IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VIRGINIA WOLF, *et al.*,

Plaintiffs,

v. Case No. 14-C-00064-BBC

SCOTT WALKER, *et al.*,

Defendants.

PLAINTIFFS' MOTION TO IMMEDIATELY LIFT STAY AND REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs hereby respectfully request that the Court immediately lift the stay it previously entered pending appeal (Doc. 134), until such time as the State Defendants re-file their notice of appeal (if any). The relief Plaintiffs request is warranted in light of the State Defendants' gamesmanship in seeking to delay the vindication of Plaintiffs' fundamental constitutional rights that this Court, like numerous other federal district courts and, most recently, the U.S. Court of Appeals for the Tenth Circuit, have recognized.

On Friday, June 6, the Court issued an opinion and order granting Plaintiffs' motion for summary judgment, and declaring that Wisconsin's constitutional amendment and statutes limiting marriage to different-sex couples violate the Fourteenth Amendment to the U.S. Constitution. Doc. 118. That same day, State Defendants filed an emergency motion to stay (Doc. 119), and *one business day* (three calendar days) later, on June 9, they filed a notice of appeal from the June 6 Order as well as another motion for a stay pending appeal, this one with the Seventh Circuit. *See* Motion, *Wolf, et al., v Walker, et al.*, No. 14-2266 (7th Cir. June 9,

2014). Doc. 120. Thus, in a single business day, State Defendants were able to file two motions and a notice of appeal, all aimed at securing a stay. That notice of appeal, of course, was premature, because the June 6 Order and the Court's statement at the June 9 hearing that it would not issue a stay until it had ruled on an injunction made clear this Court's work was not done; the Court expressly required further briefing on the content of the injunction. On June 13, the Court entered an injunction, stayed the injunction and the Court's declaration pending appeal, and finally disposed of the case, directing the clerk to enter judgment. Doc. 134 at 12-14.

At that point, since the Court had disposed of all claims, there was no bar to the State Defendants proceeding on their notice of appeal from the Court's June 6 decision on the merits of Plaintiffs' constitutional claims. Indeed, Fed. R. App. P. Rule 4(2) makes clear that "[a] notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." However, having obtained from this Court the extraordinary relief of a stay, the State Defendants instead chose to *dismiss* their appeal, on June 16. *Wolf v. Walker*, No. 14-2266, Motion to Dismiss Appeal [Doc. 17] (7th Cir. filed June 16, 2014). Now, seventeen days later, there is still no pending appeal.

The State Defendants are plainly attempting to have their cake and eat it too, using the Court's stay to delay for as long as possible adjudication of Plaintiffs' fundamental constitutional rights. After the Court's June 13 order, there was no reason for the State Defendants to withdraw their notice of appeal, except in an attempt to delay the initiation of proceedings in the Seventh Circuit. This is plain from the fact that, while the State Defendants filed their original notice of appeal one business day (three calendar days) after entry of the June 6 Order, it has now been seventeen days since the State Defendants withdrew that notice of appeal, and they have not managed to file another.

In light of the State Defendants' gamesmanship, the Court should immediately lift the stay, until such time as the State Defendants re-file a notice of appeal. The Court previously considered the factors for the grant of a stay, and concluded that "[i]f I were considering these factors as a matter of a first impression, I would be inclined to agree with plaintiffs that defendants have not shown that they are entitled to a stay." Doc. 134 at 11. However, the Court concluded that there were no grounds to distinguish the Supreme Court's order in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), where the Supreme Court stayed a district court order enjoining state officials in Utah from enforcing its ban on same-sex marriage, pending disposition of the appeal to the Tenth Circuit. *See id.* But in *Herbert* there *was* a pending appeal in the Tenth Circuit, and the Utah state defendants noted in their motion to the Supreme Court (at 6)[1] that the Tenth Circuit had "agreed to expedite the appeal." Here, not only is there no expedited appeal, but there is no appeal at all since the State Defendants dismissed their prior notice of appeal.

In short, the Supreme Court granted a stay where it was clear the important constitutional rights at stake would be adjudicated promptly by the Tenth Circuit, and the state defendants there were prepared to proceed. Here, on the other hand, the State Defendants are using the Court's stay to drag their heels. A stay pending appeal is "'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case'" (*Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672-73 (1926))), and ultimately rests upon the court's "sound equitable discretion." *Philip Morris USA Inc. v. Scott*, 131 S.Ct. 1 (2010). The Supreme Court did not purport to change this rule in *Herbert*, or hold that state officials are entitled to stays regardless of the equities or the circumstances of the particular case. Indeed, *National Organization for Marriage v. Geiger*,

[1] Available at http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2013/12/31/National-Politics/Graphics/Application-for-Stay%20(1).pdf.

2014 WL 2514491 (U.S. June 4, 2014), in which the Supreme Court declined to stay an injunction against enforcement of Oregon's ban on same-sex marriage, makes clear that the propriety of a stay depends upon the particular context of the case.

A deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, the harm here is real and tangible. Plaintiffs Willes and Young cannot fully protect their parental rights of their newborn child without recognition of their marriage. Plaintiffs Hurtubise and Palmer similarly cannot jointly adopt their foster children if they cannot marry. The Seventh Circuit has recognized the severity of harm to same-sex couples and the urgency of resolving their claims by expediting briefing in similar litigation challenging a marriage ban in Indiana and by taking the extraordinary step of lifting its stay of the district court's injunction as to one of the plaintiff couples, ordering immediate recognition of the couple's marriage. *Baskin v. Bogan*, No. 14-2386, Order Setting Expedited Briefing Schedule [Doc. 14] (June 30, 2014); Order Lifting Stay In Part [Doc. 20] (July 1, 2014). In light of the irreparable harm from a continued denial of Plaintiffs' rights, the Court can reasonably have expected the State Defendants to "do equity" and promptly proceed with their appeal if they "seek equity" in the form of a stay. That the State Defendants have not done this is reason enough to immediately lift the stay, at least until such time as the State Defendants re-file their notice of appeal. *See Florida ex rel. Bondi v. U.S. Dept. of Health and Human Svcs*, 780 F.Supp.2d 1307, 1319 (N.D. Fla. 2011) (weighing the harms to both sides and ordering that "the stay will be conditioned upon the defendants filing their anticipated appeal within seven (7) calendar days of this order and seeking an expedited appellate review."); *Rite-Hite Corp. v. Kelley Co., Inc.*, 629 F.Supp. 1042, 1066 (E.D. Wis. 1986) ("[T]he Court has the authority to grant a stay conditioned on the movant's filing of a

notice of appeal within a specified period."); *Quartararo v. Fogg*, 1988 WL 16177, at *1 (E.D.N.Y. Feb. 16, 1988) (conditioning a stay on defendants' filing of a notice of appeal and motion for expedited treatment of appeal within seven days of order). *See also Rhines v. Weber*, 544 U.S. 269, 278 (2005) (in AEDPA case, the court should exercise its "discretion in structuring the stay" and place "reasonable time limits on a petitioner's trip to state court and back" in order to prevent delay, and where "a petitioner engages in . . . intentional delay, the district court should not grant him a stay at all").

WHEREFORE, Plaintiffs respectfully request that the Court immediately lift the stay previously entered in Doc. 134, until such time as the State Defendants file a notice of appeal. Plaintiffs also request expedited briefing and consideration of this motion.

Dated: July 3, 2014

By: /s Frank Dickerson
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