

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 14-cv-1817

KATHERINE BURNS, et al.

Plaintiffs,

v.

JOHN W. HICKENLOOPER, JR., in his official capacity as the Governor of Colorado, et al.

Defendants.

**DEFENDANTS' MOTION TO STAY PROCEEDINGS AND
NON-OPPOSITION TO PROPOSED PRELIMINARY INJUNCTION**

Plaintiffs have filed a motion for preliminary injunction in this case. [Doc. #8.] In light of the ruling by a merits panel of the Tenth Circuit in *Kitchen v. Herbert*, No. 13-4178 (10th Cir. June 25, 2014), affirming a district court injunction against the State of Utah enforcing its marriage laws that limit marriage to one-man and one-woman, and thus exclude couples of the same-sex, stayed pending final disposition of certiorari, Defendants inform the Court that they do not oppose the attached agreed injunction, stayed pending a final mandate in the *Kitchen* case. The Governor, the Attorney General and the Jefferson County Clerk hereby move to stay all proceedings in this case until such time as the *Kitchen* case becomes final.¹ The Denver Clerk does not

¹ The Attorney General has waived service filed an entry of appearance. The other three Defendants agree to this filing and anticipate waiving service and entering appearances in the near future.

oppose this motion agrees a stay is appropriate in this case due to the *Kitchen* decision, but will file a separate motion to clarify her position. D.C.COLO.L.CivR 7.1.

I. NON-OPPOSITION TO STAYED, STIPULATED PRELIMINARY INJUNCTION.

On account of the *Kitchen* decision, the Defendants do not oppose the entry of a preliminary injunctive relief in favor of the Plaintiffs based on their constitutional claims at this time, to be stayed pending until all final appeals in the *Kitchen* case are resolved. Defendants suggest that the preliminary injunction be stayed until 14 days after the mandate issued from the Tenth Circuit in *Kitchen*, to give the Court and the parties sufficient time to assess the impact of the Tenth Circuit's final ruling as it applies to this case. A form stipulated and stayed preliminary injunction is attached as **Exhibit A** to this motion. The Plaintiffs have indicated they do **not oppose** the entry of a preliminary injunction. D.C.COLO.L.CivR 7.1.

To provide a clear record - the Attorney General – speaking alone as Defendant, representing the interests of the State of Colorado, believes the majority in the Tenth Circuit's 2-1 decision in *Kitchen* is incorrect for the reasons stated in his motion for summary judgment and reply in support thereof in the pending state case, (*Brinkman et al. v. Long, et al.* No. 13CV32572 (D. Ct. Adams Cnty Colo.)), and for the reasons stated in the amicus brief Colorado joined in the *Kitchen* case (Amicus Br. of Indiana et al., Case Nos. 13-4178, 14-5006 (10th Cir. 2014)).

To further clarify the record – the Governor and Denver Clerk – speaking alone as Defendants, believe the majority decision in *Kitchen* was correctly decided.

II. REASONS TO STAY THIS CASE.

Just as the Tenth Circuit stayed its decision in *Kitchen*, any order from this Court must likewise be immediately stayed. Plaintiffs have indicated that they **oppose** the request for a stay. D.C.COLO.L.CivR 7.1. The orderly administration of justice and the rule of law strongly favor a stay. Quite simply, the Tenth Circuit's decision staying the Utah case is equally as authoritative as the merits of the decision (which Plaintiffs make much of), and must be followed in this case. See *Kitchen*, slip op. 64-65 (staying case pending final appeals); see also Order, *Herbert v. Kitchen*, No. 13A687 (U.S. Jan. 6, 2014) (granting stay of injunction pending appeal).² These cases in the Tenth Circuit and U.S. Supreme Court are definitive.

Consistent with the Tenth Circuit's recent decision, the U.S. Supreme Court and all four Federal Courts of Appeals (including one Circuit twice) that have reached this precise issue have all issued stays in cases where State marriage laws were struck down by a federal district court.³ There is no jurisprudential reason for orders striking

² The text of the Supreme Court's order reads as follows: "The application for stay presented to Justice Sotomayor and by her referred to the Court is granted. The permanent injunction issued by the United States District Court for the District of Utah, No. 2:13-cv-217, on December 20, 2013, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit."

³ *Herbert v. Kitchen*, 134 S.Ct. 893 (U.S. Jan. 6, 2014) (stay pending appeal granted); *Kitchen v. Herbert*, No. 13-4178, slip op. 64-65 (10th Cir. June 25, 2014) (same); *Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (Idaho case - same) attached as **Exhibit B**; *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (Michigan case - same) attached as **Exhibit C**; see also *Tanco v. Haslam*, No.14-5297 *2 (6th Cir. April 25, 2014) (Tennessee case) (per curium) ("Because 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

down traditional marriage laws to be stayed in Oklahoma, Virginia, Utah, Kentucky, Texas, Tennessee, Michigan, Indiana, Ohio, Idaho, and Wisconsin, but not in Colorado.⁴ The purely procedural issue of staying the judgment so the parties can seek an expedited review is simply the right thing to do. The message of all these decisions is clear: rulings against traditional marriage laws in favor of same-sex marriage must be stayed pending final appeals.

The alternative, an injunction allowing Colorado clerks to issue same-sex marriage licenses for a day, or a few days, while the Tenth Circuit considers a request for a stay pending appeal (which the Attorney General would immediately seek), would not preserve the status quo, but instead would invite a race to the clerks' office, result in irreparable injury to the State, licenses issued under a legal cloud of uncertainty, and undermine the predictable and standard judicial process for testing the constitutionality of state laws.

appeal.”), attached as **Exhibit D**; *Baskin v. Bogan*, No. 14-2386 (7th Cir. June 27, 2014) (Indiana case - granting stay pending appeal), attached as **Exhibit E**.

⁴ District Court decisions granting stay: *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); *Bourke v. Beshear*, No.3:13-CV-750-H, 2014 WL 556729, at *14 (W.D. Ky. Feb. 12, 2014) (stay granted, noting “[i]t is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes. That does not serve anyone well”); *Henry v. Himes*, No. 14-cv-129, 2014 WL 1512541, *1-2 (S.D. Ohio April 16, 2014) (stay pending appeal granted); *Wolf v. Walker*, No. 14-cv-64-bbc, 2014 WL 2693963 *12 (W.D. Wis. June 13, 2014) (“I do not interpret *Geiger* as undermining the Court’s order in *Herbert*...Because I see no way to distinguish this case from *Herbert*, I conclude that I must stay any injunctive relief pending appeal.”); see also n.5 *infra*.

Plaintiffs evidently will ask this Court to disregard the legal conclusion of every (not overturned) federal court to reach the issue. Plaintiffs may point to the three states where marriage laws have been struck down and the State (or any named defendant) has declined to appeal the decision. These decisions say nothing about a stay, as Oregon, Illinois, and Pennsylvania never sought a stay.⁵ In no marriage case where the State or a party defendant has requested a stay has a stay been ultimately denied.

The result in the many federal marriage cases being stayed is unsurprising given the black letter law that a state suffers irreparable harm from its laws being enjoined. “[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.” *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”)); see also *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002) (granting a stay of an injunction because the state suffers irreparable harm when its statutes are enjoined); see also *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S.Ct. 506, 506 (U.S.

⁵ The State of Oregon declined to defend its marriage law, making the lack of a stay unremarkable. *Lee v. Orr*, 2014 WL 683630 (N.D. Ill. Feb. 21, 2014). The State of Illinois likewise declined to defend its marriage law. *Geiger v. Kitzhaber*, No. 6:13-CV-01834-MC, 2014 WL 2054264 (D. Or. May 19, 2014). The State of Pennsylvania has not defended its marriage law since the decision was issued. *Whitewood v. Wolf*, No. 1:13-CV-1861, 2014 WL 2058105, at *1 (M.D. Pa. May 20, 2014). Also in Oregon, a non-party attempted to ask for a stay, but was ultimately unsuccessful as it was not a defendant in the case. See *Nat’l Org. for Marriage, Inc. v. Geiger*, No. 13A1173, 2014 WL 2514491 (U.S. June 4, 2014).

CERTIFICATE OF SERVICE

I certify that on July 2, 2014, I served a true and complete copy of the foregoing motion on all counsel of record listed at CM/ECF:

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I certify that the following counsel were served a true and complete copy of the foregoing motion via email:

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