IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D and DONNA DITRANI, Plaintiffs/Appellees, v. ROBERT MOSER, M.D. in his official capacity as Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official capacity as Clerk of the District Court for the 7th Judicial District (Douglas County) and BERNIE LUMBRERAS in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), Defendants/Appellants.	)	Case No. 14-3246

EMERGENCY MOTION FOR STAY
OF PRELIMINARY INJUNCTION

Appellants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Douglas A. Hamilton, Clerk of the District Court for the 7th Judicial District (Douglas County, Kansas), and Bernie Lumbreras, Clerk of the District Court for the 18th Judicial District (Sedgwick County, Kansas), hereby move pursuant to Fed. R. App. P. 8(a)(1)(C) for an order staying and suspending the effect of the November 4, 2014 preliminary injunction which is the subject of this appeal.

The preliminary injunction directs defendants to disregard Kansas statutes, the Kansas Constitution, and the Orders and rulings of their respective Chief Judges who made the decisions complained of by Plaintiffs that Kansas law does not permit issuance of same-sex marriage licenses. The preliminary injunction also requires these Clerks to ignore a temporary stay imposed upon the issuance of same-sex marriage licenses by the Justices of the Kansas Supreme Court in a prior pending case, *State ex rel. Schmidt v. Moriarty*, No. 112,590.

The underlying case is a declaratory lawsuit pursuant to 42 U.S.C. § 1983 against three individual employees of the State of Kansas, two of whom are judicial officers operating in aid of and under the direction and control of their respective Chief Judges and the Kansas Supreme Court. At issue in this appeal is a request for immediate preliminary injunctive relief to compel the two clerks to issue marriage licenses to same-sex couples in two of 105 Kansas counties. The lawsuit was filed approximately one hour after the Chief Justice of the Kansas Supreme Court signed an order requiring Kansas district courts to continue denying same-sex marriage applications pending a decision by that Court on a petition for writ of mandamus filed by the Kansas Attorney General against the sole judge who had issued an order requiring court staff in his district to commence issuing same-sex marriage licenses, *State ex. rel. Schmidt v. Moriarty*, No. 112,590.

Defendants orally moved in the district court for a stay of the preliminary injunction even before it was granted, in order to permit an effective appeal to be pursued, and District Judge Crabtree suspended the effect of the preliminary injunction for one week in his order of November 5, 2014. His order makes it plain that any extension of the stay would have to be granted by this Court:

> "[U]nless defendants convince the Tenth Circuit to order an additional stay, the injunction imposed by the Order will go into effect at 5:00 p.m. (CST) on Tuesday, November 11, 2014." (See Doc. 29 at page 38, attached hereto)

This motion seeks to suspend the effect of the preliminary injunction to preserve the *status quo* in Kansas regarding issuance of same-sex marriage licenses until the merits of this appeal are decided by this Court. The substance of the appeal involves the regulation of domestic relations, "an area that has long been regarded as a virtually exclusive province of the States," *United States v. Windsor*, __ U.S. ___, 133 S. Ct. 2675, 2691 (2013) (citation omitted), the validity of a state constitutional provision, numerous Kansas statutes, a 2002 Kansas Supreme Court decision on point, the ability of the Kansas Judicial Branch to run its own state court system, and the ability of a federal court to enjoin state judicial officials exercising judicial functions.

The Kansas Supreme Court has issued a second order confirming that there is a conflict of jurisdiction inherent in the concurrent operation of its orders in the

mandamus action and the preliminary injunction issued by Judge Crabtree. The parties to the mandamus proceedings have been ordered to submit supplemental briefs to assist the court in determining how to address that conflict of jurisdiction. See order of October 5, 2014 in *State ex. rel. Schmidt v. Moriarty*, No. 112,590, attached.

The Required Elements for Stay are Met

10th Cir. Rule 8.1(A): This Court has jurisdiction to entertain an immediate appeal from the issuance of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). The preliminary injunction was issued on November 4, 2014, and by its own terms it will become effective on November 11, 2014. This appeal is therefore timely.

10th Cir. Rule 8.1(B): Defendants submit that their likelihood of success in this appeal is great, by reason of the plain language of 42 U.S.C. § 1983 prohibiting injunctive relief against judicial officers, recognized and applied by this Court recently in *Knox v. Bland*, 632 F.3d 1290, 1292 (10th Cir. 2011) and *Landrith v. Gariglietti*, 505 Fed. Appx. 701, 702-03, 2012 WL 6062668 (10th Cir. 2012). As this Court has stated, a federal court has no authority to issue injunctive relief against state judicial officers, particularly where, as here, such relief sounds in mandamus. *See, e.g., Knox*, at 1292 (citing *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986), *Olson v. Hart*, 965 F.2d 940, 942 (10th Cir. 1992)). The preliminary

injunction is contrary to the plain language of 42 U.S.C. § 1983 as amended by the 1996 Federal Courts Improvement Act and inconsistent with this Court's decisions cited above. *See also*, *Glaser v. City and County of Denver,* 557 Fed. Appx. 689, 704 (10th Cir. 2014).

10th Cir. Rule 8.1(C): Defendant clerks are exposed to irreparable harm if the stay is not granted. Obedience to the preliminary injunction exposes Defendants Hamilton and Lumbreras to potential criminal prosecution pursuant to K.S.A. 2014 Supp. 23-2513. It also directs them to disobey Orders (including an Administrative Order), of their Chief Judges, who appointed them. K.S.A. 20-343. Obedience to the preliminary injunction exposes these clerks to citations in contempt of the Kansas Supreme Court for disobedience of its Order of October 10, 2014.

10th Cir. Rule 8.1(D): The requested stay does not harm the plaintiffs. To date, none of the plaintiffs have articulated any reason why their situation will be altered to their disadvantage by the continuance of the *status quo ante* during the consideration of this appeal. There is nothing in their moving papers establishing any urgency in this matter. Although the Complaint contains allegations showing that what they really seek is judicial and administrative recognition, not just a marriage license, and their arguments at hearing included that they wanted the right of intestate succession and the right to have their marriage recognized by a hospital

for purposes of medical treatment decisions, none of which is within these Defendants' power as shown by the Affidavits submitted, at the hearing on the preliminary injunction Plaintiffs' counsel indicated that all Plaintiffs were seeking is a license, whether or not the resulting marriages will be recognized in Kansas. Plaintiffs conceded that the licenses required by the preliminary injunction would not be recognized, absent further judicial action.

10th Cir. Rule 8.1 (E): In the absence of a stay, there is a substantial risk of harm to the public interest. The preliminary injunction, requiring two clerks of 105, to ignore Kansas law and to issue same-sex marriage licenses interferes with the Kansas Supreme Court's operation of the state judicial system and creates confusion among the public with regard to the requirements of Kansas law. It may also raise unfair and unrealistic expectations and hopes of those similarly situated to the plaintiffs because, as argued by the defendants below, these defendants do not recognize marriages as valid; that function belongs to judges or other officers of the State. If plaintiffs do not prevail ultimately in this action, a substantial number of marriage licenses could be issued and registered even in two Kansas counties, licenses which would later be determined to have been improperly issued and void.

The Preliminary Injunction was Issued without Jurisdiction and Interferes with the Kansas Supreme Court's Prior Jurisdiction and Order in Violation of Federalism and Comity

Defendants submit that the requested relief is barred by Eleventh Amendment and judicial immunity and *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 2014 WL 1201488 (10th Cir. 2014). Judge Crabtree's Order considered only past actions, both of defendants and the plaintiffs, rather than their discretion to act in the future. Under *Buchheit v. Green,* 705 F.3d 1157, 1159 (10th Cir. 2012), retrospective relief against clerks (or judges) is barred by Eleventh Amendment immunity.

In response to plaintiffs' motion for temporary injunctive relief, the defendants raised jurisdictional issues under the Eleventh Amendment, under the 1996 amendment to 42 U.S.C. § 1983 prohibiting the issuance of preliminary injunctions against judicial officers acting in their judicial capacities, and the Anti-Injunction Act, as well as questions of standing, abstention and judicial immunity. Defendants also argued the requested relief was barred under the *Rooker-Feldman* doctrine as articulated in *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

By disregarding the efforts of the Kansas Supreme Court to address the issue of same-sex marriage, the preliminary injunction order ignored the principle of

comity stated in *Juidice v. Vail,* 430 U.S. 327, 334-35, 97 S. Ct. 1211, 1217, 51 L. Ed. 2d 376 (1977):

> We now hold, however, that the principles of Younger and Huffman are not confined solely to the types of state actions which were sought to be enjoined in those cases. As we emphasized in Huffman, the "more vital consideration" behind the Younger doctrine of nonintervention lay not in the fact that the state criminal process was involved but rather in "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Huffman, 420 U.S., at 601, 95 S.Ct., at 1206, quoting Younger, 401 U.S., at 44, 91 S.Ct., at 750.
>
> This is by no means a novel doctrine. In Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers, the Court said:
>
> But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wall. 366-370, 21 L.Ed. 287-290; Harkrader v. Wadley, 172 U.S. 148, 19 S.Ct. 119, 43 L.Ed. 399.' Id., at 162, 28 S.Ct., at 455.
>
> These principles apply to a case in which the State's contempt process is involved. A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest.

The mandamus proceedings against Chief Judge Moriarty serve the same function within the Kansas judicial system as a citation in contempt. No federal

court should intervene to interrupt that adjudicative process under the rule of *Juidice*.

The order also ignored the undisputed fact, stated in the Complaint and also in the Affidavits, that for purposes of judicial immunity under federal law and the 1996 amendment to 42 U.S.C. § 1983, the decisions complained of by Plaintiffs were judicial decisions by the Chief Judges of the 7th and 18th Judicial Districts in Kansas, Chief Judge Robert Fairchild and Chief Judge James Fleetwood respectively. Judges Fairchild and Fleetwood applied fact to law to determine that the requested licenses could not issue under Kansas law, all of which is recognized by federal law as a judicial determination and function. *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) (an act is judicial if it is a function normally performed by a judge and the parties dealt with the judge in his or her judicial capacity). Kansas law authorizes both clerks and judges to administer oaths and examine applicants to confirm that the qualifications for issuance of a marriage license are met, a procedure that is more than ministerial. *See* K.S.A. 23-2515. The Kansas judges are not parties here and in any event, are entitled to judicial immunity for their decisions that plaintiffs were not "legally entitled" to a license as per K.S.A. 2014 Supp. 23-2505 as are Clerks Hamilton and Lumbreras, acting under their direction and control. Clerks as well as judges are judicial officers and are entitled to

judicial immunity. *See Landrith*, 505 Fed. Appx. at 702-03 (citing *Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002); *see generally, Mireles v. Waco,* 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) (overruled in part on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (absolute judicial immunity was not affected or abolished by 42 U.S.C. § 1983)). Judicial immunity extends to injunctive relief. *Lawrence v. Kuenhold*, 271 Fed. Appx. 763, 2008 WL 822458, n.6 (10th Cir. 2008).

The District Court erroneously determined that defendants clerks Hamilton and Lumbreras would be performing nothing more than a ministerial function if they were to violate Kansas criminal law, the rulings and orders of their appointing and supervising Chief Judges, and the order issued by the Kansas Supreme Court by issuing marriage licenses to plaintiffs. Because any future harms to be suffered by plaintiffs, presuming that they were to seek a license in the future from these two clerks, would result exclusively from obedience to the order of the Kansas Supreme Court and obedience to the Clerks' appointing and supervising Chief Judges, Judges Fairchild and Fleetwood, only an injunction directed at the judges and the Kansas Supreme Court could be effective to grant plaintiffs even part of the relief they seek.

Judge Crabtree's order summarily rejected every potential defense that might be raised to the Complaint, presuming that controlling precedent exists within the decision of the Tenth Circuit Court of Appeals on every such defense. The cases cited by Judge Crabtree do not address some of the issues discussed in the order, and therefore do not reject these defenses.

An order staying the effect of the preliminary injunction for the duration of this appeal is necessary for the following reasons:

1. The preliminary injunction improperly interferes with a temporary restraining order issued by the Kansas Supreme Court in the earlier filed mandamus proceeding, *State ex. rel. Schmidt v. Moriarty,* directing district court clerks in the State of Kansas, all of whom are Kansas Judicial Branch employees working under the supervision of Chief Judges and the State Supreme Court, to deny issuance of marriage licenses to same-sex couples in the interests of statewide uniformity, at least during the pendency of the mandamus action. The effect of the preliminary injunction would be to compel two court clerks out of 105 to issue marriage licenses to same-sex couples while the other 103 court clerks are prohibited by statutes, the Kansas Constitution, and by Kansas Supreme Court Order from doing the same.

2. The District Court erred in refusing to abstain under applicable abstention doctrines, applying an overly narrow interpretation of the applicability of those doctrines, including *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), holding that "even though *Moriarty* might resolve the issues presented here," *Younger* was limited to three exceptional circumstances and did not include the Kansas Supreme Court's interest in uniform operation of its judicial system (the interest alleged here). *Younger* abstention is non-discretionary and must be invoked once the three conditions are met as they are here: (1) an ongoing state criminal, civil or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, an (3) the state proceedings "involve important state interest, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Taylor v. Jaquez*, 126 F.3d 1294, 1297 (10th Cir. 1997); *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989).
3. The preliminary injunction is contrary to the Anti-Injunction Act, 28 U.S.C. § 2283, which provides: "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect

or effectuate its judgments." As the Supreme Court has stated it, "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977) (citations omitted). The District Court rejected this argument by citing *Mitchum v. Foster*, 407 U.S. 225, 242-43, 92 S. Ct. 2151, 32 L. Ed 2d 705 (1972) without analysis of how or whether the requested injunction fit within the narrow exceptions recognized in *Mitchum*. The District Court did not address defendants' argument that *Mitchum* was inapplicable here given the 1996 amendments to Section 1983, and also did not address Defendants' argument that *Mitchum* is limited solely to situations where the state court proceeding is itself alleged to be unconstitutional. *Trustees of Carpenters' Health and Welfare Trust Fund v. Darr*, 694 F.3d 803 (7th Cir. 2012) (citing *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir. 1987)).

4. The preliminary injunction violates the rule stated in *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). *Exxon* prevents a federal district court from granting direct relief from an adverse state court decision, even if the state action is alleged to be

unconstitutional, because such relief is only available by way of a petition for certiorari to the United States Supreme Court. A federal court should not enjoin concurrent state court proceedings addressing the same equitable issues, and should instead defer to state court orders. *See Growe v. Emison*, 507 U.S. 25, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993); *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970); *see also, In re Kline*, 472 B.R. 98, 105 (B.A.P. 10th Cir. 2012), *aff'd*, 514 F. App'x 810, 2013 WL 1668342 (10th Cir. 2013) ("If success on the claims alleged in federal court would necessarily require the federal court to review and reject the state court's judgment, Rooker–Feldman applies."); *Kenmen Eng'g v. City of Union*, 314 F.3d 468 (10th Cir. 2002) (rule applicable to temporary orders as well as final judgments); *Mounkes v. Conklin*, 922 F. Supp. 1501, 1510 (D. Kan. 1996) (rule prohibits review of state judicial application of law to particular facts, and allows only generalized challenges to rule itself). Plaintiffs are limited to challenging ongoing violations of federal rights by the named defendants under the rule of *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993). Any ongoing refusal to issue marriage licenses to same-sex couples in Kansas is compelled by the temporary restraining

order issued by the Kansas Supreme Court in the case of *State ex rel. Schmidt v. Moriarty*, case number 112,590. To obtain relief by way of temporary injunction, a federal district court must necessarily set aside that temporary restraining order, or limit it to avoid its application to these plaintiffs. That relief required the District Court to act, in effect, as an appellate court reviewing the decision of the Kansas Supreme Court.

5. The preliminary injunction ignored material uncontroverted facts by concluding that no judicial decision was made to deny plaintiffs' applications for marriage licenses even though the allegations of the Complaint and affidavits submitted by Clerks Hamilton and Lumbreras confirmed that the Chief Judge in each judicial district, Judges Robert Fairchild and James Fleetwood, respectively (and Judge Eric Yost in the Sedgwick County District Court acting in Judge Fleetwood's absence), ordered the rejection of their applications. These Kansas judges, exercising their judicial function of applying Kansas law to the facts presented by the Plaintiffs' applications determined that Kansas law required denial. Judges, not clerks, made the decisions at issue here and it is the Judges' actions and Orders that the Plaintiffs seek to enjoin. The preliminary injunction order also ignored the uncontroverted fact that the Kansas Supreme Court order of October 10, 2014

also requires denial of any renewed application. Given these uncontroverted facts, the preliminary injunction directed at state district court judges exercising their judicial function was barred by 42 U.S.C. § 1983 as well as judicial immunity.

6. The Plaintiffs' request for preliminary injunction should have been denied as it required Judge Crabtree to act as a source of appellate review over the judicial determinations made by the Chief Judges of the 7th and 18th Judicial Districts that these plaintiffs were not legally entitled to the issuance of marriage licenses under K.S.A. 2014 Supp. 23-2505. Under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), no right of review exists. The relief obtainable in this action can consist of nothing more than a declaratory judgment concerning the constitutionality of the general laws of Kansas, not a determination that the laws are being applied to these plaintiffs unlawfully. Since injunctive relief is dependent on a reversal of the decision previously made by the court of each district involved, the relief requested (and granted by the District Court) was barred under the *Rooker Feldman* Doctrine and its progeny.

CONCLUSION

For all of the above stated reasons and for the reasons previously offered to the District Court, Defendants/Appellants respectfully request that the preliminary injunction issued by the District Court should be stayed and the status quo preserved, pending this Court's opportunity to consider the matter on appeal.

Respectfully Submitted,

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CERTIFICATION OF COUNSEL AS PER 10TH CIR. R. 8.2(A)(1)

1. The date the underlying order was entered: November 4, 2014, served by email via the Court's ECF system at 2:28 p.m.

2. The time and date the order becomes effective: November 11, 2014, at 5:00 p.m.

3. The telephone numbers and email addresses for all counsel of record: Stephen Douglas Bonney, dbonney@aclukansas.org, 816-994-3311, Mark P. Johnson, mark.johnson@dentons.com, 816-460-2424.

4. The reason the motion was not filed earlier: Counsel received the order granting preliminary injunction late on November 4, 2014. On November 5, 2014, counsel filed the notice of appeal. The docketing statement was also prepared for filing. The undersigned counsel was involved in preparing for oral argument in the case before the State Supreme Court, scheduled for November 6, 2014, which was continued by the Court at 4:58 p.m. on November 5, 2014. This motion was filed as soon as practicable.

s/Steve R. Fabert
Steve R. Fabert

ECF CERTIFICATIONS

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. All required privacy redactions have been made;
2. The motion filed via ECF was scanned for viruses with the most recent version of Sophos Protection and according to the program is free of viruses.

s/ Steve R. Fabert
Steve R. Fabert

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of November, 2014, a true and correct copy of the above and foregoing was filed by electronic means via the Court's electronic filing system which serves a copy upon Appellees' counsel of record, Stephen Douglas Bonney, ACLU Foundation of Kansas, 3601 Main Street, Kansas City, MO 64111 and Mark P. Johnson, Dentons US, LLP, 4520 Main Street, Suite 1100, Kansas City, MO 64111, dbonney@aclukansas.org and mark.johnson@dentons.com and Joshua A. Block, American Civil Liberties Foundation, 125 Broad Street, 18th Floor, New York, NY 100004, jblock@aclu.org.

s/Steve R. Fabert
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Attorney for Appellant Moser

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 TO SHOW CAUSE

On October 10, 2014, the State of Kansas on relation of Attorney General Derek Schmidt filed this original action in mandamus against Kevin P. Moriarty, Chief Judge of the Kansas Tenth Judicial District, and Sandra McCurdy, Clerk of the District Court for the Tenth Judicial District. Attorney General Schmidt alleged Chief Judge Moriarty exceeded his authority in issuing Amended Administrative Order 14-11 on October 8, which directs McCurdy to "issue marriage licenses to all individuals, including same-sex individuals, provided they are otherwise qualified to marry." Schmidt asked this court to strike down Moriarty's order and direct Moriarty and McCurdy not to issue marriage licenses to same-sex couples.

Later that day, this court ordered a temporary stay of Moriarty's order insofar as it authorized McCurdy to issue marriage licenses to same sex-couples. The stay was ordered to remain in force pending further order by this court. We also directed Moriarty and McCurdy to file a response to Schmidt's mandamus petition and set a deadline for any additional briefing the parties wished to submit. Oral argument on the petition was scheduled for Thursday, November 6 at 10:00 a.m.

Also on October 10, two same-sex couples who were denied marriage licenses by the Clerks of District Court in the Seventh and Eighteenth Judicial Districts filed suit in the United States District Court for the District of Kansas challenging Kansas' laws prohibiting same-sex marriage on grounds of equal protection and due process. *Marie v. Moser, et al.*, No. 14-cv-02518 (D. Kan. Oct. 10, 2014). Those plaintiffs also sought injunctive relief to temporarily block the enforcement of Kansas' constitutional and statutory ban on same-sex marriage. The federal district court held a hearing on this motion on Friday, October 31.

On Tuesday, November 4, the federal district court in *Marie* entered a preliminary injunction. It enjoined 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 on the basis that applicants are members of the same sex." *Marie*, slip op. at 38. The federal court also granted the defendants' motion for temporary stay, which effectively prevents the preliminary injunction from taking effect until 5:00 p.m. (CST) on Tuesday, November 11, 2014. The temporary stay was granted to "permit adequate time for defendants to appeal from this Order and try to convince the Tenth Circuit that it should stay the Court's preliminary injunction for a longer period." *Marie*, slip op. at 38.

In the federal district court's rulings, it exercised jurisdiction over the constitutionality of Kansas' same-sex marriage ban. If Schmidt's mandamus action in our court were to proceed, we would also likely reach the same constitutional questions reviewed in *Marie*. And if we were to reach the opposite conclusion from the federal court—uphold the ban, not block it—the courts' conflicting judgments would inject additional uncertainty into the debate of the validity of Kansas's same-sex marriage ban. See *Schaefer v. Milner,* 156 Kan. 768, 775, 137 P.2d 156 (1943) (necessity of avoiding conflict in the execution of judgments by independent courts).

Accordingly, the parties are hereby ordered to show cause by 5:00 p.m. on November 14, 2014, why:

1. our October 10 order temporarily staying Moriarty's order insofar as it allows the issuance of marriage licenses to same-sex couples should, or should not, remain in full force and effect pending final resolution of the federal matter;

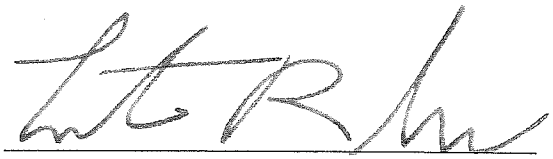
2. our consideration of this mandamus action otherwise should, or should not, be stayed pending final resolution of the federal matter. See *Henry, Administrator v. Stewart*, 203 Kan. 289, 292, 454 P.2d 7 (1969) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 [1936]) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

The parties' responses may include, but are not limited to, reference to the doctrine of judicial comity, "a principle by which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." *In re Miller*, 228 Kan. 606, Syl. ¶ 3, 620 P.2d 800 (1980); see *Perrenoud v. Perrenoud*, 206 Kan. 559, 573, 480 P.2d 749 (1971) (comity can apply between federal courts and state courts). See also *Schaefer v. Milner*, 156 Kan. at 775 (principle enforced to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and process). See, *e.g.*, *State ex rel. Wilson v. Condon*, No. 2014-002121, 2014 WL 5038396 (S.C. Oct. 9, 2014).

Oral argument scheduled for 10:00 a.m. on Thursday, November 6, 2014, is hereby postponed pending further order by this court.

The stay issued in our order of October 10, 2014, shall remain in force pending further order by this court.

IT IS SO ORDERED THIS 5th day of November 2014.



Lawton R. Nuss
Chief Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE, et al.,

Plaintiffs,

v.

ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment, et al.,

Defendants.

Case No. 14-cv-02518-DDC/TJJ

MEMORANDUM AND ORDER

Plaintiffs in this lawsuit seek injunctive and declaratory relief under 42 U.S.C. § 1983. Specifically, they ask the Court to declare unconstitutional and enjoin defendants from enforcing certain provisions of Kansas law that prohibit plaintiffs and other same-sex couples from marrying.[1] Plaintiffs also ask the Court to order defendants (and their officers, employees, and agents) to issue marriage licenses to same-sex couples on the same terms they apply to couples consisting of a man and a woman, and to recognize marriages validly entered into by plaintiffs.

The case, now pending on plaintiffs' motion for a preliminary injunction (Doc. 3), requires the Court to decide whether Kansas' laws banning same-sex marriages violate the Constitution of the United States. Judging the constitutionality of democratically enacted laws is among "the gravest and most delicate" enterprises a federal court ever undertakes.[2] But just as

[1] Plaintiffs' Complaint targets Article 15, § 16 of the Kansas Constitution, K.S.A. §§ 23-2501 and 23-2508 and "any other Kansas statute, law, policy or practice."

[2] *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring).

surely, following precedent is a core component of the rule of law. When the Supreme Court or the Tenth Circuit has established a clear rule of law, our Court must follow it.[3]

Defendants have argued that a 1972 Supreme Court decision controls the outcome here. The Tenth Circuit has considered this proposition and squarely rejected it.[4] Consequently, this Order applies the following rule, adopted by the Tenth Circuit in *Kitchen v. Herbert*, to the Kansas facts:

> We hold that the Fourteenth Amendment [to the United States Constitution] protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.[5]

Because Kansas' constitution and statutes indeed do what *Kitchen* forbids, the Court concludes that Kansas' same-sex marriage ban violates the Fourteenth Amendment to the Constitution. Accordingly, the Court grants plaintiffs' request for preliminary relief and enters the injunction described at the end of this Order. The following discussion explains the rationale for the Court's decision and addresses the litany of defenses asserted by defendants.

Background

Plaintiffs are two same-sex couples who wish to marry in the state of Kansas. Defendants are the Secretary of the Kansas Department of Health and Environment and the

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[3] *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (quoted in *Kitchen v. Herbert*, 755 F.3d 1193, 1232 (10th Cir. 2014) (Kelly, J., dissenting)); *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) (when no Supreme Court decision establishes controlling precedent, a district court "must follow the precedent of [its] circuit, regardless of its views [about] the advantages of" precedent from elsewhere).

[4] *Kitchen*, 755 F.3d at 1208 (rejecting argument that *Baker v. Nelson*, 409 U.S. 810 (1972) controls challenges to the constitutionality of bans against same-sex marriage), *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014).

[5] *Id.* at 1199.

Clerks of the Sedgwick and Douglas County District Courts. Plaintiffs' affidavits establish the facts stated below. Defendants never contest the factual accuracy of the affidavits, so the Court accepts them as true for the purpose of the current motion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (a court deems uncontested facts established by affidavit as admitted for purpose of deciding a motion for preliminary injunction) (citations and subsequent history omitted).

A. Plaintiffs

1. Kail Marie and Michelle Brown

Plaintiffs Kail Marie and Michelle Brown live together in Lecompton, Kansas, which is located in Douglas County. Ms. Marie and Ms. Brown assert they have lived in a committed relationship for twenty years. Except that they both are women, Ms. Marie and Ms. Brown meet all other qualifications for marriage in the state of Kansas. On October 8, 2012, Ms. Marie appeared at the office of the Clerk of the Douglas County District Court to apply for a marriage license so that she and Ms. Brown could marry. The deputy clerk, working under the supervision of Clerk Hamilton, asked for Ms. Marie and Ms. Brown's personal information and identification, and wrote down their information on an application form. The deputy clerk then gave the form to Ms. Marie and instructed her to return it no sooner than Monday, October 13, after Kansas' statutory three-day waiting period for issuing a marriage license had expired.

The next day, Chief Judge Robert Fairchild of the Seventh Judicial District, which consists of Douglas County, issued Administrative Order 14-13. In pertinent part, it states:

> The court performs an administrative function when it issues a marriage license. . . . The Court's role in administrative matters is to apply and follow the existing laws of the State of Kansas. Recently, the United States Supreme Court declined to review several cases in which the Circuit Courts held that similar provisions contained in the constitutions of other states violate the United States Constitution. Included in these cases were two cases from the Tenth Circuit Court

> of Appeals. While Kansas is [] within the jurisdiction of the Tenth Circuit, none of these cases involved Article 15, §16 of the Kansas Constitution. This court may not make a determination as to the validity of this constitutional provision without a judiciable case before it concerning the court's issuance of or failure to issue a marriage license.

Seventh Judicial District Administrative Order 14-13 (Doc. 23-7 at 3-4). Plaintiffs never say whether Ms. Marie submitted the marriage application or whether the clerk actually denied it, but Judge Fairchild's order makes it clear: the clerk would have denied Ms. Marie's application.

2. Kerry Wilks and Donna DiTrani

Plaintiffs Kerry Wilks and Donna DiTrani assert they have lived in a committed relationship for five years. The two reside together in Wichita, Kansas, in Sedgwick County. Except that they both are women, Ms. Wilks and Ms. DiTrani meet all other qualifications for marriage in the state of Kansas. On October 6, 2014, Ms. Wilks and Ms. DiTrani appeared in person at the office of the Clerk of the Sedgwick County District Court to apply for a marriage license. A deputy clerk and the clerk's supervisor—both working under the supervision of Clerk Lumbreras—refused to give plaintiffs an application for a marriage license because they sought to enter a same-sex marriage. Plaintiffs returned to the office of the Clerk of the Sedgwick County District Court on October 7 and October 8. Each time, a deputy clerk refused to give Ms. Wilks and Ms. DiTrani an application for a marriage license.

On October 9, 2014, Ms. Wilks and Ms. DiTrani again returned to the office of the Clerk of the Sedgwick County District Court to apply for a marriage license. This time, a deputy clerk asked them for pertinent information and wrote it down on a marriage application form, which the two signed under oath. After Ms. Wilks and Ms. DiTrani completed and submitted the marriage license application form, the deputy clerk—reading from a prepared statement—informed them that their application was denied. The deputy clerk announced that same-sex

marriage violates provisions of the Kansas Constitution, and that the Sedgwick County District Court would not issue marriage licenses to same-sex couples "until the Supreme Court otherwise rules differently."

B. Defendants

1. Robert Moser, M.D.

Defendant Robert Moser is the Secretary of the Kansas Department of Health and Environment. Secretary Moser is responsible for directing Kansas' system of vital records, and supervising and controlling the activities of personnel who operate the system of vital records. As part of his duties, Secretary Moser furnishes forms for marriage licenses, marriage certificates, marriage license worksheets and applications for marriage licenses used throughout Kansas; maintains a publicly available vital records index of marriages; and publishes aggregate data on the number of marriages occurring in the state of Kansas. Secretary Moser is also responsible for ensuring that all of these functions comply with Kansas law, including those that prohibit same-sex couples from marrying. Plaintiffs believe that Secretary Moser's responsibilities include furnishing forms that exclude same-sex couples from marriage by requiring applicants to designate a "bride" and a "groom." Plaintiffs name Secretary Moser in his official capacity, and allege that he acted under color of state law at all relevant times.

2. Douglas Hamilton

Defendant Douglas Hamilton is the Clerk of the District Court for Kansas' Seventh Judicial District (Douglas County). Mr. Hamilton's responsibilities as Clerk of the Court include: issuing marriage licenses; requiring couples who contemplate marriage to swear under oath to information required for marriage records; collecting a tax on each marriage license; authorizing qualified ministers to perform marriage rites; filing, indexing and preserving

marriage licenses after the officiants return them to the court; forwarding records of each marriage to the Kansas Department of Health and Environment; and correcting and updating marriage records. Mr. Hamilton must ensure that he performs each of these functions in compliance with all applicable Kansas laws, including the prohibition against same-sex marriage. Plaintiffs name Mr. Hamilton in his official capacity, and allege that he acted under color of state law at all times relevant to this suit.

3. Bernie Lumbreras

Defendant Bernie Lumbreras is the Clerk of the District Court for Kansas' Eighteenth Judicial District (Sedgwick County). Ms. Lumbreras holds the same position in Sedgwick County as Mr. Hamilton holds in Douglas County, and is responsible for administering the same marriage-related functions. When she performs these functions, Ms. Lumbreras also must ensure that each of these functions complies with Kansas law, including the same-sex marriage ban. Plaintiffs allege that the deputy clerk who denied Ms. Wilks and Ms. DiTrani's marriage license application worked under the direction and supervision of Ms. Lumbreras. Plaintiffs name Ms. Lumbreras in her official capacity, and allege that she acted under color of state law at all times relevant to this suit.

C. Challenged Laws

Plaintiffs contend the Court should declare the state laws banning same-sex marriages in Kansas invalid under the Fourteenth Amendment to the United States Constitution. Plaintiffs specifically challenge Article 15, § 16 of the Kansas Constitution and K.S.A. §§ 23-2501 and 23-2508, but also seek to enjoin "any other Kansas statute, law, policy, or practice that excludes [p]laintiffs and other same-sex couples from marriage." Doc. 4 at 1. Article 15, § 16 of the Kansas Constitution provides:

> (a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.
>
> (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

K.S.A. § 23-2501 codifies Kansas' same-sex marriage prohibition as part of the state's statutes, providing:

> The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

By their plain terms, Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501 prohibit same-sex couples from marrying. But K.S.A. § 23-2501 also declares all "other [non-opposite sex] marriages . . . contrary to the public policy of this state and . . . void." K.S.A. § 23-2508 extends this rule to same-sex marriages performed under the laws of another state:

> All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.

When read together, K.S.A. §§ 23-2501 and 23-2508 dictate a choice-of-law rule that prevents Kansas from recognizing any same-sex marriages entered in other states, even if the marriage is otherwise valid under the laws of the state where it was performed. Thus, Kansas law both prohibits same-sex couples from marrying and refuses to recognize same-sex marriages performed consistent with the laws of other states. Plaintiffs' Complaint challenges both features of Kansas' marriage laws.

Analysis

I. Jurisdiction and Justiciability

Before a federal court can reach the merits of any case, it must determine whether it has jurisdiction to hear the case. Here, this exercise consists of two related parts. First, does the Court have subject matter jurisdiction to decide the claims presented in the Complaint? Title 28 U.S.C. § 1331, among other statutes, answers this question by conferring jurisdiction on federal courts to decide questions arising under the Constitution of the United States. Plaintiffs' claims here easily fall within this statute's grant of jurisdiction. This leads to the second piece of the analysis: Do plaintiffs have standing to pursue the claims they assert in their Complaint?

A. Standing

"Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies." *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010). Standing is an indispensable component of the Court's jurisdiction and plaintiffs bear the burden to show the existence of an actual Article III case or controversy. *Id.* at 756. The Court must consider standing issues sua sponte to ensure the existence of an Article III case or controversy. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009).

To establish Article III standing, a plaintiff must show that (1) he or she has "suffered an injury in fact;" (2) the injury is "fairly traceable to the challenged action of the defendant;" and, (3) it is likely that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). Plaintiffs who sue public officials can satisfy the causation and redressability requirements—parts (2) and (3) of this standard—by demonstrating "a meaningful nexus" between the defendant and the asserted injury. *Bronson v. Swensen*, 500 F.3d 1099, 1111-12 (10th Cir. 2007).

Plaintiffs' facts, ones defendants do not challenge, assert that Kansas' laws banning same-sex marriage prevented the two court clerks from issuing marriage licenses to them. These undisputed facts satisfy all three parts of *Lujan*'s test.

As it pertains to Clerks Lumbreras and Hamilton, these facts, first, establish that plaintiffs suffered an actual ("in fact") injury when the Clerks, acting on account of state law, refused to issue marriage licenses to plaintiffs. Second, this injury is "fairly traceable" to Kansas' laws. Chief Judge Fairchild's Administrative Order 14-13 explains why the license did not issue to plaintiffs Marie and Brown. Likewise, the prepared statement read by the Sedgwick County deputy clerk reveals that Kansas' ban was the only reason the clerk refused to issue a license to plaintiffs Wilks and DiTrani. And last, common logic establishes that the relief sought by plaintiffs, if granted, would redress plaintiffs' injuries. The Clerks refused to issue licenses because of Kansas' same-sex marriage ban. It stands to reason that enjoining enforcement of this ban would redress plaintiffs' injuries by removing the barrier to issuance of licenses.

The standing analysis of the claim against Secretary Moser is more muted. The Complaint asserts that Secretary Moser, in his official duties, ensures compliance with Kansas marriage laws, including the ban against same-sex marriage, and issues forms that district court clerks and other governmental officials use to record lawful, valid marriages. Plaintiffs also allege that Secretary Moser controls the forms that governmental workers distribute to marriage license applicants. This includes, plaintiffs assert, a form requiring license applicants to identify one applicant as the "bride" and the other as the "groom." Secretary Moser's response to plaintiffs' motion papers never disputes these facts and the Court concludes they satisfy *Lujan*'s three-part standing test. That is, they establish a prima facie case that Secretary Moser has

caused at least some aspect of plaintiffs' injury, that at least part of their injury is traceable to the Secretary, and the relief requested would redress some aspect of plaintiffs' injury.[6]

Defendants argue that no standing can exist because they lack the wherewithal to force other state officials to recognize plaintiffs' same-sex marriages, even if licenses are issued. This argument misses the point. *Lujan*'s formulation does not require a plaintiff to show that granting the requested relief will redress every aspect of his or her injury. In equal protection cases, a plaintiff must show only that a favorable ruling would remove a barrier imposing unequal treatment. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.") (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970)). Plaintiffs here have made a prima facie showing that the relief they seek would redress aspects of their licensing claims. This is sufficient to satisfy Article III's standing requirement.

Secretary Moser raises a similar redressability issue, arguing that executive branch officials are not proper defendants because employees of the Kansas judiciary issue and administer marriage licenses. Doc. 14 at 13. Secretary Moser contends that he merely is a records' custodian and has neither supervisory authority over judicial officials who issue marriage licenses nor any other involvement administering marriage laws. Defendants rely on the Tenth Circuit's first decision in *Bishop*, where the court concluded that the general duty of

[6] The standing requirement is judged by the claims asserted in the Complaint. While they are not germane to plaintiffs' motion for preliminary relief, the Complaint also asserts "recognition" claims, *i.e.*, claims seeking to require defendants to recognize plaintiffs' marriages once licenses have issued and plaintiffs have married. Kansas law shows that Secretary Moser is significantly involved with recognition of marriage in Kansas. *See* K.S.A. § 23-2512 (requiring him to issue, on request, marriage certificates that constitute prima facie evidence of two persons' status as a married couple).

the Governor and Attorney General to enforce Oklahoma's laws lacked sufficient causal connection to satisfy the standing requirement. *Bishop v. Okla.*, 333 F. App'x 361, 365 (10th Cir. 2009). But the present case against Secretary Moser is materially different.

Among other things, Kansas' statutes make Secretary Moser responsible for the following marriage-related activities: supervising the registration of all marriages (K.S.A. § 23-2507); supplying marriage certificate forms to district courts (K.S.A. § 23-2509); and maintaining an index of marriage records and providing certified copies of those records on request (K.S.A. § 23-2512). Secretary Moser's records play an important role in the recognition aspect of plaintiffs' claims. When Secretary Moser distributes certified copies of marriage licenses kept under his supervision, those copies constitute prima facie evidence of the marriages in "all courts and for all purposes." *See* K.S.A. § 23-2512. In short, when Secretary Moser issues a marriage certificate he creates a rebuttable presumption that persons listed in that certificate are married.[7]

Finally, where a plaintiff seeks "'injunctive, as opposed to monetary relief"' against high-level state officials, "'no "direct and personal" involvement is required'" to "'subject them to the equitable jurisdiction of the court.'" *Hauenstein ex rel. Switzer v. Okla. ex rel. Okla. Dep't of Human Servs.*, No. CIV-10-940-M, 2011 WL 1900398, at *4 (W.D. Okla. May 19, 2011) (quoting *Ogden v. United States*, 758 F.2d 1168, 1177 (7th Cir. 1985)). In other words, plaintiffs

[7] The parties dispute the significance of Secretary Moser's role in promulgating marriage license forms that require applicants to specify a "bride" and a "groom." Docs. 14 at 2, 20 at 5-6. At least two cases have held that the state official responsible for marriage license forms that exclude same-sex couples is a proper defendant in a case challenging a state's same-sex marriage laws. *Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (subsequent history omitted) (Virginia's Registrar of Vital Records was a proper defendant because she promulgated marriage license application forms); *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 1729098, at *4 (W.D. Wis. Apr. 30, 2014) (Wisconsin state Registrar was a proper defendant because of his official duty to "prescribe forms for blank applications, statement, consent of parents, affidavits, documents and other forms" related to acquiring a marriage license).

need not establish that Secretary Moser personally denied their marriage license applications so long as he would play a role in providing their requested relief. *See Wolf*, 2014 WL 1729098, at *4. Given Secretary Moser's responsibility for marriage-related enabling and registration functions, he has a sufficiently prominent connection to the relief sought by the Complaint to justify including him as a defendant.

But the standing analysis differs for plaintiffs' claim seeking to recognize same-sex couples married outside Kansas. For this claim, plaintiffs have failed to establish Article III standing. Neither of the plaintiff couples assert that they entered a valid marriage in another state that Kansas refuses to recognize. Nor do they even allege that they sought to marry in another state and have that marriage recognized in Kansas. Rather, both couples seek to marry in Kansas and under the laws of Kansas. Doc. 1 at ¶ 15. In sum, plaintiffs have not alleged an injury in fact attributable to the non-recognition aspect of Kansas' same-sex marriage ban. This case differs from *Kitchen* and *Bishop* because both of those cases involved at least one same-sex couple who had married under the laws of another state. *Bishop v. Smith*, 760 F.3d 1070, 1075 (10th Cir. 2014) *cert. denied*, No. 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014); *Kitchen*, 755 F.3d at 1199.

In their Amicus Brief, Phillip and Sandra Unruh assert that the Court may not decide the constitutionality of Kansas' same-sex marriage ban as applied to male, same-sex couples because the only plaintiffs are two female, same-sex couples. Doc. 22 at 7-8. This argument is a clever use of the facts but, ultimately, it fails to persuade the Court.[8] The Court construes plaintiffs' Complaint to allege that Kansas' laws banning same-sex marriage are ones that are

[8] In their Amicus Brief, the Unruhs assert a number of other arguments about the wisdom and constitutionality of Kansas' same-sex marriage ban. The Court does not address those arguments individually because the Tenth Circuit's decisions in *Kitchen* and *Bishop* have decided the issues they raise in their brief.

unconstitutional on their face (as opposed to a claim challenging the way that Kansas has applied those laws to them). A claim is a facial challenge when "it is not limited to plaintiffs' particular case, but challenges application of the law more broadly." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). If plaintiffs succeed in establishing no circumstances exist under which Kansas could apply its same-sex marriage ban permissibly, the Court may invalidate the laws in their entirety, including their application to male, same-sex couples. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) ("[A] successful facial attack means the statute is wholly invalid and cannot be applied to anyone.") (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 698-99 (7th Cir. 2011))

In sum, plaintiffs' Complaint asserts sufficient facts and claims to satisfy all three components of *Lujan*'s standard. Consequently, the Court concludes that an actual case or controversy exists between all four plaintiffs and all three defendants.

B. Sovereign Immunity

Defendants next assert that the Eleventh Amendment and 42 U.S.C. § 1983 prohibit a federal court from issuing injunctive relief against a state judicial officer. Docs. 14 at 10-14, 15 at 5-7. Defendants advance three principal arguments as support for this proposition.

First, the two Clerk defendants argue that 42 U.S.C. § 1983 expressly prohibits injunctive relief against judicial officers. Supporting their argument, defendants cite the plain text of § 1983, which provides:

> Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable*.

(emphasis added). Defendants correctly point out that the Clerks are "judicial officers" for purposes of the judicial immunity provision of § 1983. *Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002). However, § 1983 contains a significant caveat—the "acts or omissions" at issue must be ones taken in the "officer's judicial capacity." *Id.*; *Mireles v. Waco*, 502 U.S. 9, 11 (1991); 42 U.S.C. § 1983. Thus, to determine whether judicial immunity applies to the Clerks, the Court must determine whether issuing marriage licenses constitutes a judicial act.

"In determining whether an act by a judge [or here, a clerk of the judicial system] is 'judicial,' thereby warranting absolute immunity, [courts] are to take a functional approach, for such 'immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.'" *Bliven v. Hunt*, 579 F.3d 204, 209-10 (2d Cir. 2009) (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)) (emphasis in original). "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Kansas law distinguishes between a clerk's "judicial" and "ministerial" functions by asking whether "a statute imposes a duty upon the clerk to act in a certain way leaving the clerk no discretion." *Cook v. City of Topeka*, 654 P.2d 953, 957 (Kan. 1982).

Judged by these criteria, the issuance of marriage licenses under Kansas law is a ministerial act, not a judicial act. When K.S.A. § 23-2505 describes the Clerk's duty to issue marriage licenses, the statute uses mandatory language and does not allow for any discretion by the Clerks. *Id.* § 23-2505(a) ("The clerks of the district courts 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).

Thus, if applicants for a marriage license meet the statutory qualifications for marriage, the clerk has no discretion to deny them a marriage license.

Moreover, Chief Judge Fairchild's Administrative Order in Douglas County leaves no doubt that Kansas judges regard issuing marriage licenses as a ministerial and not a judicial function. When his Administrative Order explained why Clerk Hamilton was not issuing a marriage license to plaintiffs Marie and Brown, he wrote, "[t]he court performs an administrative function when it issues a marriage license . . . . The Court's role in administrative matters is to apply and follow the existing laws of the State of Kansas." Seventh Judicial District Administrative Order 14-13 (Doc. 23-7 at 3). Indeed, as Chief Judge Fairchild explained, no same-sex marriage licenses could issue despite the Tenth Circuit's decisions in *Kitchen* and *Bishop* because issuing marriage licenses is not a judicial act. *Id.* ("This court may not make a determination as to the validity of this constitutional provision without a justiciable case before it concerning the court's issuance of or failure to issue a marriage license.").

The Tenth Circuit reached the same conclusion during the first *Bishop* appeal. 333 F. App'x at 365. It recognized, under laws similar to Kansas', that Oklahoma district court clerks perform a ministerial function when they issue marriage licenses. *Id.* By the time the case returned to the Tenth Circuit following remand, plaintiffs had added district court clerks as defendants. *Bishop*, 760 F.3d at 1075. The Tenth Circuit confirmed that the clerks' function administering marriage licenses was a ministerial one. *Id.* at 1092 ("[Clerks] are responsible for faithfully applying Oklahoma law, and Oklahoma law clearly instructs both of them to withhold marital status from same-sex couples."). Judicial immunity under 42 U.S.C. § 1983, therefore, does not apply.

Defendants' second immunity argument contends that plaintiffs' seek "retroactive" relief, which, they assert, the Eleventh Amendment does not allow against state officials acting in their official capacities. Generally, the Eleventh Amendment bars suits brought by individuals against state officials acting in their official capacities. *Harris v. Owens*, 264 F.3d 1282, 1289 (10th Cir. 2001). However, under *Ex parte Young*, 209 U.S. 123 (1908), "a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012) (citations omitted). If both aspects of this test are met, *Ex parte Young* allows a court to enjoin a state official from enforcing an unconstitutional statute. *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013).

Defendant Moser asserts that plaintiffs have failed to bring a proper *Ex parte Young* suit because plaintiffs only seek to remedy a past refusal to issue marriage licenses instead of seeking prospective relief for an ongoing deprivation of their constitutional rights. The Court disagrees. Plaintiffs are not seeking to correct or collect damages for the Clerks' inability to issue marriage licenses in the past. Instead, plaintiffs seek a preliminary and permanent injunction prohibiting the Clerks from enforcing the Kansas same-sex marriage ban in the future. As a result, the concern protected by the Eleventh Amendments' ban against retroactive relief—federal courts awarding monetary damages that states must pay from their general revenues—is not implicated. *See Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974). The Court concludes that plaintiffs seek prospective relief for an ongoing deprivation of their constitutional rights. As such, their requested relief falls within the *Ex parte Young* exception to sovereign immunity.

Last, defendants contend that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits the Court from enjoining them. Defendants' argument reasons that an injunction prohibiting them

from enforcing Kansas' ban against same-sex marriages would interfere with a stay order entered by the Kansas Supreme Court in *State of Kansas ex rel. Schmidt v. Moriarity*, No. 112,590 (Kan. Oct. 10, 2014) (contained in record as Doc. 14-1). This argument ignores an important exception to the Anti-Injunction Act. The Anti-Injunction Act provides, "A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (emphasis added). The Supreme Court has held that a suit seeking to enjoin deprivation of constitutional rights under 42 U.S.C. § 1983 falls within the "expressly authorized" exception to the act's general rule. *See Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972). Likewise, plaintiffs' suit here falls squarely within this exception, negating defendants' argument under this act.

Defendants persist, however. They argue that even if the Anti-Injunction Act does not apply directly, the requested injunction nonetheless implicates the policies the act protects. This argument also relies on the stay order entered by the Kansas Supreme Court in *Moriarity*, (Doc. 14-1). While defendants' argument is a colorable one, it is miscast as one under the Anti-Injunction Act. The federal courts have addressed this concern under the rubric of the *Younger* abstention doctrine, as applied to § 1983 cases, and not as a concern predicated on the Anti-Injunction Act. *See* Erwin Chemerinsky, *Federal Jurisdiction* 770 (6th ed. 2012). Consistent with this approach, the Court addresses the substance of defendants' argument as part of its discussion of abstention doctrines, below at pages 18-26.

C. Domestic Relations Exception

Defendant Moser asserts that the Court should decline jurisdiction because states have exclusive control over domestic relations. Secretary Moser cites *United States v. Windsor*,

__U.S.__, 133 S. Ct. 2675 (2013) for two propositions in support of this assertion: that states have exclusive control over domestic relations; and no federal law may contradict a state's definition of marriage.

Secretary Moser's argument misapprehends *Windsor*. *Windsor* held that the federal government may not give unequal treatment to participants in same-sex marriages recognized by states that permit same-sex marriage as a matter of state law. 133 S. Ct. at 2795-96. Moreover, *Windsor* made clear that although "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states," state marriage laws "of course, must respect the constitutional rights of persons." *Id.* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (internal quotations and further citations omitted)).

The domestic relations exception Secretary Moser invokes is a narrow exception to federal court diversity jurisdiction and it "encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." *Ankenbrandt v. Richards*, 504 U.S. 689, 692, 704 (1992). This exception does not apply to cases like this one, where a federal court has jurisdiction over a case because that case presents a "federal question." *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946-47 (9th Cir. 2008). Nor does it apply to constitutional challenges to an underlying statutory scheme. *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1111 (10th Cir. 2000).

D. Abstention

While "the Constitution and Congress equip federal courts with authority to void state laws that transgress federal civil rights, . . . comity toward state sovereignty counsels the power be sparingly used." *Moe v. Dinkins*, 635 F.2d 1045, 1046 (2d Cir. 1980). In this case especially, plaintiffs ask the Court to enter a particularly sensitive issue of state social policy. *Smelt v. Cnty.*

of Orange, 447 F.3d 673, 681 (9th Cir. 2006). Recognizing the delicate balance of sovereignty implicated by plaintiffs' request, the doctrine of abstention authorizes a federal court to decline to exercise jurisdiction if federal court adjudication would "cause undue interference with state proceedings." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989).

But likewise, "federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, __ U.S. __, 134 S. Ct. 584, 588 (2013). Even in cases where permissible, abstention under any doctrine is "the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* (citations omitted). The following four subsections address the propriety of abstention under three doctrines raised on the Court's own motion (the first three), and one raised by defendants.

1. *Pullman* Abstention

Under the abstention doctrine of *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). "*Pullman* abstention is limited to uncertain questions of state law." *Id.* (citing *Colorado River*, 424 U.S. at 813). If the meaning or method of enforcing a law is unsettled, federal courts should abstain so that a state court has an opportunity to interpret the law. *Id.* If the state court might construe the law in a way that obviates the need to decide a federal question, abstention prevents "both unnecessary adjudication . . . and 'needless friction with state policies.'" *Id.* (quoting *Pullman*, 312 U.S. at

500). Conversely, "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand and not decide the question before the state courts decided it." *Wis. v. Constantineau*, 400 U.S. 433, 439 (1971) (citations omitted); *see also Zwickler v. Koota*, 389 U.S. 241, 251 (1967) (a federal court should not abstain under *Pullman* simply to give a state court the first opportunity to decide a federal constitutional claim).

The Court does not detect, nor have defendants pointed to any ambiguity or uncertainty in the Kansas laws plaintiffs challenge. The challenged laws unequivocally prohibit plaintiffs and other same-sex couples from procuring a marriage license and marrying a person of the same sex in Kansas. Kan. Const. art. 15, §16; K.S.A. §§ 23-2501 and 23-2508. State officials have applied these laws to plaintiffs consistent with their plain meaning. *See* Docs. 4-1 at ¶ 5, 4-3 at ¶ 5, 4-4 at ¶ 5. Thus, the challenged laws are not subject to an interpretation that might avoid or modify the federal constitutional questions raised by plaintiffs. As a result, the critical concern underlying *Pullman* abstention—avoidance of unnecessary state-federal friction where deference to a state court decision may negate the federal question involved—is missing.

2. *Younger* Abstention

On the same day plaintiffs filed this action, Kansas' Attorney General Eric Schmidt filed a mandamus action with the Kansas Supreme Court. *Moriarty*, Case No. 112,590 (Kan. Oct. 10, 2014) (Doc. 14-1). This mandamus action stemmed from an Administrative Order order entered by a Kansas state court trial judge in Johnson County, Kansas, who, in the wake of the Supreme Court's decision not to grant certiorari in *Kitchen* or *Bishop*, directed the clerk of his court to begin issuing Kansas marriage licenses to same-sex couples. General Schmidt asked the Kansas

Supreme Court to vacate the Johnson County, Kansas Administrative Order, or at least to stay its effect. Though the Kansas Supreme Court recognized that the Tenth Circuit's decisions in *Kitchen* and *Bishop* may present a valid defense to the Attorney General's mandamus action, it granted a "temporary stay" of the trial judge's order directing the Johnson County clerk to issue marriage licenses to same-sex couples. Doc. 14-1 at 2. The Kansas Supreme Court set a briefing deadline for October 28, 2014, and will hold oral arguments on November 6, 2014. *Id.* at 3.

The Kansas Supreme Court's stay order also specifies the issues pending before it: (1) whether the Johnson County District Court possessed authority to issue marriage licenses to same-sex couples; (2) whether the Tenth Circuit's interpretation and application of the United States Constitution in *Kitchen* and *Bishop* are supreme and therefore modify Kansas' ban against same-sex marriage; and (3) even if the Tenth Circuit rulings are supreme, whether Kansas' same-sex marriage laws are otherwise permissible under the United States Constitution. *Id.* Because the issues specified in *Moriarty* might resolve the constitutional questions presented here, and because an injunction could interfere with those state proceedings, the Court considers whether it should abstain from adjudicating this action under the principles of *Younger v. Harris*, 401 U.S. 37 (1971).

The *Younger* doctrine reflects "longstanding public policy against federal court interference with state court proceedings." *Id.* at 43. The doctrine holds that, for reasons of state sovereignty and comity in state-federal relations, federal courts should not enjoin state judicial proceedings. *Younger* abstention is required when: (1) there is an ongoing state judicial proceeding involving the federal plaintiff; (2) that implicates important state interests; and (3) the proceeding provides an adequate opportunity for the federal plaintiff to assert his or her federal claims. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Originally, *Younger* abstention applied only to concurrent state court criminal proceedings. *Younger*, 401 U.S. at 53. But the doctrine's scope has expanded gradually, and in its current form it also prevents federal courts from interfering with state civil and administrative proceedings. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (federal courts may not enjoin pending state court civil proceedings between private parties); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986) (federal courts may not enjoin pending state administrative proceedings involving important state interests). Moreover, the Supreme Court also has expanded *Younger*'s restrictions against federal court injunctions to include requests for declaratory relief because "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that [*Younger* abstention] was designed to prevent." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).

But even though *Moriarty* might resolve the issues presented here, the Court concludes that *Younger* abstention is not appropriate. Two independent reasons lead the Court to this conclusion. First, and most, plaintiffs are not a party in *Moriarty* and therefore cannot assert their constitutional claims in that proceeding. As a result, a critical element of the *Younger* formulation is absent. "[A]bstention is mandated under *Younger* only when the federal plaintiff is actually a party to the state proceeding; the [*Younger*] doctrine does not bar non-parties from raising constitutional claims in federal court, even if the same claims are being addressed in a concurrent state proceeding involving similarly situated parties." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975) (cited in *Blackwelder v. Safnauer*, 689 F. Supp. 106, 119 (N.D.N.Y. 1988)).

Second, even if plaintiffs had asserted their claims in *Moriarty*, the Supreme Court has narrowed *Younger*'s application in civil proceedings to three "exceptional circumstances."

Sprint Comm'ns, Inc. v. Jacobs, __ U.S. __, 134 S. Ct. 584, 586 (2013). None of the three is present here. *Younger* precludes federal interference with ongoing state criminal prosecutions, certain ongoing civil enforcement proceedings akin to criminal prosecutions, and pending civil proceedings involving certain orders that uniquely further the state courts' ability to perform their judicial functions. In *Jacobs*, the Supreme Court explicitly confirmed *Younger* does not apply "outside these three 'exceptional' categories," and that the three categories define the entirety of *Younger*'s scope. *Id.* at 586-87 (citing *NOPSI*, 491 U.S. 350, 368 (1989)).

Tacitly recognizing that *Younger* is limited to three exceptional circumstances, defendants strive to fit this case (and derivatively, *Moriarity*) within the third exception—pending state court civil proceedings involving certain orders that uniquely further the Kansas state courts' ability to perform their judicial functions. They argue that a federal court injunction would interfere with the state courts' efforts to ensure uniform treatment of same-sex marriage licenses across all of Kansas' 105 counties. This argument is not without any appeal, for the Court recognizes that a decision from a Kansas state court would not raise the comity concerns inherent in a federal court injunction. But after reviewing the cases where *NOPSI* approved of abstention under this branch of the *Younger* analysis, the Court concludes that abstention is not appropriate.

In *Juidice v. Vail*, 430 U.S. 327, 335 (1977), the Supreme Court held that a federal court should abstain from interfering with a state's contempt process because it is integral to "the regular operation of [the state's] judicial system." Likewise, in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14, (1987), the Court extended *Juidice* to a challenge to Texas' law requiring an appellant to post a bond pending appeal. As the Court explained, both "involve[d] challenges to the processes by which the State compels compliance with the judgments of its courts." *Id.* at

13-14. Both *Juidice* and *Pennzoil* involved processes the state courts used to decide cases and enforce judgments, *i.e.*, functions that are uniquely judicial functions. In contrast, as the Court already has determined, when Kansas clerks issue marriage licenses they perform a ministerial function. *See supra* at pp. 14-15. Accordingly, the stay order in *Moriarty* does not qualify as one uniquely furthering Kansas' courts ability to perform their judicial functions in the sense that the post-*Younger* cases use that phrase.

Because neither plaintiffs nor defendants are parties in *Moriarty* and because the case does not fall within one of the three exceptional categories of civil cases that trigger *Younger* abstention, the Court declines to abstain on this basis.

3. *Colorado River* Abstention

The United States Supreme Court has recognized that, in certain circumstances, it may be appropriate for a federal court to refrain from exercising its jurisdiction to avoid duplicative litigation when there is a concurrent foreign or state court action. *Colorado River Water Conservation Dist. v. United States.*, 424 U.S. 800 (1976). Although it is generally classified as an abstention doctrine, *Colorado River* is not truly an abstention doctrine because it "springs from the desire for judicial economy, rather than from constitutional concerns about federal-state comity." *Rienhardt v. Kelly*, 164 F.3d 1296, 1303 (10th Cir. 1999); *see also Colorado River*, 424 U.S. at 817 ("there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts"). However, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are

considerably more limited than the circumstances appropriate for abstention." *Colorado River*, 424 U.S. at 818.

Colorado River identified four factors that federal courts should consider when deciding whether to abstain under its aegis: the problems that occur when a state and federal court assume jurisdiction over the same res; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order that the concurrent forums obtained jurisdiction. *Id.* "No one factor is necessarily determinative," but "[o]nly the clearest of justifications will warrant dismissals." *Id.* at 818-19.

The Court finds no clear justification for dismissing this case. This Court and the Kansas Supreme Court have not assumed concurrent jurisdiction over the same res, so there is no exceptional need for unified proceedings. Moreover, concerns about interfering with state proceedings are resolved under a *Younger* analysis, which—as the Court has explained—does not apply here. *See supra* at pp. 20-24. Finally, this case and *Moriarty* are not parallel proceedings for purposes of *Colorado River* because the cases involve different parties and different claims. *Moriarty* is a dispute between two government officials—the Kansas Attorney General and the Chief Judge of the Johnson County, Kansas District Court. Plaintiffs are not involved in *Moriarty*, and although *Moriarty* may have state-wide consequences, it does not directly address issuance of marriage licenses in Douglas or Sedgwick Counties, where plaintiffs live and seek to vindicate their constitutional rights. *See Wolf v. Walker*, 9 F. Supp. 3d 889, 895 (W.D. Wis. 2014) ("Plaintiffs have the right under 42 U.S.C. § 1983 to bring a lawsuit to vindicate their own constitutional rights."); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983) ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender" of jurisdiction under *Colorado River*."). In

sum, this case does not present exceptional circumstances warranting departure from the Court's general obligation to decide cases pending properly before it.

4. *Burford* Abstention

Defendants also urge the Court to abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, the federal court confronted a complex question of Texas oil and gas law governed by a complex state administrative scheme. *Id.* at 318-20. Holding that the federal district court should have dismissed the case, the Supreme Court emphasized the existence of complex state administrative procedures and the need for centralized decision-making when allocating drilling rights. *Id.* at 334. Defendants argue that this case resembles *Burford* because granting plaintiffs' relief would interfere with Kansas' system for uniform administration of marriage licenses and records.

The Court is sympathetic to the burden an injunction places on state officials but does not find Kansas' system for administering the marriage laws to be so complex that state officials will struggle to sort out an injunction banning enforcement of the state's same-sex marriage ban. Nor does this case present the type of issue best left to localized administrative procedures. Rather, this case presents federal constitutional questions, ones squarely within the province and competence of a federal court. *See Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1112 (10th Cir. 2000). Accordingly, the Court declines to abstain under *Burford*.

E. The *Rooker-Feldman* Doctrine

In supplemental briefing filed with the Court the morning of the preliminary injunction hearing, defendants asserted that the *Rooker-Feldman* doctrine bars plaintiffs' federal court claims. *See* Doc. 24. The *Rooker-Feldman* doctrine provides that federal courts, except for the Supreme Court, cannot directly review state court decisions. In *Exxon Mobil Corp. v. Saudi*

Basic Indus. Corp., 544 U.S. 280 (2005), the Supreme Court confined the doctrine's application to the factual setting presented in the two cases that gave the doctrine its name: when the losing parties in a state court case bring a federal suit alleging that the state court ruling was unconstitutional. *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Plaintiffs ask this Court to conduct, defendants assert, what amounts to a "review" of the Kansas' Supreme Court's stay order in *Moriarty*.

Defendants' *Rooker-Feldman* argument is not persuasive. First, plaintiffs were not "losing parties" in the *Moriarty* action. In *Moriarty*, the Kansas Attorney General "prevailed"—at least for the length of the court's stay—over Chief Judge Moriarty of the Johnson County, Kansas District Court by obtaining a temporary stay of Judge Moriarty's Administrative Order. Plaintiffs are not parties to *Moriarty* and "[t]he *Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state court judgment." *Lance v. Dennis*, 546 U.S. 459, 466 (2006).

Nor do plaintiffs in this case seek review of the *Moriarty* stay order—an order that applies only to applicants in Johnson County. Plaintiffs seek marriage licenses in Sedgwick and Douglas Counties. Instead, plaintiffs here challenge the constitutional validity of a legislative act and a state constitutional amendment. Such challenges are permissible under *Rooker-Feldman* because the doctrine does not bar a federal court from deciding the "validity of a rule promulgated in a non-judicial proceeding." *Feldman*, 460 U.S. at 486. Although this Court's ruling may affect some aspects of *Moriarty*, concurrent state and federal court litigation over similar issues does not trigger dismissal under *Rooker-Feldman*. *See Exxon Mobil*, 544 U.S. at 292 ("neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or a related question").

During the injunction hearing, defendants invoked *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (1970). Defendants' reliance on this case is also unpersuasive. In that case, a union asked a federal court to enjoin enforcement of a state court injunction against picketing because the state court's injunction violated federal law. *Id.* at 284. The Supreme Court concluded that the union's suit amounted to a request for the federal district court to review the state court's injunction, which *Rooker-Feldman* prohibits. *Id.* at 296. In contrast to the current case, the plaintiff in *Atl. Coast Line* was a party to the state court proceeding and sought review of a judgment—not a legislative act. Consequently, nothing in *Atl. Coast Line* suggests this Court should depart from the well-established rule that the *Rooker-Feldman* doctrine does not bar a federal court challenge to the constitutionality of a state statute by someone who is not a party to the similar state court proceeding.

II. Merits of Plaintiffs' Motion

A. Standard for a Preliminary Injunction

Having determined that it can, and should, adjudicate plaintiffs' motion on its merits, the Court now turns to plaintiffs' request for a preliminary injunction. Under Fed. R. Civ. P. 65(a), plaintiffs seek a preliminary injunction that: (1) enjoins the defendants from enforcing Article 15, § 16 of the Kansas Constitution, K.S.A. §§ 23-2501 and 23-2508, and any other law that excludes same-sex couples from marriage, and (2) directs defendants to issue marriage licenses to otherwise-qualified same-sex couples.

A preliminary injunction is an order prohibiting a defendant from taking certain specified actions. In some cases, such an order can mandate the defendant to take (or continue taking) certain actions. The injunction is "preliminary" in the sense that it is entered before the case is ready for a final decision on the merits. The issuance of a preliminary injunction is committed to

the "sound discretion of the trial court . . ." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir. 1986). A preliminary injunction is considered an "extraordinary and drastic" remedy, one that a court should not grant "unless the movant, by a clear showing, carries the burden of persuasion." *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1220, 1221-22 (D. Kan. 1998) (internal quotation omitted).

To obtain a preliminary injunction, a plaintiff must establish four elements: (1) the plaintiff is substantially likely to succeed on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is denied; (3) the plaintiff's threatened injury outweighs the injury the defendant will suffer if the injunction issues; and (4) the injunction would not be adverse to the public interest. *Tri-State Generation*, 805 F.2d at 355 (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)). The Court considers each of these elements, in order, below.

1. Likelihood of Success on the Merits

a. Tenth Circuit Precedent

"The Tenth Circuit has adopted [a] liberal definition of the 'probability of success' requirement." *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981). As long as the other three factors favor a preliminary injunction, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.* (citing *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964) (further citations omitted)). But this general standard is elevated when a plaintiff requests one of the three types of "disfavored" preliminary relief—"those altering the status quo,

'mandatory' preliminary injunctions,[9] and those granting the moving party all the relief it could achieve at trial." *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 n.1 (10th Cir. 2010). When a plaintiff seeks one of the disfavored forms of injunction, he or she must make an elevated showing that establishes the likelihood of success on the merits and the balance of harms favors issuing an injunction. *Id.* (citing *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009)). Here, plaintiffs' motion requests a preliminary injunction that qualifies under each category of disfavored injunction: it would alter the status quo; it would require that defendants undertake some affirmative conduct; and it would grant plaintiffs almost the entire scope of relief they would request at a trial on the merits. *See* Docs. 1 at ¶ 1, 3 at ¶ VI.A. Accordingly, the Court will require plaintiffs to show a strong likelihood of success on the merits.

Two Tenth Circuit opinions, *Kitchen* and *Bishop*, control this part of the preliminary injunction analysis. In *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), same-sex couples challenged Utah's state statute and state constitutional amendment prohibiting same-sex marriage. They argued that the laws violated their due process and equal protection rights under the Fourteenth Amendment. Utah's state-constitutional provision prohibiting same-sex marriage provided:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Utah Const. art. I, § 29. Utah's statutory same-sex marriage ban provided that:

[9] An injunction is "mandatory" if it requires the nonmoving party to perform some affirmative act to comply with it. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

> (1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.

U.C.A. § 30-1-4.1.

After finding that the plaintiffs had sued the proper parties for standing purposes, the Tenth Circuit held that the fundamental right to marry includes the right to marry a person of the same sex. *Kitchen*, 755 F.3d at 1201-02, 1218. The Tenth Circuit then examined the challenged laws under the strict scrutiny standard that applies to fundamental rights. *Id.* at 1218. This standard requires that any law infringing on a fundamental right be "narrowly tailored" to promote a "compelling government interest." *Id.* After discussing the government interests Utah said the same-sex marriage ban served, the Tenth Circuit concluded that the laws failed the strict scrutiny standard. *Id.* at 1218-28 (rejecting the following rationales under strict scrutiny: promoting biological reproduction within marriages, promoting optimal childrearing, promoting gendered parenting styles, and accommodating religious freedom and reducing the potential for civic strife). The Tenth Circuit concluded: "[U]nder the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex." *Id.* at 1229-30.

In *Bishop v.* Smith, 760 F.3d 1070 (10th Cir. 2014), same-sex couples brought a similar equal protection and due process challenge to Oklahoma's constitutional amendment prohibiting same-sex marriage. Oklahoma's constitutional same-sex marriage ban provided:

> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be

> construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Okla. Const. art. 2, § 35. After determining that plaintiffs had standing to sue, the Tenth Circuit held that *Kitchen* controlled the merits of the appeal. *Bishop*, 760 F.3d at 1076-79. The Tenth Circuit considered arguments not addressed in *Kitchen*, but ultimately concluded that they did not "persuade [the court] to veer from our core holding that states may not, consistent with the United States Constitution, prohibit same-sex marriages." *Id.* at 1080-82 (reaffirming *Kitchen* but also rejecting under strict-scrutiny analysis children's interest in having their biological parents raise them as a compelling government interest justifying a same-sex marriage ban).

Even under the more exacting standard for disfavored injunctions, plaintiffs have shown a strong likelihood they will succeed on the merits of their claims. *Kitchen* and *Bishop* establish a fundamental right to same-sex marriage, and state laws prohibiting same-sex marriage infringe upon that right impermissibly. *Kitchen*, 755 F.3d at 1229-30; *Bishop*, 760 F.3d at 1082. Kansas' same-sex marriage ban does not differ in any meaningful respect from the Utah and Oklahoma laws the Tenth Circuit found unconstitutional.

At the preliminary injunction hearing, defendants' counsel tried to differentiate Kansas—and its same-sex marriage ban—from the Utah and Oklahoma provisions nullified in *Kitchen* and *Bishop*. He argued that Kansas, by statute, recognizes common law marriage and plaintiffs could achieve married status under the common law variant of marriage. This argument, even if accurate, proves too much. On its best day, this argument contends that Kansas' common law marriage alternative provides same-sex couples access to a separate but equal classification of

marriage. That is, opposite-sex citizens can marry by either statutory or common law marriage while same-sex couples must confine their marriages to the common law alternative. Thus, defendants' alternative way of looking at the same-sex ban still denies plaintiffs equal protection of Kansas' marriage laws.

Because Tenth Circuit precedent is binding on this Court, *Kitchen* and *Bishop* dictate the result here. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit . . ."); *Phillips v. Moore*, 164 F. Supp. 2d 1245, 1258 (D. Kan. 2001) ("The [district] court, of course, is bound by circuit precedent"). The Court concludes, therefore, that plaintiffs have shown a strong likelihood that they will succeed in establishing that Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501 violate their rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

b. Role of Kansas State Court Precedent

Defendants contend that the Kansas Court of Appeals decision *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001), *aff'd in part, rev'd in part*, 42 P.3d 120 (Kan. 2002) controls the constitutional questions raised by plaintiffs' motion. In *Gardiner*, the Kansas Court of Appeals rejected plaintiff's claim that Kansas' prohibition against recognizing same-sex marriages violated the Fourteenth Amendment of the United State Constitution. *Id.* at 125-26. Defendants assert that this Court now must follow *Gardiner* for two reasons: (1) 28 U.S.C. § 1738 obligates federal courts to honor the decisions of state courts; and (2) the United States Supreme Court's denial of certiorari in *Gardiner* elevated the precedential effect of that decision to one that is binding on all federal courts. The Court disagrees with both propositions.

Title 28 U.S.C. § 1738 is the full faith and credit statute that applies in federal court. This statute requires federal courts to give the same preclusive effect to a state court *judgment* that another court of the same state would give to it. In other words, under 28 U.S.C. § 1738, a federal court must look to law of the judgment-rendering state to determine the preclusive effect of a state court judgment. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 375 (1985). But defendants' argument confuses judgment and precedent. A "judgment" represents a court's final determination of the parties' rights after their case has been litigated to its conclusion. In contrast, "precedent" consists of the body of decisional rules established in previous cases that courts must apply later when deciding like cases. Section 1738 obligates federal courts to honor state court judgments, not follow their precedent. Moreover, for § 1738 purposes, a state court judgment precludes subsequent federal litigation only if it involved the same parties, the same claim, and resulted in a final decision on the merits. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). Neither plaintiffs nor defendants were parties in *Gardiner*. Thus, 28 U.S.C. § 1738 does not obligate this Court to honor the judgment rendered in *Gardiner* or follow its precedent.

Nor does the Supreme Court's decision declining to issue a writ of certiorari confer precedential effect on *Gardiner* in a way that binds the federal courts. It is well-settled that a denial of certiorari creates no precedential value. *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'") (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)); *United States v. Mitchell*, 783 F.2d 971, 977 (10th Cir. 1986) ("[n]o precedential conclusion can be drawn from the denial of certiorari"). This is especially true here, because the *Gardiner* plaintiff abandoned his constitutional attack on Kansas' same-sex marriage laws before he took his appeal to the

Kansas Supreme Court. *See* 42 P.3d 120. Thus, the only consideration of Kansas' same-sex marriage laws came in the Kansas Court of Appeals' opinion—one the United States Supreme Court was never asked to review.

In sum, defendants have failed to persuade the Court to depart from two well-settled decisional principles: first, that federal courts are not bound by state court interpretations of federal constitutional issues, *see Tighe v. B.C. Christopher Sec. Co.*, No. 91-4219-SAC, 1994 WL 191876, at *5 n.7 (D. Kan. Apr. 22, 1994) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975)); and second, that a federal district court must follow the precedent of its Circuit. *Spedalieri*, 910 F.2d at 709.

2. Irreparable Injury

Plaintiffs have shown they likely will suffer irreparable injury if the Court does not issue a preliminary injunction. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quotation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012); *Quinly v. City of Prairie Village*, 446 F. Supp. 2d 1233, 1237-38 (D. Kan. 2006). Moreover, the Court would be "unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain," further favoring a finding of irreparable injury. *Awad*, 670 F.3d at 1131. Thus, the Court concludes that plaintiffs have satisfied the irreparable injury requirement by showing a likely violation of their constitutional rights.

3. Balance of Harm

Next, plaintiffs have shown that their threatened injury outweighs any injury defendants would experience from the injunction. "[W]hen a law is likely unconstitutional, the interests of

those [whom] the government represents, such as voters[,] do not outweigh a plaintiff's interest in having [her] constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (plurality) (quoting *Awad*, 670 F.3d at 1131) (internal alterations omitted), *aff'd*, __ U.S. __ ,134 S. Ct. 2751 (2014). On these facts, Tenth Circuit precedent requires the Court to conclude that the balance of harm analysis favors injunctive relief.

4. Public Interest

Last, the Court must determine whether granting an injunction would be adverse to the public interest. Here, competing considerations collide head-on. On one hand, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby*, 723 F.3d at 1145 (quoting *Awad*, 670 F.3d at 1131-32). On the other hand, the public interest values enforcement of democratically enacted laws. This latter value must yield though, when binding precedent shows that the laws are unconstitutional. In this setting, the public's interest in enforcement must give way to the "more profound and long-term interest in upholding an individual's constitutional rights." *Awad*, 670 F.3d at 1132 (quotation omitted). Consistent with this precedent, the Court concludes that the public interest favors protecting plaintiffs' constitutional rights by enjoining Kansas' plainly unconstitutional provisions.

III. Effective Date of Preliminary Injunction

Finally, defendants have asked the Court to stay any injunction it might enter temporarily, while they appeal to the Tenth Circuit. Under Fed. R. Civ. P. 62(c), a court may suspend or modify an injunction during the pendency of an appeal to secure the opposing party's rights. *See also Rhines v. Weber*, 544 U.S. 269, 276 (2005) (holding district courts "ordinarily have authority to issue stays . . . where such a stay would be a proper exercise of discretion").

The purpose of a stay is to preserve the status quo while the opposing party pursues its appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

In the same-sex marriage decisions that followed *Kitchen* and *Bishop*, several federal district courts have stayed the effect of their decisions to permit defendant to exhaust its appeal rights. *See, e.g.*, *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797, at *7 (D. Wyo. Oct. 17, 2014) (granting request for stay pending appeal); *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *18 (D. Utah May 19, 2014) (granting request for stay pending appeal despite factors weighing against it). Judge Skavdahl explained why in *Guzzo*:

> The Court is sympathetic to the mounting irreparable harms faced by Plaintiffs. However, the many changes that result from this ruling are very serious and deserve as much finality as the Court can guarantee. Given the fundamental issues apparent in this case, it is in the litigants' and the public's interest to ensure the correct decision is rendered. It would only cause a great deal of harm and heartache if this Court allowed same-sex marriage to proceed immediately, only to have a reviewing court later nullify this decision (and with it, the same-sex marriages occurring in the interim).

2014 WL 5317797, at *7.

Defendants' stay request presents a relatively close call. As *Guzzo* explained, the Tenth Circuit has settled the substance of the constitutional challenge plaintiffs' motion presents. *Id.* at *5. And under the Circuit's decisions, Kansas law is encroaching on plaintiffs constitutional rights. But defendants' arguments have required the Court to make several jurisdictional and justiciability determinations, and human fallibility is what it is; the Circuit may come to a different conclusion about one of these threshold determinations. On balance, the Court concludes that a short-term stay is the safer and wiser course.

Consequently, the Court grants the preliminary injunction described below but stays the effective date of that injunction until 5:00 p.m. (CST) on Tuesday, November 11, 2014 (unless defendants sooner inform the Court that they will not seek review from the Circuit). This will

permit adequate time for defendants to appeal from this Order and try to convince the Tenth Circuit that it should stay the Court's preliminary injunction for a longer period. This stay will provide the added benefit of giving the defendant Clerks and Secretary Moser adequate time to prepare to honor the injunction—assuming the Court of Appeals does not stay or vacate the Court's injunction. But unless defendants convince the Tenth Circuit to order an additional stay, the injunction imposed by the Order will go into effect at 5:00 p.m. (CST) on Tuesday, November 11, 2014.

Conclusion

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' Motion for a Preliminary Injunction is granted (Doc. 3). Defendants are hereby enjoined 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. Defendants may not refuse to issue marriage licenses on the basis that applicants are members of the same sex. The Court also orders that defendants' request for a temporary stay of the preliminary injunction is granted. The preliminary injunction is stayed and will not take effect until 5:00 p.m. (CST) on Tuesday, November 11, 2014, unless defendants sooner inform the Court they will not seek review before the Court of Appeals.

Finally, plaintiffs' motion for a temporary restraining order is denied as moot.

IT IS SO ORDERED.

Dated this 4th day of November, 2014, at Kansas City, Kansas.

Daniel D. Crabtree

Daniel D. Crabtree
United States District Judge

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 was filed October 10, 2014, by petitioner 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 issuing 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.

In the Attorney General's petition, he seeks the following relief "on an expedited basis":

"(a) An order directing the Respondents to *immediately* cease from issuing marriage applications or licenses to same gender couples in contravention of existing Kansas law;

"(b) A *peremptory* writ of mandamus barring the Respondents from following or otherwise implementing Administrative Order 14-11;

"(c) An order vacating Administrative Order 14-11 and declaring it null and void; and

"(d) Such other and further relief as the Court deems just and proper attributable to Respondents' failure to follow the law." (Emphases added.)

The court has carefully reviewed the Attorney General's petition and memorandum in support. Given the nature of his claim—based in part as it is on what he believes to be inconsistent practice among the state's 31 judicial districts—it is appropriate that jurisdiction remain in this court. Relief is not available in the district court. See Supreme Court Rule 9.01(b) (2013 Kan. Ct. Rule Annot. 82).

On the Attorney General's petition and memorandum, we do not discern a need for an immediate or peremptory grant of relief under K.S.A. 60-802(b), nor for an ex parte grant of relief under Supreme Court Rule 9.01(c)(2). Simply put, the Attorney General's right to relief on the merits is not clear, nor is it apparent per the Rule "that no valid defense to the petition can be offered," given the interpretation and application of the United States Constitution by panels of the United States Tenth Circuit Court of Appeals. See *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

Nevertheless, in the interest of establishing statewide consistency, we grant the Attorney General's alternative request, advanced in his memorandum, for a temporary stay of Chief Judge Moriarty's Amended Administrative Order 14-11, insofar as this Order allows issuance of marriage licenses. Applications for marriage licenses may continue to be accepted during the period of the stay. The stay shall remain in force pending further order by this court.

In addition, we order the following:

(1) Respondents shall file a response to the petition by 5:00 p.m. on October 21, 2014. Under Supreme Court Rule 9.01(c)(3)(B), the respondents may file a joint response. But Chief Judge Moriarty also remains free to invoke Supreme Court Rule 9.01(c)(3)(C), which provides that he may decide not to appear in this proceeding.

(2) Any additional briefing the parties wish to submit on any currently pending issue must be filed by 5:00 p.m. on October 28, 2014. The currently pending issues include but are not limited to:

(a) Whether Chief Judge Moriarty possessed authority to issue Amended Administrative Order 14-11;

(b) Whether Chief Judge Moriarty was correct in asserting that the interpretations and applications of the United States Constitution by panels of the Tenth Circuit Court of Appeals are supreme and therefore modify any Kansas state constitutional, statutory, or common law ban on same-sex marriage; and

(c) Even if the Tenth Circuit rulings on federal constitutional law are supreme, whether Kansas' state constitutional, statutory, or common law bans on same-sex marriage are permissible under the United States Constitution.

(3) No extensions of the filing deadlines set out above in (1) and (2) will be considered or permitted.

(4) Counsel for any party appearing in this action must appear for oral argument at 10:00 a.m. on November 6, 2014. Each side will be allowed 15 minutes of argument. Should both respondents appear, they will be responsible for allocating the 15 minutes allowed to their side of the case between them. The court will not entertain any motion for a continuance of this setting.

IT IS SO ORDERED THIS 10th day of October 2014.

Lawton R. Nuss
Chief Justice

A true copy ATTEST

Heather L. Smith

Clerk Supreme Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D and DONNA DITRANI, Plaintiffs,	)	
v.	)	Case No. 14-cv-2518-DDC-TJJ
ROBERT MOSER, M.D. in his official capacity as Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official capacity as Clerk of the District Court for the 7th Judicial District (Douglas County) and BERNIE LUMBRERAS in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), Defendants.	)	

AFFIDAVIT OF DEFENDANT ROBERT MOSER

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Dr. ROBERT MOSER, after being duly sworn upon his oath states as follows:

1. I am Secretary of the Kansas Department of Health and Environment.

2. I am personally knowledgeable about the matters described in the complaint filed in the above proceeding insofar as they relate to my role and the role of the Kansas Department of Health and Environment in the issuance of marriage licenses to applicants who present themselves to one of the 105 Kansas court clerks.

3. Neither I nor any other KDHE employee participates in evaluating the qualifications of applicants to determine whether they are lawfully entitled to the issuance of a marriage license consistent with the statutory limitations set forth in K.S.A. 2014 Supp 23-2501 *et seq*. Decisions to issue marriage licenses to same-sex couples or to refuse to issue licenses to those couples are made by court personnel, without participation by me or by any KDHE employee.
4. K.S.A. 2014 Supp. 23-2507 requires the registration of all marriages "under the supervision of the secretary of health and environment as provided in K.S.A. 65-102." K.S.A. 65-102 directs the KDHE secretary to prepare the blank forms used to gather vital statistics related to marriages that have already been performed. It gives the KDHE secretary no supervisory authority over decisions concerning denial of applications based on the sex of the applicants.
5. K.S.A. 2014 Supp. 23-2509 directs the secretary of health and environment to supply marriage certificate forms and describes how the forms are to be used in recording marriages. This statute gives the KDHE secretary no supervisory authority over court personnel in deciding whether to issue marriage licenses.
6. K.S.A. 2014 Supp. 23-2512 directs the KDHE secretary to maintain indexed records of marriages once they have been performed and to provide certified copies when requested. It gives the KDHE secretary no authority over court personnel in deciding whether to issue marriage licenses.
7. Any guidance provided by KDHE employees to court personnel is limited to helping them fill out the forms to report information to the Office of Vital Statistics. None of the advice provided by KDHE employees relates to the performance by court personnel of their role in assuring that marriage licenses are not issued to persons who are not legally entitled to be

married.

FURTHER AFFIANT SAITH NAUGHT

Dr. ROBERT MOSER

BE IT REMEMBERED, that on this 27th day of October, 2014, before me, the undersigned, a Notary Public in and for the county and state aforesaid, came Dr. ROBERT MOSER who is personally known to me as the same person who executed the within instrument of writing and such person duly acknowledged the execution of the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, on this the 27th day of October, 2014.

NOTARY PUBLIC

My Appointment Expires: 04-25-16

NOTARY PUBLIC - State of Kansas
MELISSA L. ROSDAHL
My Appt Expires 04-25-16

IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D., and DONNA DITRANI, Plaintiffs, v. ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official Capacity as Clerk of the District Court for the 7th Judicial District (Douglas county), and BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), Defendants.	)	Case No. 14-CV-2518-DDC-TJJ

AFFIDAVIT OF BERNIE LUMBRERAS

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Bernie Lumbreras, being first duly sworn, on oath, depose and say that:

1. I am the Clerk of the District Court of Sedgwick County, Kansas, Eighteenth Judicial District. I was appointed to this position on December 18, 2005. In that capacity, I supervise deputy clerks in performing the functions imposed by law on clerks of the district court in Kansas. My deputy clerks and I are judicial officers of the State of Kansas and are employed by the State of Kansas as part of the Kansas Judicial Branch.

2. Neither I nor the clerks operating under my supervision discriminate against any person or operate under any sort of personal belief or animus. We perform our duties in accordance with legal requirements as per K.S.A. 20-3102 and as

communicated to us under the supervision of the Chief Judge, at this point, Chief Judge James R. Fleetwood.

3. One of the functions of my office is to issue marriage licenses as per K.S.A. 2014 Supp. 23-2505. Under K.S.A. 2014 Supp. 23-2505, marriage licenses may be issued by either judges or clerks. In performing this function, I and the clerks operating under my supervision act as an aide to the twenty-eight (28) judges of the 18th Judicial District who would otherwise be performing this function.

4. If there is a question about whether a person is legally entitled to a marriage license, the applicant is referred to a judge for determination.

5. I do not authorize persons to perform marriage rites; the Clerks have no role in the function set forth in K.S.A. 2014 Supp. 23-2504.

6. Any determination as to the issuance of a license to Kerry Wilks or Donna DiTrani was made by Chief Judge James R Fleetwood or Judge Eric Yost acting in Chief Judge Fleetwood's absence. It was not made by me or by my clerks.

7. My office is also in compliance with the Supreme Court's October 10, 2014, Order in *State ex rel. Schmidt v. Moriarty* which is consistent with the directions of Chief Judge Fleetwood.

8. Neither I nor my clerks have any role in deciding whether a person is authorized to file a joint tax return in Kansas.

9. Neither I nor my clerks have any role in determining whether a person is entitled to inherit property through intestate succession in Kansas.

FURTHER AFFIANT SAITH NOT.

Bernie Lumbreras

Bernie Lumbreras

Subscribed and Sworn to before the undersigned this 29th day of October, 2014.

Cathy Stepp-Pratt

Notary Public

My Appointment Expires: 3-1-18

CATHY STEPP-PRATT
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 3-1-18

IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D., and DONNA DITRANI, Plaintiffs, v. ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment and DOUGLAS A. HAMILTON, in his official Capacity as Clerk of the District Court for the 7th Judicial District (Douglas county), and BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County), Defendants.	)	Case No. 14-CV-2518-DDC-TJJ

AFFIDAVIT OF DOUGLAS A. HAMILTON

STATE OF KANSAS)
) ss:
COUNTY OF DOUGLAS)

I, Douglas A. Hamilton, being first duly sworn, on oath, depose and say that:

1. I am the Clerk of the District Court of Douglas County, Kansas, Seventh Judicial District. I was appointed to this position on January 23, 2000. In that capacity, I supervise deputy clerks in performing the functions imposed by law on clerks of the district court in Kansas. My deputy clerks and I are judicial officers of the State of Kansas and are employed by the State of Kansas as part of the Kansas Judicial Branch.

2. Neither I nor the clerks operating under my supervision discriminate against any person or operate under any sort of personal belief or animus. We perform our duties in accordance with legal requirements as per K.S.A. 20-3102 and as communicated to us under the supervision of the Chief Judge, at this point, Chief Judge Robert Fairchild.

3. One of the functions of my office is to issue marriage licenses as per K.S.A. 2014 Supp. 23-2505. Under K.S.A. 2014 Supp. 23-2505, marriage licenses may be issued by judges or clerks. In performing this function, I and the clerks operating under my supervision act as an aide to the six (6) judges of the 7th Judicial District who would otherwise be performing this function.

4. If there is a question about whether a person is legally entitled to a marriage license, the applicant is referred to a judge for determination.

5. I do not authorize persons to perform marriage rites; the clerks have no role in the function set forth in K.S.A. 2014 Supp. 23-2504.

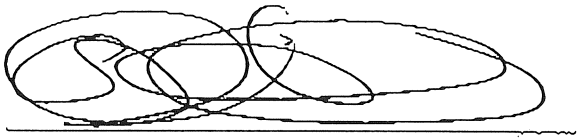
6. Any determination as to the issuance of a license to Kail Marie was made by Chief Judge Robert Fairchild as per Administrative Order 14-13, a certified copy of which is attached hereto.

7. My office is also in compliance with the Supreme Court's October 10, 2014, Order in *State ex rel. Schmidt v. Moriarty* which is consistent with Administrative Order 14-13.

8. Neither I nor my clerks have any role in deciding whether a person is authorized to file a joint tax return in Kansas.

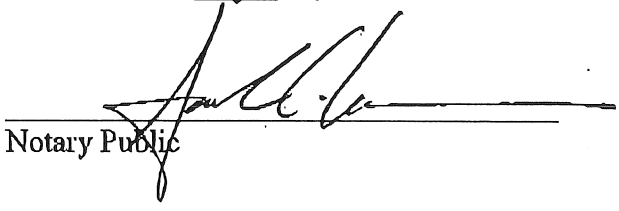
9. Neither I nor my clerks have any role in determining whether a person is entitled to inherit property through intestate succession in Kansas.

FURTHER AFFIANT SAITH NOT.



Douglas A. Hamilton

Subscribed and sworn to before the undersigned this 30 day of October, 2014.



Notary Public

My Appointment Expires: 6/5/2018

SEVENTH JUDICIAL DISTRICT
ADMINISTRATIVE ORDER 14-13

The Clerk of the District Court referred the Marriage License Application of Thomas Tuozzo and Rodd Hedlund to the Chief Judge for review. The applicants appear to be of the same sex. Article 15, §16 of the Kansas Constitution provides that: "Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void." No Kansas or Federal Appellate Court has reviewed this provision of the Constitution and this court is bound by the Kansas Constitution. If the court were to issue a license to the applicants and the appellate courts later hold that Article 15, §16 does not violate the United States Constitution, the parties' marriage will be void.

The court performs an administrative function when it issues a marriage license. In exercising its administrative functions the court has a different role than it does when it rules on a petition that has been filed in this court as a contested matter. The Court's role in administrative matters is to apply and follow the existing laws of the State of Kansas. Recently, the United States Supreme Court declined to review several cases in which the Circuit Courts held that similar provisions contained in the constitutions of other states violate the United States Constitution. Included in these cases were two cases from the Tenth Circuit Court of Appeals. While Kansas is in within the jurisdiction of the Tenth Circuit, none of these cases involved Article 15, §16 of the Kansas Constitution. This court may not make a determination as to the validity of this constitutional provision without a judiciable case before it concerning the court's issuance of or failure to issue a marriage license.

The Clerk of the District Court shall not issue a marriage license to these applicants or to any other applicants of the same sex. When the Clerk rejects the application, the clerk shall give the applicants a copy of this order

IT IS SO ORDERED.

IN THE DISTRICT COURT OF DOUGLAS COUNTY KS OFFICIAL SEAL

Robert W. Fairchild
Chief Judge

I HEREBY CERTIFY THAT THE FOREGOING INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
Dated 22 October 20 14
Douglas County District Court
Lawrence, Kansas
by Michael Pruet
Deputy

IN THE DISTRICT COURT OF DOUGLAS COUNTY KS OFFICIAL SEAL

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS ex rel. DEREK SCHMIDT, ATTORNEY GENERAL,	)	
Petitioner,	)	Case No. 112, 590
v.	)	
KEVIN P. MORIARTY, Chief Judge, Tenth Judicial District, and SANDRA McCURDY, Clerk of the District Court, Tenth Judicial District,	)	
Respondents.	)	

AFFIDAVIT OF SANDRA McCURDY

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

The undersigned, of lawful age, being first duly sworn, upon her oath and personal knowledge states:

1. My name is Sandra McCurdy, and I am the Clerk of the District Court for the Tenth Judicial District of Kansas.

2. On October 7, 2014, the Clerk of the District Court for the Tenth Judicial District of Kansas received an application from a same-sex couple to obtain a marriage license pursuant to K.S.A. 23-2505(a).

3. My office sought guidance from the Honorable Kevin P. Moriarty, Chief Judge of the Tenth Judicial District of Kansas, regarding the handling of the same-sex marriage application.

4. On October 7, 2014, Martha J. Coffman, General Counsel for the Office of Judicial Administration, distributed an e-mail to the thirty-one Chief Judges presiding over the

respective Judicial Districts of Kansas. (*See Ex. A* attached hereto). Judge Moriarty shared the e-mail with me. This e-mail contains recommendations on how to proceed with the applications from same-sex couples to obtain a marriage license in Kansas.

5. On October 8, 2014, Chief Judge Kevin P. Moriarty issued Amended Administrative Order No. 14-11, directing the Clerk of the District Court to issue marriage licenses to same-sex couples provided they are otherwise qualified to marry under Kansas law.

6. Accordingly, I issued a marriage license to the same-sex applicants on October 10, 2014

7. Currently, there are other same-sex marriage license applications pending in the District Court for the Tenth Judicial District of Kansas.

AFFIANT SAYS NOTHING FURTHER.

Sandra McCurdy

Subscribed and sworn to before me this 20 day of October 2014.

JOHNSON COUNTY DISTRICT COURT KANSAS

Melissa Mercer
~~Notary Public~~ deputy clerk

My Commission Expires: 53-504

Moriarty, Kevin, DCA

From:	Mary Rinehart <Rinehartm@kscourts.org>
Sent:	Tuesday, October 07, 2014 12:25 PM
To:	David King; Hon Gary Nafziger; Hon Evelyn Wilson; Hon Phillip M Fromme; Merlin Wheeler; Richard Smith; Hon Robert W Fairchild; Hon Michael F Powers; Hon Richard B Walker; Moriarty, Kevin, DCA; Hon AJ Wachter; Kim Cudney; Hon David Ricke; Hon Roger Gossard; Hon Glenn D Schiffner; Hon Daniel L Love; Hon Preston Pratt; Hon James Fleetwood; Hon Nicholas St Peter; Hon Mike Keeley; Hon Meryl D Wilson; Hon James A Patton; Edward Bouker; Hon Bruce Gatterman; Hon Wendel Wurst; Hon Brad Ambrosier; Hon Patricia Macke Dick; Hon Jerome Hellmer; Wayne Lampson; Hon Larry T Solomon; Dan Creitz
Cc:	Nancy Dixon
Subject:	Marriage license application questions
Attachments:	Kitchen v Herbert, 755 F3d 1193 (10th 2014) - Utah same sex marr.docx; Bishop v. Smith, 760F.3d 1070 10th 2014 - OK same sex marr.docx; Burns v Hickenlooper, 2014 WL 3634834 (D CO 2014) - CO same-sex marr.rtf; Harris v McDonnell, 2013 WL 6835145 WDVa 2013-clerk no personal liab same sex mar.docx

Chief Judges,

The Office of Judicial Administration received several calls and e-mails from clerks asking how to respond to questions about same-sex marriage in Kansas. Clerks -- and judges -- also reported getting calls from media as a result of the U.S. Supreme Court deciding yesterday not to accept for review cases from the 10th U.S. Circuit Court of Appeals finding that Utah's and Oklahoma's law prohibiting same-sex marriage are unconstitutional.

We also heard reports that several same-sex couples have asked for marriage license applications. Media reports have stated that several clerks have denied the request for an application.

The following discussion is offered to explain the advice clerks have received directly from OJA and the reasons for this advice. As always, clerks have been told to talk with their chief judge and follow the instructions given. I am sending this message directly to Chief Judges so that you may decide whether to forward it to your clerks.

The 10th Circuit has not ruled on Kansas law. The Appeals Court opinions ruled on cases from Utah and Oklahoma; those are attached to this email.

Clerks can't give legal advice or issue legal opinions. Therefore, I have recommended that clerks not try to answer questions asking whether same-sex marriage is legal in Kansas. Instead, if asked, I recommended that clerks state they cannot give legal advice and offer a marriage license **application** to fill out even if the clerk believes the couple may not qualify to receive a marriage license. Then the completed application should be given to the chief judge (or designee) to review and decide whether to grant or deny the marriage license. This is the same procedure I recommend clerks follow when other questions are presented about an applicant's eligibility to receive a marriage license: Offer the application and refer the completed application to the chief judge for review and decision. As always, a clerk should consult with and follow the chief judge's instructions. If a chief judge has directed a clerk to approve or deny a request for an application, then the clerk should comply with this direction.

If you learn that a lawsuit has been filed in state or federal court that challenges Kansas laws prohibiting same-sex marriage, please notify me as soon as possible. We anticipate that the ACLU will file a lawsuit in federal district court soon. Other lawsuits may be filed as well.

Below is a short discussion about Kansas law on marriage. I include my reasoning for the recommendation set out above. The Kansas Constitution, at article 15, section 16, states that marriage "shall be constituted by one

man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void." K.S.A. 2013 Supp. 23-2501 clearly establishes that marriages between persons of the same sex are void. Both clerks and judges of the district court are empowered to issue marriage licenses under K.S.A. 2013 Supp. 23-2505. Under 23-2505, (i) either party may apply for the license, but both do not need to complete the application; (ii) a 3-day waiting period is prescribed; and (iii) the judge or clerk is expressly prohibited from issuing a license to any person who is not of a required age or does not have the necessary consent to marry, but the judge or clerk are given authority to administer oaths regarding a party's age. Also, applicants must take an oath regarding familial relationships. K.S.A. 2013 Supp. 23-2503 (incestuous marriage void). Kansas statutes contain no provisions that require a clerk or judge to obtain an applicant's oath regarding the sex of the parties to the marriage contract.

Kansas law imposes criminal liability upon any judge or clerk who fails to comply with the provisions of the act. Failure to comply with the act is deemed a misdemeanor punishable by a fine not to exceed $100. K.S.A. 2013 Supp. 23-2513. In addition, a judge or clerk granting a marriage license without examining the familial relationships listed in 23-2503 is subject to a fine not exceeding $1,000.

As noted above, 23-2505 requires that a clerk or judge issue a license only to persons who are legally entitled to receive a marriage license under Kansas law. If a marriage license is denied, the licensor may be subject to civil suit on constitutional grounds. My recommendation is that judges, not clerks, make the decision to grant or deny a marriage license under existing Kansas law, rather than requiring a district court clerk to do so and then be required to defend a civil lawsuit. Judges enjoy absolute immunity for decisions made in their role as judges; therefore, judges have a minimal risk of being held liable for conduct performed as part of their judicial duties. In contrast, clerks have only qualified immunity for actions taken as a clerk; the procedure to obtain dismissal of a clerk from a lawsuit is more complex and may require a hearing to develop facts to support the application of qualified immunity. Attached is a decision from the Western District of Virginia in which the court clerk was the named defendant.

Judges who face the question of ruling on whether to grant or deny a marriage license for a same-sex couple may wish to review the Kansas Constitution, Art. 15, Sec. 16, and those statutes addressing marriage. K.S.A. 2013 Supp. 23-2501 to 23-2518. Judges may also want to consider a recent Kansas Supreme Court decision that interprets the phrase "opposite sex." *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (2002). Finally, the Tenth Circuit decisions addressing the law in Utah and in Oklahoma are attached. Finally, I have included a decision by the US District Court for the District of Colorado, finding Colorado law unconstitutional.

I realize that it has taken some time to distribute this message and that some of you have already advised your clerks regarding this issue. Know that all of your efforts are appreciated. I hope this discussion is helpful. Please contact me if you have further questions.

Martha

Martha J. Coffman
General Counsel
Office of Judicial Administration
301 SW 10th Street
Topeka, KS 66612
785-296-3530