marriage license to a couple because both applicants for the license are the same sex[, and must] issue marriage licenses to couples who, but for their sex, satisfy all the requirements to marry under Indiana law." MSJ Entry at 34. Attorney General Zoeller, *et al.*, are permanently enjoined "from prosecuting or assisting in the prosecution [of] same-sex couples who fill out the current

marriage license application where the spaces provided only allow for a male and female[,] clerks who grant the marriage licenses to qualified same-sex couples[, or] those who choose to solemnize same-sex marriages[.]" *Id.* Commissioner VanNess, *et al.*, are permanently enjoined to "[a]ct pursuant to their authority under Indiana Code § 16-37-1 to change the death certificate form to allow for same-sex spouses, [a]ct pursuant to their authority under Indiana Code § 16-37-3 to issue death certificates listing same-sex spouses, and [a]ct pursuant to their authority under Indiana Code § 31-11-4-4 to revise the marriage license application to allow for same-sex applicants." *Id.* at 34-35.

The Court's final judgment and injunctions threaten irreparable harm to Defendants because it proposes to alter the meaning of marriage in Indiana, but potentially only temporarily, and creates confusion over the meaning of marriage in Indiana. County clerks, even those not directly subject to this Court's injunction, have already begun to issue marriage licenses. Marion County Clerk's Office, http://www.indy.gov/eGov/County/Clerk/Pages/home.aspx (last visited Jun. 25, 2014) (An alert on the main page reads, "The Marion County Clerk's Office is issuing same-sex marriage licenses."); *see also* Jill Disis & Cara Anthony, *Weddings Begin as Judge Throws Out Indiana's Same-Sex Marriage Ban*, IndyStar, June 25, 2014, http://www.indystar.com/story/news/politics/2014/06/25/judge-throws-indiana-ban-sex-marriage/11354083/.

Other non-defendant clerks have decided not to immediately issue licenses, though these decisions are fluctuating rapidly. *See How Are Indiana Clerks Handling Same-Sex Marriage?*, TheIndyChannel, June 25, 2014, http://www.theindychannel.com/news/local-news/how-are-indiana-clerks-handling-same-sex-marriage (Bartholomew, Delaware, Hancock, LaGrange, Madison, Marshall, Randolph, Shelby, and Starke Counties not issuing licenses). Numerous

other sources report on the confusion from this Court's ruling. *See, e.g.*, *Federal Judge Rules Indiana's Ban on Gay Marriage Unconstitutional*, Fox 59 (Jun. 25, 2014), http://fox59.com/2014/06/25/federal-judge-rules-indianas-ban-on-gay-marriage-unconstitutional/#axzz35fsXGU3s.

This type of confusion is not unique to Indiana. Wisconsin experienced similar uncertainty after Judge Crabb of the District Court for the Western District of Wisconsin struck down Wisconsin's constitutional provision defining marriage as between one man and one woman. *See* Ashley Luthern & Megan Trimble, *State Divided on Issuing Licenses: Some County Clerks Await Word on Legality*, Milwaukee Journal Sentinel, June 10, 2014, http://www.jsonline.com/news/wisconsin/counties-split-on-whether-to-issue-marriage-licenses-to-gay-couples-b99287392z1-262397131.html; Erik Eckholm, *Legal Confusion Follows Federal Judge's Ruling on Same-Sex Marriage*, New York Times, June 11, 2014, http://www.nytimes.com/2014/06/12/us/legal-confusion-follows-federal-judges-ruling-on-same-sex-marriage-in-wisconsin.html?_r=0. Judge Crabb ultimately stayed her ruling, pending appeal. *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 2693963 (W.D. Wis. June 13, 2014).

Given that there is no final resolution of the same-sex marriage issue, the Court's ruling creates public uncertainty and a sense of chaos as to what Indiana law is now and what it portends in the long term. This is true not only with respect to eligibility for marriage licenses but also eligibility for marriage benefits down the road, including employment, retirement, health care, and even probate issues. The State must also have certainty with respect to how it treats issues concerning taxation, marriage certificates, and other forms that take account of marriage, just to name a few issues where certainty with respect to Indiana's marriage laws is important.

The public interest in the continuity of Indiana's marriage laws—*i.e.*, the interest in avoiding the potential for public confusion over a series of judicial injunctions that keep re-setting a state's authority to define marriage—favors a stay. Widespread attention to this case raises the risk exponentially that permanent injunctive relief without full appellate review will disrupt public understanding of the meaning and purpose of marriage in Indiana, raise expectations that any number of Indiana laws pertaining to marriage are suddenly suspended or modified, and generally create unnecessary confusion among the public. This would be especially damaging with respect to any public acts that cannot be undone.

Without a stay, in the absence of a final appellate determination of their rights, any "recognition" of same-sex marriage would come under a cloud of doubt. Plaintiffs have discussed at length their desire for societal recognition and acceptance. *See, e.g.*, Pls.' Prelim. Inj. Mem. at 25 [Doc. 36]; Pls.' Summ. J. Mem. at 1, 4, 8, 18-19 [Doc. 39]. Yet the final judgment and related injunctions cannot ensure those aims, and it will unavoidably leave a bitter taste because it cannot conclusively resolve the legality of same-sex marriages. The best course of action would be to allow for full and fair appellate review before building up the expectations of these Plaintiffs or any other same-sex couples interested in recognition of their out-of-state marriages.

III. Defendants Are Likely to Succeed on the Merits

Baker v. Nelson, 409 U.S. 180 (1972), was a ruling on the merits that upheld Minnesota's traditional definition of marriage. *Baker* was not overruled by *United States v. Windsor*, 133 S.Ct. 2675 (2013), or any other Supreme Court case and therefore precludes these challenges. Neither the United States Supreme Court nor the Seventh Circuit Court of Appeals has issued a decision stating that the constitutional right to marry encompasses forcing States to recognize

out-of-state same-sex marriages. Furthermore, other federal courts that have considered the issue have concluded that traditional marriage laws limiting marriage to the legal union of a man and woman do not violate the Constitution. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Hawaii 2012); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

The Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), did not undermine the legal underpinnings of these decisions. The Court struck down Section 3 of DOMA, which had "the purpose and effect to disparage and to injure those whom *the State*, by its marriage laws, sought to protect in personhood and dignity[,]" as a violation of the Fifth Amendment principally because it was an "*unusual* deviation from the tradition of recognizing and accepting *state definitions* of marriage . . . ." *Id.* at 2693, 2696 (emphases added). It was critical to the Court's analysis that New York had *previously granted* marital interests that federal DOMA then threatened. *Id.* at 2689.

While the Constitution plainly gives its blessing to New York to recognize out-of-jurisdiction same-sex marriages, *id.* at 2692 (explaining that New York's "actions were without doubt a proper exercise of its sovereign authority within our federal system, [which] allow[s] the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other"), it is a considerable leap from this to the conclusion that *Windsor* established a singular vision of a fundamental right to marriage that must be respected by *all States*. Traditional state marriage definitions are, as *Windsor* amply affirms, the "usual" course of business. *Id*. at 2691. In no uncertain terms, the majority forcefully states that "[t]his opinion and its holding are confined to [New York's] lawful

marriages." *Id.* at 2696. It is therefore improper to extrapolate from "this opinion" any rule that affects any other state's marriage laws.

Furthermore, there is no constitutional right to have one's out-of-state same-sex marriage or civil union recognized in Indiana. *See* Defs.' Combined Mem. at 24-32 [Doc. 56]. There is no federal due process right to have a license issued in one State—whether for professional, weapons, driving, or marriage purposes—treated as valid by government and courts in another. *See Hawkins v. Moss*, 503 F.2d 1171, 1176 (4th Cir. 1974) ("[L]icenses to practice law granted by . . . one state, have no extraterritorial effect or value and can vest no right in the holder to practice law in another state."). Marriage-recognition principles are rooted in the common law of comity. The common law choice-of-law starting point is usually the *lex loci* rule, which says a marriage valid in the State of licensure is valid in other States as well. But that is not, and never has been, the end of the matter. The Restatement (Second) of Conflict of Laws § 283(2) (1971) states that even if a marriage "satisfies the requirements of the state where the marriage was contracted," that marriage will not "be recognized as valid" if "it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." This "public policy" exception comports with the "Nation's history, legal traditions, and practices," and indeed dates back before the Fourteenth Amendment. *See* Joseph Story, *Commentaries on the Conflict of Laws* § 113a, at 168 (Little Brown, & Co. 6th ed. 1865). *See* Defs.' Combined Mem. at 27 (listing examples). In the only Indiana Supreme Court decision that Defendants are aware of that addresses an out-of-jurisdiction marriage that could not have been entered into in Indiana, the Court refused to recognize the marriage on public policy grounds. *Sclamberg v. Sclamberg*, 41 N.E.2d 801, 802-03 (Ind. 1942) (treating as void a marriage between uncle and niece).

Finally, Indiana's traditional marriage definition does not violate equal protection. The proper level of scrutiny here is rational basis, *see* Defs.' Combined Mem. at 35-48, and to the extent out-of-state opposite-sex marriages are generally treated as valid under Indiana law but same-sex marriages are not, that differential treatment is fully justifiable. For Indiana, marriage is about encouraging responsible procreation so as to ameliorate the consequences of unplanned pregnancies. *See Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005); Defs.' Combined Mem. at 50-55. For States recognizing same-sex marriages, the purpose of marriage is obviously something else—something that cannot be reconciled with Indiana's marriage philosophy. Notably, the same is *not* true with respect to other variations in state marriage laws, which may reflect marginal differences about the proper age of majority or the proper distance of consanguinity, but which do not call into question the fundamental purpose of the entire enterprise. Indiana has a legitimate interest in maintaining the integrity of its fundamental rationale for civil marriage rather than letting it be redefined by other States.

Fundamentally, the constitutional validity of Indiana's decision not to recognize out-of-state same-sex marriages turns on the constitutional validity of its traditional marriage definition. Because Indiana can constitutionally adhere to that definition and thereby refuse to provide for same-sex marriages, Defs.' Combined Mem. at 32-60, it can also refuse to recognize same-sex marriages from other States.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court stay enforcement of its Final Judgment and all related injunctions pending disposition of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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