

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 112,590

STATE OF KANSAS *ex rel.* DEREK SCHMIDT, ATTORNEY GENERAL,
Petitioner,

v.

KEVIN P. MORIARTY, CHIEF JUDGE, TENTH JUDICIAL DISTRICT,
AND SANDRA MCCURDY, CLERK OF THE DISTRICT COURT,
TENTH JUDICIAL DISTRICT,
Respondents.

ORDER

This original action in mandamus was filed October 10, 2014, by the State of Kansas, on relation of Attorney General Derek Schmidt, alleging that respondent, Chief Judge Kevin P. Moriarty of the Tenth Judicial District, exceeded his administrative authority and contravened Kansas constitutional, statutory, and common law by promulgating Amended Administrative Order 14-11. This Order permitted marriage licenses to be issued to same-sex couples. Respondent Sandra McCurdy is the Clerk of the District Court in the Tenth Judicial District. Her office is responsible for complying with Amended Administrative Order 14-11 in the acceptance of applications for and issuance of marriage licenses.

On the same day this action was filed, we determined jurisdiction should remain with this court based in part on the State's claim that Chief Judge Moriarty's Amended Administrative Order 14-11 created an inconsistent practice among the state's 31 judicial districts regarding the issuance of marriage licenses to same-sex couples and that appropriate relief was not available in the district court. See Supreme Court Rule 9.01(b) (2013 Kan. Ct. Rule Annot. 82). This court also granted the State's request for a

temporary stay of Amended Administrative Order 14-11 insofar as it allowed marriage licenses to be issued to same-sex couples. See *Henry, Administrator v. Stewart*, 203 Kan. 289, 292, 545 P.2d 7 (1969). The stay was granted "in the interest of establishing statewide consistency" pending our further order. (Order, dated Oct. 10, 2014, p. 2.)

After the filing of this original mandamus action, two same-sex couples who were denied marriage licenses by the Clerks of the District Court in the Seventh and Eighteenth Judicial Districts filed a federal lawsuit in the United States District Court for the District of Kansas. They challenged Kansas' laws prohibiting same-sex marriage on grounds of equal protection and due process under the United States Constitution. *Marie v. Moser*, No. 14-cv-02518 (D. Kan. Oct. 10, 2014). This federal lawsuit named as defendants these two district court clerks, as well as Robert Moser, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment. The federal action has progressed quickly.

On November 4, the federal district court in *Marie* entered a preliminary injunction, prohibiting the defendants from "enforcing or applying Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501, and any other Kansas statute, law, policy or practice that prohibits issuance of marriage licenses to same-sex couples in Kansas." *Marie*, slip. op. at 38. Of additional importance was the federal court's grant of a stay, which delayed the injunction's effect until 5 p.m. (CST) on November 11, to permit the defendants time to appeal the Order and secure an extension of that stay from a higher federal appellate court. *Marie*, slip op. at 38.

The federal defendants were unsuccessful in securing a further stay of the preliminary injunction in *Marie* beyond a brief one granted to give the United States Supreme Court time to consider the stay application. On November 12, the Supreme

Court denied a further stay without explanation and with two recorded dissents. *Moser v. Marie*, No. 14A503, 2014 WL 5847590 (U.S. Nov. 12, 2014).

Notably, the United States Supreme Court denied the request for a stay of the Kansas federal district court's injunction with knowledge that the Sixth Circuit Court of Appeals had only 6 days earlier concluded that state marriage laws in Michigan, Ohio, Kentucky, and Tennessee, which are similar to those of Kansas, do not violate the United States Constitution. See *DeBoer v. Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297, 5818, ___ F.3d ___, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). The Sixth Circuit decision creates a split among the federal circuits. This split makes it more likely that the federal constitutional questions will be reviewed by the United States Supreme Court.

In addition to these rapid federal court developments, the parties in this mandamus action have represented to this court that marriage licenses are being issued to same-sex couples in the Seventh and Eighteenth Judicial Districts and that federal defendant Moser, in his official capacity as Kansas Secretary of Health and Environment, is fully complying with the federal district court's preliminary injunction in *Marie*. The parties have further represented that marriage licenses are being issued to same-sex couples in some, but not all, of the 28 other Kansas judicial districts. At this time, *Marie* remains pending and the ultimate issue whether the Kansas same-sex marriage ban violates the United States Constitution appears to be proceeding toward final federal resolution.

In light of some of these events, on November 5 this court ordered the parties to show cause why: (1) the October 10 temporary stay of Chief Judge Moriarty's Amended Administrative Order 14-11 should, or should not, remain in full force and effect pending final resolution of the federal litigation in *Marie*; and (2) this court's consideration of the State's mandamus action otherwise should, or should not, be stayed pending final

resolution of *Marie*. The parties timely responded, and this court has fully considered the matter.

For the reasons stated below, the court orders that its October 10 temporary stay of Chief Judge Moriarty's Amended Administrative Order 14-11 be lifted immediately. The court also orders that further proceedings in this original mandamus action are to be held in abeyance pending the federal court's final resolution in *Marie* of the equal protection and due process challenges under the United States Constitution to Kansas' same-sex marriage prohibition. Once the underlying federal constitutional questions are finally resolved, this court will be in a position to determine whether the mandamus relief requested by the State is appropriate. See *State ex rel. Stephan v. Smith*, 242 Kan. 336, 377, 383, 747 P.2d 816 (1987) (mandamus denied after determination that system for appointment of counsel for the indigent, as administered, violated the Equal Protection Clause of the United States Constitution and Article 2, § 17 of the Kansas Constitution).

We now turn to the parties' specific arguments regarding the two issues we ordered them to address in our show cause order.

In arguing that the temporary stay should be kept in place, the State contends first that Chief Judge Moriarty was without jurisdiction to make a determination whether a marriage license could be issued to a same-sex couple in light of the state's same-sex marriage ban. We disagree to the extent that K.S.A. 2013 Supp. 23-2505(a) directs that "[t]he clerks of the district court *or judges thereof*, when applied to for a marriage license by any person who is one of the parties to the proposed marriage and who is *legally entitled to a marriage license*, shall issue a marriage license" (Emphasis added.) So when Chief Judge Moriarty had a pending marriage license application before him, he was faced with deciding whether the applicants were "legally entitled" to that license. In doing so, he considered the substantial federal authority existing at that time suggesting

the Kansas ban violated the United States Constitution. Chief Judge Moriarty, as a district court judge, was within his jurisdiction to weigh these authorities and make a determination. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.) *cert. denied* 135 S. Ct. 265 (2014) (Utah law violates federal constitution); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.) *cert. denied* 135 S. Ct. 271 (2014) (Oklahoma law violates federal constitution).

We emphasize we are not concluding that Chief Judge Moriarty was correct in determining that the Kansas ban is unconstitutional and, therefore, that the same-sex applicants were legally entitled to a marriage license. But making that determination was within his jurisdiction—as it is with all district court judges under K.S.A. 2013 Supp. 23-2505(a), some of whom have reached a different conclusion than Chief Judge Moriarty. In short, we hold that the jurisdiction question raised by the State is not a sufficient basis to keep the temporary stay in place or to grant the State relief on the merits at this time.

The State next argues this court's temporary stay should be kept in place for Chief Judge Moriarty's Tenth Judicial District because the federal district court's preliminary injunction applies only in two other judicial districts: the Seventh and the Eighteenth. We hold this to be an insufficient justification for several equally important reasons. As stated in our October 10 temporary stay order, its basis was "in the interest of establishing statewide consistency." That worthy interest is no longer viable because the federal district court's preliminary injunction remains in place—by an order of the United States Supreme Court. And it is undeniable that marriage licenses are not only being issued to same-sex couples in Kansas, but also that under state law those licenses may be used by those couples to marry anywhere in the state. See K.S.A. 2013 Supp. 23-2504 and K.S.A. 2013 Supp. 23-2505. This reality makes it even more difficult to justify keeping the temporary stay in place only for the Tenth Judicial District.

Just as significantly, the federal district court's decision in *Marie* did not merely conclude that the Kansas same-sex marriage ban violated the Fourteenth Amendment *as applied* in the Seventh and Eighteenth Judicial Districts where the defendant court clerks were located. In other words, the federal court's decision was not based on some peculiar quirk in those specific judicial districts' operations. Instead, the federal court's analysis was aimed directly at the epicenter of the Kansas same-sex marriage ban: Article 15, § 16 of the Kansas Constitution and K.S.A. 2013 Supp. 23-2501.

This aim is evident from the federal district court's specific conclusion that the two defendant clerks were "acting on account of state law" and that plaintiffs' injury was "fairly traceable to Kansas' laws." Slip op. at 9. In short, that court approached its decision as a facial challenge to the Kansas ban, not simply as applied in those particular judicial districts.

In addition, the federal court's order in *Marie* took on a statewide perspective when it concluded that defendant Moser, as Secretary of the Kansas Department of Health and Environment, is "significantly involved with recognition of marriage in Kansas" and the preliminary injunction is equally applicable to him. Slip op. at 10, fn. 6. See also K.S.A. 2013 Supp. 23-2509 (requiring district courts to comply with the specifications of the marriage license forms as prescribed by the secretary of the department).

Put simply, while arguably only two judicial districts are directly affected by the injunction, the federal district court's rationale underlying its order is not as localized as the State argues. But we need not make an express determination about the breadth of the federal injunction for the purposes of deciding the limited issue before this court. Rather, we only determine the State's arguments to be unpersuasive on the question of whether

the October 10 temporary stay should remain in place in the Tenth Judicial District. And we have determined the temporary stay should be lifted.

With the temporary stay lifted in the Tenth Judicial District, this court next must decide whether the State's mandamus action should be held in abeyance while the federal litigation in *Marie* continues on its path to final resolution. This decision is important because the unconstitutionality of the state's same-sex marriage ban, if so determined, may serve as a defense for Chief Judge Moriarty and Clerk McCurdy to the State's request for issuance of mandamus relief. See *Smith*, 242 Kan. at 383-84.

We hold that judicial comity and other principles favor waiting for the federal courts to finish the task begun in that jurisdiction. In part, the doctrine of comity recognizes the necessity of avoiding conflicts in the execution of judgments between state and federal courts. See *Schaefer v. Milner*, 156 Kan. 768, 775, 137 P.2d 156 (1943) (stating policy considerations in the administration of justice when courts with coordinate authority consider the same questions, *e.g.*, to prevent unseemly, expensive, and dangerous conflicts of jurisdiction); see also *State ex rel. Wilson v. Condon*, No. 2014-002121, 2014 WL 5038396, at *1 (S.C. Oct. 9, 2014) (expressing South Carolina Supreme Court's reasons for deferring to federal courts on same-sex marriage constitutionality, citing principles of comity).

Finally, we address the State's request that this court expressly "consider providing guidance to all the judicial districts—whether in the form of administrative guidance outside the scope of a case, whether as non-binding dicta in this case, or whether in a separate case" on how the preliminary injunction currently in effect in *Marie* applies statewide to the 29 nonparty judicial districts. We decline to do so because, among other things, Kansas courts do not render advisory opinions. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). Nor have we been asked to add as parties to this litigation

the hundreds of other district court judges and district court clerks in Kansas. In other words, in the current posture of this case as presented by the State, the issue of uniformity resides with the federal court in *Marie* and ultimately perhaps with the United States Supreme Court. See Federal Rule of Civil Procedure 65(d) (pertaining to application of injunctions to persons not named as parties in a lawsuit under certain circumstances).

In conclusion, today's order does not decide the substance of the State's challenges presented by this original mandamus action. Rather, it holds that after final resolution of the federal issues in *Marie*, this court will be in a position to determine whether respondent Moriarty possessed authority in his capacity as chief judge to issue Amended Administrative Order 14-11 covering his district's clerks and fellow judges and whether the mandamus relief sought by the State is appropriate.

IT IS SO ORDERED THIS 18th day of November 2014.

A handwritten signature in black ink, appearing to read 'L. R. Nuss', written over a horizontal line.

Lawton R. Nuss
Chief Justice