IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VALERIA TANCO and SOPHY JESTY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 3:13-cv-01159**
	)	**Trauger/Griffin**
WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

Defendants William Edward "Bill" Haslam, Larry Martin, and Robert E. Cooper, Jr., in their official capacities, have given notice that they are appealing the March 14, 2014, Order, Memorandum, and Preliminary Injunction of this Court granting Plaintiffs' motion for preliminary injunction (Doc. Nos. 67, 68, and 69) to the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1292(a)(1). In addition, Defendants have moved this Court, pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a), for an order staying the Order, Memorandum, and Preliminary Injunction (Docket No. 67, 68, and 69) entered on March 14, 2014, pending appeal to the United States Court of Appeals for the Sixth Circuit. In support of the motion, Defendants submit the following:

STANDARD FOR A STAY PENDING APPEAL

Rule 62(c) of the Federal Rules of Civil Procedure provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction." The purpose of a

stay is to preserve the status quo pending appellate determination. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

When considering a stay pending appeal, a court must consider the following factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm absent a stay; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. *Baker v. Adams County/Ohio Valley School Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). A stay pending appeal does not "require the trial court to change its mind or conclude that its determination on the merits was erroneous" before holding that a stay pending appeal is warranted. *St. Agnes Hospital v. Riddick*, 751 F.Supp. 75, 76 (D.Md. 1990) (citations omitted).

In *Herbert v. Kitchen*. 2:13-cv-00217 (C.D. Utah Dec. 20, 2013) (Doc. No. 48-2), the permanent injunction issued by the district court enjoining Utah from enforcing its ban on same-sex marriage was stayed by the United States Supreme Court without any dissent after the request was referred to the full Court by Justice Sotomayor. *Herbert v. Kitchen*, No. 13A687, 571 U.S. ___, 2014 WL 30367 (Jan. 6, 2014) (copy attached). Consistent with the Supreme Court's issuance of a stay, the district courts in *De Leon v. Perry*, No. SA-13-CA-00982-OLG (W.D. Tex. Feb. 26, 2014) (Doc. No. 58-1); *Bostic v. Rainey*, No. 2:13-cv-395-JGH (E.D. Va. Feb. 13, 2014) (Doc. No. 56-1); and *Bishop v. Holder*, No. 04-cv-848-TCK-TLW (N.D. Okla. Jan. 14, 2014) (copy attached), all stayed their respective decisions. This Court relied on the decisions in these cases to grant injunctive relief; it should rely on them again for purposes of deciding this motion to stay.

I. LIKELIHOOD OF SUCCESS ON APPEAL

Movants seeking a stay pending appeal "need not always establish a high probability of success on the merits" but instead must show, at a minimum, the existence of "serious questions

going to the merits." *Grutter v. Bollinger*, 247 F.3d 631, 632-33 (6th Cir. 2001) (citing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991). The issuance of stays pending appeal in the similar cases cited above supports the conclusion that there is at least a serious question going to the merits of Plaintiffs' claims.

Indeed, one aspect of this Court's merits analysis is subject to immediate question. In concluding that Plaintiffs are likely to succeed on the merits, the Court concluded that "[t]he defendants have not persuaded the court that Tennessee's Anti-Recognition Laws will likely suffer a different fate than the anti-recognition laws struck down and/or enjoined in *Bourke*, *Obergefell*, and *DeLeon*," noting that "[d]efendants offer arguments . . . that Anti-Recognition Laws have a rational basis because they further a state's interest in procreation, which is essentially the only 'rational basis' advanced by the defendants here." (Doc. No. 67, pp. 13-14). But it is not the Defendants' responsibility to prove a rational basis; instead, "'[t]he existence of facts supporting the legislative judgment is to be presumed.'" *American Exp. Travel Related Services Co., Inc. v. Kentucky*, 641 F.3d 685, 693 (6th Cir. 2011) (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 152 (1938). The "heavy burden of 'negat[ing] every conceivable basis which might support [the enactment]'" should have been placed on the Plaintiffs. *Id.* at 694 (quoting *Hadix v. Johnson*, 230 F.3d 840, 843 (6th. Cir. 2000)).

II. LACK OF IRREPARABLE HARM TO PLAINTIFFS

Plaintiffs will not be irreparably harmed by a stay pending appeal. Although the Court has found the circumstances of Plaintiffs Tanco and Jesty "particularly compelling," their concerns regarding healthcare decisions arising from the birth of their child can be (or could have been) addressed through legal methods such as powers of attorney and advanced directives. The alleged irreparable harm that could hypothetically occur during Plaintiff Tanco's childbirth

could have been obviated had Plaintiffs Jesty and Tanco availed themselves of these protective legal methods, as noted in Defendants' Response in Opposition to the Motion for Preliminary Injunction, filed on December 6, 2013. (Doc. No. 35). Plaintiffs "cannot rely on [their] own [in]action[] to create the risk of irreparable injury." *Vantico Holdings, S.A. v. Apollo Management, LP*, 247 F.Supp.2d 437, 454 (S.D.N.Y. 2003). And their concerns regarding visitation at the University of Tennessee Medical Center should unforeseen medical complications arise during childbirth are unfounded: 42 C.F.R. § 482.13 requires the Medical Center to inform Plaintiff Tanco of her right "to receive the visitors whom he or she designates, including but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend." (Doc. No. 32-1, ¶ 17; Doc. No. 32-2, ¶17). Plaintiffs Tanco and Jesty also assert real-property concerns easily remedied with proper legal planning. (Doc. No. 67, p. 16). This may well be "time-consuming and expensive," (Doc. No. 67, p. 16), but the harm is not irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Beyond that, the Court has pointed to the indignity and stigmatization that Plaintiffs experience (Doc. No. 67, pp. 15-16), but this is not the type of harm that warrants the preliminary injunctive relief this Court has provided. It is well settled that reputational damage "falls far short of the type of irreparable injury which is a necessary predicate to issuance of a temporary injunction." *Sampson*, 415 U.S. at 88, 91-92. The harm Plaintiffs have alleged in their declarations is precisely the kind of harm *Sampson* says is insufficient.

III. PUBLIC INTEREST AND BALANCE OF HARM TO THE STATE

The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98 (6th Cir. 1991) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). But the

Court's preliminary injunction *changes* the relative position of the parties and *alters* the status quo. A stay is necessary to restore the balance pending appeal, particularly where the Court's order is one that frustrates the will of the people of Tennessee, reflected in the State's democratically established public policy.

The Defendants have previously asserted 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 harm." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 506 (2013) (Scalia, J., concurring in denial of application to vacate stay of an injunction) (quoting *Maryland v. King*, 567 U.S. 1, 3 (2012) (Roberts, C.J., in chambers)). This Court countered that proposition, noting that "[t]he public interest is promoted by the robust enforcement of constitutional rights." (Doc No. 67, p. 18). But as the Court has stressed, it has *not* found that Tennessee's same-sex marriage laws are unconstitutional. (Doc. No. 67, p. 19). The Court has concluded, to be sure, that it is likely to so find, but the Defendants have now signaled their intent to seek Sixth Circuit review of that determination. It is only right for the status quo to be maintained during that process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

Notice of this filing will be sent via first class mail, postage prepaid, to the following parties:

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