FILED
United States Court of Appeals
Tenth Circuit

July 11, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JONELL EVANS; STACIA IRELAND; MARINA GOMBERG; ELENOR HEYBORNE; MATTHEW BARRAZA; TONY MILNER, DONALD JOHNSON; CARL FRITZ SHULTZ,

Plaintiffs-Appellees,

v.

STATE OF UTAH; GARY HERBERT, in his official capacity as Governor of Utah; SEAN REYES, in his official capacity as Attorney General of Utah,

Defendants-Appellants.

No. 14-4060
(D.C. No. 2:14-CV-00055-DAK)
(D. Utah)

ORDER

Before **KELLY**, **LUCERO**, and **HOLMES**, Circuit Judges.

The State of Utah defendants have appealed from the district court's grant of a preliminary injunction that requires them to recognize marriages that were licensed and solemnized in Utah during the window of time between when the federal district court struck down Utah's same-sex marriage ban and when the Supreme Court issued a stay of the district court's order. They filed a motion asking this court to stay the district court's injunctive ruling, pending this court's decision on appeal. We granted a temporary stay on June 5, 2014, to consider the stay motion, response, and reply.

To receive a stay pending appeal, a movant must address four things: (1) the likelihood of success on the merits of their appeal; (2) whether they will suffer irreparable harm absent a stay; (3) the absence of harm to the opposing parties; and (4) whether a stay is in the public interest. 10th Cir. R. 8.1; *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). In this case, there is harm on both sides of the stay question, which means there is no relaxation of the likelihood-of-success-on-appeal standard. *See Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). And to succeed on the merits of their appeal, appellants will be required to show that the district court abused its discretion in granting a preliminary injunction. *See id.*

We conclude that appellants have not made showings sufficient to warrant a stay pending appeal. We will, however, leave the temporary stay in place until 8:00 a.m., MDT, on Monday, July 21, 2014, to allow appellants time to seek relief from the United States Supreme Court. The motion for stay pending appeal is denied, but the temporary stay currently in place will remain in effect until Monday, July 21, 2014, at 8:00 a.m., MDT.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

No. 14-4060, Jonell Evans et al. v. State of Utah, et al.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur with this court's decision to leave the temporary stay in place so that the State Defendants ("State") may seek a stay from the Supreme Court. I dissent from this court's decision to now deny a stay pending appeal. The district court stayed its preliminary injunction order for 21 days to allow the State to seek a stay from this court. Evans v. Utah, No. 2:14CV55DAK, 2014 WL 2048343, at *20 (D. Utah May 19, 2014). We then issued a temporary stay on June 5 until further order of our court not only to allow briefing, but also because the court had yet to issue an opinion in two pending same-gender marriage cases.

Though the briefing has been completed, the only new federal development in this case is that a divided panel issued an opinion in Kitchen v. Herbert, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), and stayed its ruling. Whatever one's view of the merits, the district court's preliminary injunction in this case (as both the district court and this court apparently recognized) should be stayed to allow for an orderly resolution of this controversy and one based upon the rule of law. Denying a stay pending appeal in this case complements the chaos begun by the district court in Kitchen when it faulted the State for not anticipating its ruling and seeking a preemptive stay. See Plaintiffs-Appellees' Opposition to State Defendants-Appellants' Emergency Motions for Stay Pending Appeal and Temporary Stay Pending Resolution of Motion to Stay Ex. B at 6, Kitchen, No. 13-4178, 2014 WL 2868044. Ultimately, the Supreme Court granted a stay, but not before the State was compelled to issue marriage licenses to hundreds of same-

gender couples from December 23, 2013 to January 6, 2014. See Herbert v. Kitchen, 134 S. Ct. 893 (2014).

To obtain a stay, the State must establish (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. 10th Cir. R. 8.1; F.T.C. v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 852 (10th Cir. 2003) (per curiam). Where the three "harm" factors tip in favor of the moving party, the "probability of success" requirement is somewhat relaxed. Mainstream Mktg., 345 F.3d at 852. "Under those circumstances, probability of success is demonstrated when the petitioner seeking the stay has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" Id. at 852-53 (quoting Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246-47 (10th Cir. 2001)). In my view, the State has made the required showing.

As to the merits, the district court concluded that the Plaintiffs have a vested interest in their state-law marriages regardless of the outcome of Kitchen. It concluded that invalidation of such marriages would constitute an invalid retroactive application of Utah's contrary provisions concerning same-gender marriage. As the State reminds us, however, Plaintiffs' right to marry was created by a district court decree in Kitchen and that decree remains stayed. The judgment is non-final. See McCullough v. Virginia, 172 U.S. 102, 123–24 (1898); Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78, 84 (2d

Cir. 1993); Johnson v. Cigna, 14 F.3d 486, 490–91 (10th Cir. 1993). Insofar as retroactivity, the Utah provisions barring same-gender marriage and its recognition predate the district court's stayed injunction in Kitchen. The rule contended for by the Plaintiffs—that a federal district court may change the law regardless of appellate review and the State is stuck with the result in perpetuity—simply cannot be the law. It would not only create chaos, but also undermine due process and fairness. As such, the State has shown a likelihood of success on the merits, or at least raised substantial questions "deserving of more deliberate investigation." Mainstream Mktg., 345 F.3d at 853.

The State will be irreparably harmed without a stay. In denying a stay pending appeal, this court is running roughshod over state laws which are currently in force. It is disingenuous to contend that the State will suffer no harm if the matter is not stayed; undoing what is about to be done will be labyrinthine and has the very real possibility to moot important issues that deserve serious consideration.

Moreover, granting a stay would not harm Plaintiffs because a stay would not ultimately decide or dispose of their claims. Though the Plaintiffs have important interests at stake, those interests may still be vindicated while appellate review occurs, and Plaintiffs are free to live their lives as they will. A stay would simply maintain the status quo until this case—and the broader issue to ultimately be resolved in Kitchen—comes to a resolution via the normal legal process, including that currently unfolding in the Utah courts.

Finally, there is a great risk of harm to the public interest absent a stay. As the

State points out, "final, complete review of the legal issues" will benefit all the people of Utah. State Defendants-Appellants' Reply in Support of Motions for Stay Pending Appeal at 5. Declining a stay here may well moot the novel issues involved, as well as those pending in the state courts. The State and its citizens, and respect for the law, are better served by obtaining complete, final judicial resolution of these issues.