IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAMES DOMER BRENNER, *et al.*,

Plaintiffs,

v. Case No. 4:14-cv-107-RH/CAS

RICK SCOTT, *et al.*,

Defendants.
_____/

SLOAN GRIMSLEY, *et al.*,

Plaintiffs,

v. Case No. 4:14-cv-138-RH/CAS

RICK SCOTT, *et al.*,

Defendants.
_____/

DEFENDANTS' JOINT MOTION TO CONTINUE STAY PENDING APPEAL AND OPPOSITION TO PLAINTIFFS' MOTIONS TO LIFT STAY

The Clerk of Court of Washington County, the Secretary of the Florida Department of Management Services (DMS), and the Secretary of the Florida Department of Health (DOH) (collectively, the "Enjoined Officials"), move to continue the stay pending appeal. They also respond in opposition to the plaintiffs' requests to lift the stay.[1]

[1] The Clerk of Court of Washington County is a defendant in only one of these two consolidated cases. For the Court's convenience, though, the Enjoined Officials file this one document.

As this Court correctly recognized, "[t]here is a substantial public interest in implementing this decision just once—in not having, as some states have had, a decision that is on-again, off-again." (DE 74 at 28-29.) "This is so for marriages already entered elsewhere, and it is more clearly so for new marriages." *Id.* at 29. This Court has already entered a limited stay after recognizing the "substantial public interest in stable marriage laws," *id.*, and it should continue the stay until the federal appeals court can review the decision. On balance, it is in the public's best interest to wait for an appellate decision before implementing an order of this significance.

Procedural Background

Earlier this year, the plaintiffs filed complaints challenging the constitutionality of Florida's marriage laws and seeking injunctive relief. They sought relief against the DOH Secretary based on his authority to issue and amend certifications of death that reflect marital status; they sought relief against the DMS Secretary based on his authority to manage Florida's retirement and pension plans, which in part provide specific benefits based on marital status; and they sought relief against the Clerk of Court based on his authority to issue marriage licenses in Washington County.

On August 21, 2014, this Court entered a preliminary injunction. The injunction barred the Secretaries from enforcing Florida's marriage laws, and it required the Clerk of Court to issue a marriage license to the two plaintiffs seeking one. The Enjoined Officials appealed to the Eleventh Circuit, and the appeal remains pending. The initial brief is due November 14, 2014.

This Court stayed its injunction (except regarding the amended death certificate for Ms. Goldberg) until 91 days following the denial or lifting of stays in three federal circuit court decisions—*Bostic v. Schaefer* (4th Cir.), *Bishop v. Smith* (10th Cir.) and *Kitchen v. Herbert* (10th Cir.). It also specified that it could lift or extend the stay by further order. The stays in *Bostic*, *Bishop*, and *Kitchen* expired or were lifted after the United States Supreme Court denied certiorari petitions in those cases on October 6, so the current stay is set to expire on January 5, 2015 (91 days later).

Same-Sex Marriage Litigation Throughout Florida

This is not the only challenge to Florida's marriage laws. Throughout the State, there are challenges presenting the same issue presented here: Whether the Fourteenth Amendment to the United States Constitution requires Florida to allow same-sex marriage. No fewer than three state district courts of appeal have the issue before them:

- The Third District has the consolidated cases of *State v. Pareto* and *State v. Huntsman*, Nos. 3D14-1816 and 3D14-1783, both of which address whether the Fourteenth Amendment requires local clerks of court to provide marriage licenses to same-sex couples. The lower courts found that it did, and they ordered the clerks of Miami-Dade and Monroe Counties to begin issuing licenses. Those decisions are stayed pending appeal. (The plaintiffs in *Huntsman* asked the trial court and the district court to lift the automatic stay, but both courts denied the request).

- The Second District has *Shaw v. Shaw*, No. 2D14-2384, which raises the issue of whether Florida's marriage laws allow a Florida court to dissolve a same-sex marriage entered in another state and, if they do not, whether that prohibition violates the Fourteenth Amendment.

- The Fourth District has *Dousset v. Florida Atlantic University*, No. 4D14-480, which presents a same-sex partner's challenge to the university's refusal to give him in-state tuition, despite his same-sex marriage entered into in another jurisdiction. That case, too, raises the validity of Florida's marriage laws under the Fourteenth Amendment.

- There are numerous additional trial court cases raising the validity of Florida's marriage laws.

Because parties are continually raising this issue in courts throughout Florida, the State has taken steps toward a final Florida Supreme Court review. In the consolidated *Pareto* and *Huntsman* cases, pending in the Third District, the State recently filed papers seeking pass-through certification. The State noted that the issue presented was unquestionably an important issue, and that the plaintiffs, the State, and all citizens deserve a definitive answer with statewide effect.

The State had earlier argued against pass-through certification, noting that the United States Supreme Court was likely to grant review in one of the then-pending cases—and therefore likely to provide a final answer with nationwide effect. After the United States Supreme Court's October 6 decision denying all of the pending certiorari petitions, the State acted to move the issue in Florida toward an orderly resolution by seeking pass-through jurisdiction. Earlier today, the Third District entered an order carrying the issue with the case.

Argument in Favor of Continuing Stay

"A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken v. Holder*, 556 U.S. 418, 421 (2009). Whether a stay is appropriate depends on "the circumstances of the particular case." *Id.* at 433 (internal quotation and citation omitted). The circumstances of this particular case demonstrate the need for a stay.

As this Court noted in initially granting the stay, there are four factors to be considered: (1) the likelihood of prevailing on the merits on appeal; (2) irreparable harm

to the movant if no stay is granted; (3) harm to the adverse parties if a stay is granted; and (4) the public interest. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *see also Nken*, 556 U.S. at 434. In this case, the last factor—the overall public interest—is the most important.

1. The Public Interest:

There is a great public interest in stability of the law. If Florida's law is going to change in the substantial manner plaintiffs seek, it should be only after the plaintiffs' legal claims undergo appellate review. If the Eleventh Circuit reverses, and if people married in the meantime, those new marriages would be subject to uncertainty. No one benefits from on-again off-again marriage laws.

This Court also recognized the "substantial public interest in allowing those who would enter same-sex marriages the same opportunity for due deliberation that opposite-sex couples routinely are afforded. Encouraging a rush to the marriage officiant, in an effort to get in before an appellate court enters a stay, serves the interests of nobody." (DE 74 at 29.) The same is true if those efforts are to rush to the marriage officiant before the Eleventh Circuit rules on the merits.

In addition, there is a substantial interest in uniformity throughout the state. The plaintiffs sued only one clerk of court; the other sixty-six are not parties here. It is not in the public interest to have a marriage license issued in Washington County but not in other counties. Indeed, the Third District Court of Appeal, which has before it the same

issue and whose appellate ruling would have statewide effect, allowed the stay of the lower court decisions to remain in place.[2]

The United States Supreme Court having passed on an opportunity to provide a decision with national effect, the State has now moved to have the issue resolved in the Florida Supreme Court with statewide effect. *See supra*. It is in the public interest to at least allow Florida's highest court an opportunity to review the issue before ordering changes to Florida's law. This Court should protect that public interest by extending the stay pending appellate review.

2. <u>The Likelihood of Success On Appeal:</u>

Ordinarily, a party seeking a stay must show a substantial likelihood of success on the merits. But when there is a "serious legal question" involved, *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981), and the balance of the equities identified in factors two, three, and four "weighs heavily in favor of granting the stay," the stay may issue upon a "lesser showing of a substantial case on the merits." *Garcia-Mir*, 781 F.2d at 1452 (internal quotations, brackets, and citations omitted) (emphasis supplied).

There is here, at the very least, a "serious legal question." The plaintiffs point out that several circuits have agreed with their arguments. True, but two circuits issued divided opinions, whose lengthy dissents showed, at the least, a serious legal question. And the Fifth and Sixth Circuits are still considering the issue—with stays still in place, *see Tanco v. Haslam*, Case No. 14-5297 (mem. order) (6th Cir. Apr. 25, 2014) (granting

[2] The DMS and DOH Secretaries acknowledge that the injunction as to them would have statewide effect, because the Secretaries have statewide duties and the order preliminarily enjoins their enforcing the marriage laws.

stay pending appeal after district court denied stay; finding that "public interest requires granting a stay" in light of "hotly contested issue in the contemporary legal landscape" and possible confusion, cost, and inequity if State ultimately successful) (following and quoting *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1512541, at *1 (S.D. Ohio Apr. 16, 2014)); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014). The plaintiffs also point out that the United States Supreme Court recently denied certiorari in pending cases. True also, but the Supreme Court has "often stated [that] the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)).

Moreover, the Eleventh Circuit's earlier decision refusing to find that a person's sexual orientation implicates a fundamental right or suspect class, *see Lofton v. Sec'y, Fla. Dep't of Children & Family Servs.*, 358 F.3d 804, 816-17, 818 (11th Cir. 2004), further demonstrates that this appeal presents a serious defense of Florida's law. Although this Court determined that the State is unlikely to prevail on the merits, (DE 74 at 27), it should conclude that there is a "substantial case on the merits" that warrants careful consideration.

3. <u>The Balance of Equities:</u>

"[S]tatutes are presumptively constitutional and, absent compelling equities on the other side … should remain in effect pending a final decision on the merits by this Court." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in chambers) (citing *Marshall v. Barlow's Inc.*, 429 U.S. 1347, 1348

(1977) (Rehnquist, J., in chambers)). Any time a court enjoins a State "from effectuating statutes enacted by representatives of its people," there is a significant impact on it that can tip the balance in favor of a stay. *See New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1351 (Rehnquist, J., in chambers); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (noting that effect on State of court injunction against enforcement of one of its statutes is one of the two "most critical" factors weighing in favor of stay) (Scalia, J., concurring in upholding stay).

In this particular case, where the definition of marriage is so inextricably intertwined with the operation of whole chapters of the State's code, unless the stay remains in place pending appeal, there is considerable risk of confusion—reorienting whole systems to accommodate the preliminary injunction while this appeal is pending, and potentially trying to undo that reorientation if the injunction is reversed.

This Court found that Florida's laws violate the plaintiffs' constitutional rights—the central issue on appeal. It is true that any denial of a constitutional right is a real injury, but that also was true when the Court decided, on balance in this unique case, to stay the injunction. There is no need for immediate relief now that alters that balance of equities away from entering the stay and toward lifting the stay. In fact, there is no more urgency for any of the plaintiffs now than existed when the Court entered the stay in August, or than when the plaintiffs filed suit earlier this year.

Conclusion

For the reasons this Court already recognized, there is a substantial public interest in a stay. The Enjoined Officials respectfully request that this Court not only deny the

request to shorten the stay, but that the Court extend the stay until the Eleventh Circuit resolves the appeal.

Finally, the Enjoined Officials request that if the Court is inclined to lift the stay, that it leave it in place long enough to allow them to ask the Eleventh Circuit for a stay. Time for orderly consideration of such a request was one reason for this Court's providing a 90-day period after dissolution of the Supreme Court's stays. (DE 74 at 29) ("The stay will remain in effect until stays have been lifted in *Bostic*, *Bishop*, and *Kitchen*, and for an additional 90 days to allow the defendants to seek a longer stay from this court or a stay from the Eleventh Circuit or Supreme Court."). That additional time made sense then, and it makes sense still. The *Grimsley* plaintiffs have suggested that they would not oppose a seven-day period for this further review, (DE 87 at 4), and the *Brenner* plaintiffs adopt that view, (DE 88 at 4 n.1); but the Enjoined Officials respectfully believe a longer period is appropriate. There is no need to burden the Eleventh Circuit by presenting it with an emergency filing demanding resolution within seven days. The Enjoined Officials respectfully request that *if* this Court lifts the stay, it provide not less than 45 days for further review.

WHEREFORE, the Enjoined Officials respectfully ask that this Court deny the plaintiffs' motion to lift the stay and that it continue its stay of the preliminary injunction while that injunction remains on review with the Eleventh Circuit.

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Respectfully submitted by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 2014, a true copy of the foregoing was filed with the Court utilizing its CM/ECF system, which will transmit a notice of said electronic filing to all plaintiffs' and defendants' counsel of record registered with the Court for that purpose; and a true paper copy of the foregoing was sent to Samuel Jacobson, Esquire, Bledsoe, Jacobson, Schmidt, Wright, Lang & Wilkinson, 1301 Riverplace Boulevard, Suite 1818, Jacksonville, Florida 32207.

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