No. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Virginia Wolf, et al.

Plaintiffs-Appellees,

v.

Scott Walker, et al.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WISCONSIN, CASE NO. 14-CV-64,
THE HONORABLE BARBARA B. CRABB, PRESIDING

STATE DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR TEMPORARY IMMEDIATE STAY FROM THE RELIEF GRANTED BY THE JUNE 6, 2014, OPINION AND ORDER OF THE DISTRICT COURT

Defendants-Appellants Scott Walker, J.B. Van Hollen, and Oskar Anderson (collectively, "State Defendants"), by their undersigned counsel, hereby move this Court for an order on an emergency basis to immediately stay that portion of the district court's June 6, 2014, Opinion and Order effectively denying State Defendants' motion to immediately stay any relief granted by the district court. (Dist. Ct.

Dkt. #118; Dist. Ct. Dkt. #114, 115, 116.) An emergency stay order from this Court is necessary to preserve the *status quo* and to avoid widespread public confusion regarding the relief granted by the district court.

INTRODUCTION

Late in the afternoon on Friday, June 6, 2014, the Western District of Wisconsin, Hon. Barbara B. Crabb, presiding, entered an Opinion and Order declaring that provisions of the Wisconsin Constitution and Wisconsin Statutes restricting the legal status of marriage to opposite-sex couples violate the Fourteenth Amendment to the United States Constitution. (Dist. Ct. Dkt. #118.) The district court ordered further briefing on the scope of a proposed injunction, but the declaratory relief went into effect immediately. (*Id.*) The district court took no action on State Defendants' previously filed contingent motion to immediately stay any relief granted by the district court pending appeal. (Dist. Ct. Dkt. #114, 115, 116.) The lack of a ruling on the contingent motion to stay and the subsequent actions of two county clerk defendants in immediately issuing marriage licenses to same-sex couples has caused precisely the type of confusion and uncertainty that the State Defendants' contingent motion sought to avoid.

Approximately an hour after the district court entered its Opinion and Order, county clerk defendants Czarnezki (Milwaukee) and McDonell (Dane) began issuing marriage licenses to same-sex couples.[1] (*See* Samuelson Declaration ("Decl.") at ¶6.) Both Dane and Milwaukee Counties waived the standard five-day waiting period for issuing marriage licenses. (*Id.*, at ¶7.) Between Friday evening (6/6/14) and Saturday afternoon (6/7/14), 283 same-sex couples obtained marriage licenses in Dane and Milwaukee counties. (*Id.*, at ¶8.) Other county clerks, however, have stated that they would await further clarification, creating a situation where *some* Wisconsin same-sex couples may marry while others may not. (*Id.*, at ¶9.)

Within hours after the district court entered its Opinion and Order, State Defendants filed their emergency motion for temporary stay. (Dist. Ct. Dkt. #119; Decl., at ¶ 4.) As of the present filing, the district court has neither ruled upon the emergency motion to stay nor stayed the relief entered in its Opinion and Order as previously requested in State Defendants' contingent motion to stay. (Decl., at ¶ 5.)

[1]The timing of the district court's decision at approximately 3:22 p.m. CDT, together with the County Clerk's decision to issue licenses starting at 5:00 p.m. CDT, effectively prevented State Defendants from obtaining relief from this Court over the weekend.

The district court's Opinion and Order has thus created a legal environment in which Wisconsin's county clerks are deciding on a county-by-county basis whether to issue marriage licenses to same-sex couples immediately or wait for the district court to enter injunctive relief or rule on State Defendants' motions to stay.

State Defendants therefore request, under Federal Rule of Appellate Procedure 8 and Circuit Rules 8 and 27, that this Court, on an emergency basis, immediately stay the relief granted by the district court's June 6, 2014, Opinion and Order to maintain the *status quo*.

BACKGROUND

Following expedited summary judgment briefing, the district court declared unconstitutional Wis. Const. art. XIII, § 13 (the "Marriage Amendment") and all provisions of the Wisconsin marriage laws (Wis. Stat. ch. 765) referring to marriage as a relationship between a husband and wife as applied to same-sex marriage. (Dist. Ct. Dkt. #118.)

The U.S. Supreme Court, and more recently, the Ninth Circuit and Sixth Circuit, have issued stays to maintain the *status quo* after district courts have found state laws banning same-sex marriage unconstitutional. *See Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014);

Latta v. Otter, No. 14-35420, at 5 (9th Cir. May 20, 2014) (*Herbert* "provides a clear message—the Court (without noted dissent) decided that district court injunctions against the application of laws forbidding same-sex unions should be stayed at the request of state authorities pending court of appeals review"); *Tanco v. Haslam*, No. 14-5297, at 1-2 (6th Cir. Apr. 25, 2014) ("a stay of the district court's order pending consideration of this matter by a merits panel of this Court is warranted"); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) ("[t]here is no apparent basis to distinguish this case or to balance the equities any differently than the Supreme Court did in [*Herbert*]"). Last week, the Circuit Court of Appeals for the Tenth Circuit postponed until at least June 12, 2014, the District of Utah's order requiring the recognition of marriages conducted after the district court's *Kitchen* decision (*Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013)) but before the Supreme Court granted its stay. *See Evans v. State of Utah*, 14-4060 (10th Cir. June 5, 2014).

Given the import of the district court's decision and order to the State of Wisconsin, particularly amidst a vigorous and unsettled national debate on the issue, a stay should be ordered immediately. Further, a stay is necessary in this case to avoid confusion and to maintain the *status quo* while the Seventh Circuit decides how

Wisconsin, and other states, may define the civil institution of marriage.

STATEMENT OF FACTS

Plaintiffs are eight same-sex couples who claim that the limitation of the legal status of marriage under Wisconsin state law to opposite-sex couples violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. (Dist. Ct. Dkt. #26.)

Plaintiffs challenged the Marriage Amendment as unconstitutional. (*Id.*,¶ 1.) The Marriage Amendment states:

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

Wis. Const. art. XIII, § 13.

Plaintiffs further challenged as unconstitutional "any and all provisions of Wisconsin's marriage statutes (Wis. Stat. ch. 765) that refer to marriage as a relationship between a 'husband and wife,' if and to the extent that such provisions constitute a statutory ban on marriage for same sex-couples." (*Id.*)

After Plaintiffs' summary judgment motion was fully briefed, but before the district court ruled, State Defendants' filed a Contingent

Motion to Stay, asking the district court to immediately stay any relief in the case at the time such relief is ordered in order to preserve the *status quo* for when an appeal is filed. (Dist. Ct. Dkt. #114, 115, 116.) Among other things, State Defendants' discussed the Supreme Court's stay in *Herbert*, the Ninth Circuit's stay in *Latta*, and the Sixth Circuit's stays in *Tanco* and *DeBoer*. (*Id.*) State Defendants also discussed Fed. R. Civ. P. 62(c) and facts justifying their stay request. (*Id.*)

Late in the afternoon on June 6, 2014, the district court granted Plaintiffs' motion for summary judgment. (Dist. Ct. Dkt. #118.) The district court issued a declaration that the challenged provisions of Wisconsin law are unconstitutional, but expressly refrained from issuing any injunctive relief, and issued a schedule for further proceedings on any such injunctive relief. (*Id.*) The district court also held in abeyance State Defendants' Contingent Motion to Stay, pending the outcome of the scheduled proceedings regarding injunctive relief. (*Id.*) Within hours after the issuance of the district court's Opinion and Order, the county clerks of two Wisconsin counties, Dane and Milwaukee, began issuing marriage licenses to same-sex couples, and over the weekend of June 6-8, 2014, approximately 283 same-sex

couples obtained marriage licenses, many of whom married. (*See* Decl., ¶¶6-8.)

On June 8, 2014, the Rock County clerk stated that she will begin issuing marriage licenses to same-sex couples on June 9, 2014 when their office opens at 8:00 a.m. (*Id.*, at ¶10.) Other county clerks, however, have stated that they would await further clarification. (*Id.*, at ¶9.) Thus, at present, *some* Wisconsin same-sex couples may marry while others may not.

Within hours after the issuance of the district court's Opinion and Order, State Defendants filed with the district court an emergency motion for temporary stay asking the court to temporarily stay the June 6, 2014, Opinion and Order in order to preserve the *status quo* on an interim basis until entry of final relief and a decision on the State Defendants' contingent motion to stay. (Dist. Ct. Dkt. #119.) As of this filing, although the Dane and Milwaukee clerk's offices have held extraordinary evening and weekend hours, the district court has not ruled upon[2] State Defendants' contingent motion to stay or emergency motion for temporary stay. (*See* Decl., ¶5.) State Defendants have, therefore, complied with Fed. R. App. P. 8.

[2]At 7:40 a.m. on Monday, June 9, 2014, the district court entered a minute order scheduling a telephonic motion hearing for June 9, 2014 at 1:00 p.m. on State Defendants' emergency motion to stay. (Decl., at ¶11.)

ARGUMENT

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.* (emphasis in original; citation omitted).

Courts "consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *See In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (citations omitted).

The Supreme Court has already concluded in favor of a stay pending appeal in same-sex marriage litigation. *See Herbert*, 134 S. Ct. 893.

I. State Defendants Are Reasonably Likely To Succeed on Appeal.

The Supreme Court's recent stay of an injunction against enforcement of Utah's marriage laws suggests State Defendants are

reasonably likely to succeed on appeal because the standards for granting a stay in the Supreme Court are 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 Supreme Court stayed the *Herbert* district court's injunction, thereby signaling the Supreme Court's belief that there is at least a fair prospect that it will reverse the District of Utah's judgment. 134 S. Ct. 893. The Sixth Circuit and Ninth Circuit later followed the Supreme Court's lead. *See Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014); *Tanco v. Haslam*, No. 14-5297 (6th Cir. Apr. 25, 2014); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014).

As discussed more fully in their memorandum in opposition to Plaintiffs' motion for summary judgment (Dist. Ct. Dkt. #102) and in amici curiae's brief (Dist. Ct. Dkt. #109), State Defendants are

reasonably likely to succeed on appeal because: (i) Plaintiffs' claims do not implicate a fundamental right; (ii) Wisconsin's marriage laws do not discriminate based on gender or sexual orientation; (iii) rational bases exist to support Wisconsin's marriage laws; and (iv) Plaintiffs' claims are foreclosed by *Baker v. Nelson*, 409 U.S. 810 (1972).

II. Irreparable Harm Will Result Absent a Stay.

Irreparable harm will result if the district court's decision is not stayed pending appeal. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King,* 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers)); *Aid for Women v. Foulston,* 441 F.3d 1101, 1119 (10th Cir. 2006) (same); *Coalition for Econ. Equality v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same)). Here, the district court has declared a provision of the Wisconsin Constitution unconstitutional and such a declaration causes the same harm or a greater harm than if a statute were declared unconstitutional.

The Supreme Court recently affirmed the states' unique and historic interests in regulating civil marriage when it stated that "[t]he

recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *U.S. v. Windsor*, 133 S. Ct. 2675, 2691 (2013). *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 (citations omitted). Forcing Wisconsin 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 significant administrative burdens associated with issuing marriage licenses under a cloud of uncertainty during appeal.

The Utah same-sex marriage litigation exemplifies the harms that may occur absent a stay. There, both the district court and the Tenth Circuit Court of Appeals declined to issue a stay. *See Kitchen v. Herbert*, No. 2:13-cv-00217-RJS, 2013 WL 6834634 (D. Utah Dec. 23, 2013) (order on motion to stay); *Kitchen v. Herbert*, 12-4178 (10th Cir. Dec. 24, 2013) (order denying emergency motion for stay and temporary motion for stay). Several days later, however, the United States

Supreme Court granted a stay and Utah's traditional marriage laws were reinstituted. *See Herbert*, 134 S. Ct. 893.

In the 17 days between the district court's ruling and the Supreme Court's stay, roughly 1,300 same-sex couples obtained marriage licenses and approximately 1,000 were married. *See Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *1 (May 19, 2014). Utah refused to recognize those 1,000 marriages and additional litigation ensued to determine the legal status of those marriages. *Id.* Approximately 300 of the couples who obtained licenses but did not marry before the Supreme Court's stay order in *Herbert* were unable to marry despite having legally obtained Utah marriage licenses. The district court eventually enjoined Utah from applying Utah's marriage bans retroactively. *Id.* at 21. The Tenth Circuit, however, has temporarily stayed the district court's order in *Evans*. *See Evans v. State of Utah*, 14-4060 (10th Cir. June 5, 2014).

Here, there is a very real risk of harm where both Milwaukee County clerk Czarnezki and Dane County clerk McDonell have begun issuing marriage licenses to same-sex couples and will continue to do so in the future. The failures of the district courts in Utah (and to a lesser extent in Michigan) to immediately enter stays to preserve the *status quo* pending appeal has led to chaos, confusion, uncertainty, and

ultimately, further litigation. State Defendants request this Court stay any injunctive relief to avoid similar results and their associated administrative burdens. *See I.N.S. v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Labor*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant a stay).

Since State Defendants are reasonably likely to succeed on appeal, refusal to stay the district court's injunction pending appeal could result in injuries similar to those sustained in Utah. Moreover, state officials and administrative agencies, including Registrar Anderson, would have to revise regulations and forms to accommodate the injunction—but may have to re-revise them if this Court, or the Supreme Court ultimately upholds Wisconsin's traditional marriage laws.

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

III. Public interests weigh in favor of a stay.

Wisconsin citizens have an interest in deciding, through the democratic process, public policy issues of societal importance including the definition of civil marriage. Removing the decision from the people harms the public interest.

The public also has an interest in certainty and in avoiding unnecessary expenditures. As discussed above, should a stay *not* be granted, marriage licenses would be issued under a cloud of uncertainty and the State would face heavy administrative burdens. A stay would, on the other hand, 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.

In reversing the Middle District of Tennessee's denial of a motion to stay, the Sixth Circuit found "that the public interest requires granting a stay." *See Tanco*, No. 14-5297 at 2. The Sixth Circuit quoted *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1512541 at *1 (S.D. Ohio Apr. 16, 2014):

> "[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. These considerations lead the Court to conclude that the public

> interest would best be served by granting of a stay. Premature celebration and confusion do not serve anyone's best interests. The federal appeals courts need to rule, as does the United States Supreme Court."

Tanco, No. 14-5297 at 2. These same public interest concerns are true here.

CONCLUSION

For the reasons discussed, State Defendants respectfully request that this Court consider the present motion on an emergency basis, enter an order immediately staying that portion of the district court's June 6, 2014, Opinion and Order that effectively denied State Defendants' motion to immediately stay any relief granted by the district court, and for all other and further relief that justice requires.

Dated this 9th day of June, 2014.

Respectfully submitted,

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