

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeals No: 14-1341

APRIL DEBOER, *et al.*
Plaintiffs-Appellees

v.

RICHARD SNYDER, *et al.*
Defendants-Appellants

**DEFENDANT LISA BROWN'S MOTION TO RESPOND TO STATE
DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY &
RESPONSE TO STATE DEFENDANTS-APPELLANTS' EMERGENCY
MOTION FOR STAY**

On Appeal from the United States District Court
Eastern District of Michigan
Southern Division
Case No. 12-10285
Hon. Bernard A. Friedman

PITT, McGEHEE, PALMER & RIVERS, P.C.
Attorneys for Defendant Lisa Brown
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Now comes Defendant Lisa Brown in her official capacity as Clerk of Oakland County, by and through her attorneys Pitt, McGehee, Palmer & Rivers, PC, and moves this Court for leave to file a response to the State Defendants-Appellants' emergency motion for immediate consideration and motion for stay pending appeal.

1. On March 21, 2014, Judge Friedman, U.S. District Judge, Eastern District of Michigan, ruled the Michigan Marriage Amendment (MMA) unconstitutional as violative of the Equal Protection Clause of the United States Constitution.

2. Throughout the litigation which resulted in Judge Friedman's ruling, Defendant Lisa Brown has taken a legal position different from the State Defendants-Appellants. This legal position is consistent with the United States Constitution and consistent with Plaintiffs' legal position.

3. On March 21, 2014, the State Defendants-Appellants filed a notice of appeal and an emergency motion to stay with this Court.

4. On March 22, 2014, this Court ordered Plaintiffs-Appellees to respond to the State Defendants-Appellants' motion by noon on March 25, 2014 and issued a temporary stay of Judge Friedman's ruling.

5. Due to Defendant Brown's unique position throughout this litigation as opposing State Defendants-Appellants and filing briefs in favor of Plaintiffs-

Appellees' legal position, Defendant Brown requests that this Court grant her leave to file the response brief which is attached hereto.

WHEREFORE, for the foregoing reasons and the reasons stated in the accompanying brief, Defendant Brown respectfully requests that the Court file the attached Response to State Defendants-Appellants' Emergency Motion for Stay.

PITT, McGEHEE, PALMER, & RIVERS, PC

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Dated: March 25, 2014

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**DEFENDANT BROWN'S RESPONSE TO STATE DEFENDANTS-
APPELLANTS' EMERGENCY MOTION FOR STAY**

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INTRODUCTION

In determining whether a stay should be granted pending appeal, the Court considers four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001); *Michigan Coalition of Radioactive Material Users, Inc. v Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together. *Griepentrog*, 945 F.2d at 153.

1. State Defendants-Appellants Are Unlikely to Prevail on the Merits of the Appeal.

Prior to ruling on the underlying action in this case, Judge Friedman fully considered the merits, held a two-week trial, and issued well-reasoned findings of fact which are entitled to deference. As a result, the State Defendants-Appellants have a more difficult burden with respect to demonstrating a likelihood of success on the merits of the appeal. *Griepentrog*, 945 F.2d at 153 (“a movant seeking a stay pending review on the merits of a district court’s judgment will have greater difficulty in demonstrating a likelihood of success on the merits”).

For the reasons stated in Judge Friedman’s opinion, the MMA does not pass even rational basis scrutiny and is unconstitutional under the Equal Protection

Clause of the Fourteenth Amendment. In addition, the MMA is also unconstitutional under the Due Process Clause of the Fourteenth Amendment because it is a direct and substantial interference with the fundamental right to marry. *See Zablocki v. Redhail*, 434 US 374 (1978); *Loving v. Virginia*, 388 US 1 (1967); *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996). Because the factual findings and legal precedent support Judge Friedman's finding that the MMA is unconstitutional, the State Defendants-Appellants are unlikely to succeed on the merits of their appeal.

Furthermore, no federal court that has ruled on this issue since the United States Supreme Court decision in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) has found same-sex marriage bans to be constitutionally valid. Each and every federal court that has addressed this issue post-*Windsor* found such bans to be unconstitutional.

Despite the State Defendants-Appellants' persistent arguments to the contrary, *Baker v. Nelson* does not control the outcome of this case. In *Baker v. Nelson*, 409 U.S. 810 (1971), the Supreme Court summarily dismissed a challenge to a ruling of the Minnesota Supreme Court that a same sex marriage ban did not violate the Fourteenth Amendment. The Supreme Court merely stated, without briefs or oral argument, that the appeal was "dismissed for want of a substantial federal question."

A summary dismissal for want of a substantial federal question “remains a decision on the merits of the precise questions presented except when doctrinal developments indicate otherwise.” *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotes omitted). In the four decades since *Baker* was decided, there have been significant doctrinal shifts which indicate that *Baker* is not dispositive of the case currently before this Court. Most notably, those doctrinal shifts are demonstrated by *Windsor*, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996).

Furthermore, a summary dismissal like *Baker* is binding only “on the precise issues presented and necessarily decided.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added). The constitutional validity of the MMA was not the precise issue presented in *Baker*; therefore, it is not binding.

The State Defendants-Appellants are unlikely to prevail on their appeal.

2. Granting the Stay Will Cause Irreparable Harm to Plaintiffs and Same-Sex Couples, While the State Defendants-Appellants Will Suffer No Irreparable Injury.

State Defendants-Appellants argue that the State and citizens will be irreparably harmed by the same sex couples who marry because they will cause an administrative burden and a “cloud of uncertainty during appeal.” State Br. at 15. The State claims this will cause a lack of administrative clarity. The State compares this case to the case in Utah, where the United States Supreme Court

issued a stay after the district court found the same-sex marriage ban unconstitutional. However, Michigan law is unique from Utah law. Michigan law is clear that the same sex marriages performed with licenses issued after Judge Friedman's ruling are valid.

MCL 551.16 states:

A marriage solemnized before an individual professing to be a district judge, common pleas court judge, district court magistrate, municipal judge, judge of probate, judge of a federal court, mayor, the county clerk or, in a county having more than 2,000,000 inhabitants, an employee of the county clerk designated by the clerk to solemnize marriages, or a minister of the gospel or cleric or religious practitioner shall not be considered or adjudged to be void, nor shall the validity of the marriage be affected, on account of a want of jurisdiction or authority by that individual if the marriage was consummated with a full belief on the part of the individuals married, or either of them, that they were lawfully joined in marriage. (Underlining added).

Therefore, it is clear that there will be no cloud of uncertainty regarding the validity of these marriages. Moreover, State Defendants-Appellants' arguments amount to the following: that the State will suffer in terms of money, time and energy expended in the absence of a stay. These considerations are insufficient to demonstrate an irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

After Judge Friedman's ruling on the evening of March 21, 2014, same-sex couples lined up the following Saturday morning at 6 a.m. outside of the Oakland County Courthouse. These couples stood outside for hours. Some exchanged

vows without their family and friends because they felt an urgency to marry as soon as possible. They feared that if they waited, their right to do so would be taken away again. For many of these couples, it was not the wedding day they envisioned. For others, it seemed a miracle that they would be permitted to marry at all in their lifetime. (Exh. A, Brown Affidavit)

Couples who felt they were treated as second class citizens in Michigan and felt shame due to the discrimination shared that, after their marriage ceremonies, they felt their families were finally validated. Defendant Brown married same-sex couples who shared homes; who raised children together; who have been together for decades; and who, in some cases, were elderly and eager to lock in benefits for their partners that are only available through marriage. Defendant Brown married couples who are in the middle of adoption proceedings. Their children deserve the legal protection of having both parents jointly adopt them. She also married many couples who were already raising children. These children deserve the same stability and legal protections as all other children of couples who wish to marry. Defendant Brown also married couples who expressed that they have contemplated leaving the State because of the unconstitutional ban. (Exh. A, Brown Affidavit).

Approximately 323 marriage licenses were issued to same-sex couples state-wide after Judge Friedman's ruling and before this Court's temporary stay. At

least 130 of those licenses were returned to be processed in Oakland County for filing.

Couples and their families who want the legal protection and recognition of marriage will experience real harm if a stay is granted by this Court. Defendant Brown will be forced to discriminate against couples and their families if a stay is granted. The State risks losing residents who can no longer live in a State that treats them and their families like second class citizens. They can no longer stay in a State that leaves them and their children legally vulnerable. (Exh. A, Brown Affidavit).

The State Defendants-Appellants also claim to that being prevented from enforcing the MMA is, itself, an irreparable injury. This is without legal support. The State Defendants-Appellants cite no cases holding that enjoining the enforcement of an unconstitutional State law irreparably harms the State.

The constitutional rights of Plaintiffs and other same-sex couples are at issue in this litigation. “When constitutional rights are threatened or impaired, irreparable injury is presumed.” *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. Ohio 2012). Money cannot compensate for the denial of constitutional rights, and a loss of constitutional rights “unquestionably constitutes irreparable injury.” *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Windsor* supports this argument by recognizing that discrimination against same-sex couples “humiliates . . . children

now being raised by same-sex couples.” *Windsor at 2694*. Such humiliation is irreparable.

Here, the State Defendants-Appellants can point to only speculative harm. The Plaintiffs and other same-sex couples are concretely harmed in a number of ways by the MMA. For example, they and their children are not eligible for certain federal benefits available to married couples. This includes Family Medical Leave benefits for a sick spouse, health benefits as a spouse, and certain Medicare benefits available for spouses. *See Garden State Equal v. Dow*, 216 NJ 314, 327 (NJ 2013). If any individual in a same-sex couple wishing to marry passes away during the stay, these marital benefits and their constitutional right to marry and to be afforded equal protection of the law will forever be denied. A stay will cause irreparable harm to Plaintiffs and same sex couples, not the State Defendants-Appellants.

3. The Public Interest Is Best Served by Denying the Stay.

The State Defendants-Appellants argue that the public has an interest in avoiding uncertainty by maintaining the status quo while this case is appealed. Defendant Brown respectfully disagrees. It best serves the public interest to prevent the continued violation of the federal constitutional rights of the citizens of the State of Michigan. It is beyond dispute that “the public interest is promoted by the robust enforcement of constitutional rights.” *Am. Freedom Def. Initiative v.*

Suburban Mobility Auth. for Reg'l Transp., 698 F.3d 885, 896 (6th Cir. Mich. 2012). Issuing a stay would only prolong the enforcement of an unconstitutional law, harming same-sex couples and the integrity of their families.

CONCLUSION

For these reasons, Defendant Brown respectfully requests that this Court deny the State Defendants-Appellants' request for stay.

PITT, McGEHEE, PALMER, & RIVERS, PC

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Dated: March 25, 2014

CERTIFICATE OF SERVICE

I hereby certify that on **March 25, 2014**, the foregoing document was electronically filed with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

s/ Andrea J. Johnson
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EXHIBIT A

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AFFIDAVIT OF DEFENDANT LISA BROWN, OAKLAND COUNTY CLERK

STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

I, Lisa Brown, being duly sworn, depose and state as follows:

1. I am the Clerk/Register of Deeds for Oakland County and a Defendant in *DeBoer, et al. v. Snyder, et al.*, Case No. 2:12-cv-10285, before Hon. Judge Bernard A. Friedman.

2. On Saturday, March 22, 2014, same-sex couples started lining up at 6 a.m. outside of the county courthouse in order to apply for marriage licenses. They stood outside for hours.

3. After receiving their licenses, some of these couples exchanged vows without their family and friends to witness and join in the celebration because they felt an urgency to get married as soon as they could, for fear that their right would be taken away again. Many couples told me that this was not how they envisioned their wedding day.

4. Other couples told me they thought the same-sex marriage ban would not be lifted in their lifetimes.

5. Couples mentioned feelings of shame and second class citizenship status due to the same-sex marriage ban, but after the marriage ceremonies felt that their families were finally "validated".

6. I observed couples rush to the courthouse in order to be legally recognized as a couple and as a family.

7. Couples told me that they worried about having only a short window of time in order to get married. They rushed to the courthouse in order to be afforded the same legal protections as opposite sex couples.

8. I married couples who share a home together; couples who have children together; couples who have been together for decades; elderly couples.

9. I married couples who are in the middle of adoption proceedings.

10. It is my belief that their children deserve and are constitutionally entitled to the legal protection of having both parents jointly adopt them.

11. Many of the couples that were married on Saturday, March 22, 2014 are raising children. Experts on both sides testified that marriage brings stability to children. If the state defendants are concerned about children, logically they should be supportive of same sex couples marrying so those children can have the stability as children of opposite sex couples who can marry.

12. I married same-sex couples who told me they have contemplated leaving the State because of the unconstitutional same-sex marriage ban.

13. Based on my observations and conversations with these couples, same-sex couples and their families who want the legal protection and recognition of marriage will experience real harm if a stay continues.

14. I will continue to be forced to discriminate against couples and their families with respect to my duties as Oakland County Clerk if a stay continues.

15. Based on my observations and conversations with these couples, the State risks losing residents who can no longer live in a State that treats them and their families like second class citizens and leaves them and their children legally vulnerable.

Deponent swears the above to be true under penalty of perjury.



Lisa Brown