

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

JAMES THOMAS and DAVID HIXSON,)	
)	
Plaintiffs,)	
)	Case No. 3:17-0005
v.)	
)	Judge Trauger
BILL HASLAM, Governor of Tennessee, in)	
his official capacity; <i>et al.</i> ,)	
)	
Defendants.)	

**COMMISSIONER DAVID W. PURKEY’S MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR PARTIAL STAY PENDING APPEAL**

Defendant David W. Purkey, in his official capacity, has given notice that he is appealing the July 2, 2018, Order and Memorandum (D.E. 113, 114) of this Court denying Defendant’s Motion for Summary Judgment and granting Plaintiffs’ (D.E. 37, 61) to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1292(a)(1). Defendant now moves this Court, pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a), for an order partially staying the Order, pending appeal to the United States Court of Appeals for the Sixth Circuit. In addition, Commissioner Purkey requests a stay of briefing and consideration of Plaintiffs’ Motion for Attorney Fees (D.E. 118). In support of the Motion, Commissioner Purkey submits as follows.

INTRODUCTION

The Court’s Order of 7/2/18 directs the Commissioner to do three things:

- “cease all revocations of driver’s licenses for nonpayment of court debt pursuant to Tenn. Code Ann. § 40-24-105(b), unless or until the State of Tennessee lawfully adopts a process for providing an exception to revocation based on inability to pay the relevant debt . . .”;

- “not withhold reinstatement of the driver’s license of any person whose license was revoked pursuant to Tenn. Code Ann. § 40-24-105(b), based solely on his failure to pay court debt or related reinstatement fees”; and
- “submit a plan, within 60 days . . . for lifting the revocations of persons whose licenses were revoked pursuant to Tenn. Code Ann. § 40-24-105(b) and providing a process for reinstatement, including, where legally appropriate, automatic reinstatement for any driver who has no obstacle to holding a Tennessee driver’s licenses other than [a Section 105(b)] revocation.”

At this time, the Department is not revoking any licenses pursuant to Tenn. Code Ann. § 40-24-105(b). The Department also has administratively lifted approximately 237,000 Section 105(b) revocations affecting approximately 118,000 drivers. In addition, older Section 105(b) revocations, which pre-date the Department’s current computer system, are being manually lifted as individual drivers contact the Department.

Commissioner Purkey requests, however, a stay of the third component of the Order pending appeal. As the Court has noted, not every person under a Section 105(b) revocation “would or should have an automatic right to drive again, even if his revocation is lifted. Some such drivers may face other revocations or suspensions on other grounds.” Mem. Op. (D.E. 113) at 31. The development of a plan for automatic restoration will require review of driver’s license records on an individual-by-individual basis. As the Department is complying with the first two components of the Court’s Order, it requests relief from the third component so that the constitutional issues raised in this case may be considered by the Court of Appeals.

For similar reasons, Commissioner Purkey also submits that the Plaintiffs’ Motion for Attorney Fees, (D.E. 118), should likewise be stayed pending appeal given that the decision to award fees, and in what amount, is certain to be affected by the pending appellate litigation. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (partial success after appeal must be considered in calculating a fee award).

STANDARD FOR A STAY PENDING APPEAL

Rule 62(c), Fed. R. Civ. P., provides that “[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction.” It “has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal’ [in order to] allow an appellate court the time necessary to review it.” *Nken v. Holder*, 556 U.S. 418, 421 (2009) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942)).

When considering a stay pending appeal, a court must consider the following factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Id.* at 434. All four factors are not prerequisites but are interconnected considerations that must be balanced together. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991).

I. LIKELIHOOD OF SUCCESS ON APPEAL

The Sixth Circuit has recognized that to justify the granting of a stay, a movant need not always establish a high probability of success on the merits. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987). To the contrary, a party seeking a stay must to “demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.” *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224, 227 (6th Cir.2004) (internal quotation marks omitted).

Serious constitutional questions are presented in this case, which are matters of first impression for the Sixth Circuit. Specifically, the Court has ruled that Tenn. Code Ann. § 40-24-105(b) is unconstitutionally irrational under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution as applied to the indigent. *See, e.g.,* Mem. Op. (D.E. 113) at 25 n.10.

Section 105(b) embodies a legislative determination that—in addition to the payment of punitive fines—criminal defendants should be held responsible for the court costs and litigation taxes incurred in their prosecution, rather than Tennessee taxpayers. This policy serves a two-fold purpose: (a) providing further deterrence for criminal conduct and (b) apportioning expenses to those whose conduct caused the expenses to be incurred. For those who do not comply with their obligations, Tennessee denies them a state-privilege—the offender’s driver’s license.¹ However, the Court held that these justifications were irrational and that the Constitution requires an indigence exception to revocation.

As the Sixth Circuit has not addressed these issues, there remain serious questions as to the merits on appeal. A stay is thus warranted.

II. IRREPARABLE HARM TO THE STATE

“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)).

Moreover, the development of a plan while this matter is on appeal will require

¹ Unless the offender avails him- or herself of the statutory remedies currently available, and obtains relief. *See, e.g.,* Tenn. Code Ann. §§ 40-24-102; 40-24-104(a); 40-24-105(b)(4)(B); 40-24-105(h); 40-25-123(b), (c)(1).

individual review of many driver's license records, and such driver-by-driver assessments will be quite complicated in some instances. The expenditure of government funds and resources to that endeavor, while the State exercises its right to appeal, would be potentially wasteful given the possibility of a reversal or remand for further proceedings.

III. LACK OF HARM TO THE PLAINTIFFS

The entry of a stay over the third component of the Court's Order would cause no harm to the Plaintiffs or the members of the putative class. As stated above, Section 105(b) revocations have stopped, and the Department is administratively lifting existing Section 105(b) revocations from affected drivers in the State. Staying the submission of a plan merely permits the Department to pursue a meaningful appeal of the constitutional issues ruled upon by this Court. This factor weighs in favor of a stay.

IV. PUBLIC INTEREST

To reiterate, “[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws. As the State is the appealing party, its interest and harm merges with that of the public.” *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (citing *Maryland v. King and Nken*, *supra*). See also *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 506 (2013) (“any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable harm”; Scalia, J., concurring in denial of application to vacate stay of an injunction).

“The authority to hold an order in abeyance pending review allows an appellate court to act responsibly [and] fulfill [its] role in the judicial process.” *Nken*, 566 U.S. at 427. In this case, there is a clear public interest in allowing the Court of Appeals to consider carefully the

complicated constitutional issues presented, without the State suffering irreparable injury while the appellate process is pending.

V. CONCLUSION

For these reasons, the Commissioner moves for a stay of the third component of the Court's injunction and a stay of consideration of the Plaintiffs' Motion for Attorney Fees.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

/s/ Andrew B. Campbell
ANDREW B. CAMPBELL (14258)
Assistant Attorney General
Public Interest Division
Andrew.Campbell@ag.tn.gov (615) 532-0356

ALEXANDER S. RIEGER (29362)
Deputy Attorney General
General Civil Division
alex.rieger@ag.tn.gov (615) 741-2408

SCOTT C. SUTHERLAND (29013)
Deputy Attorney General
Law Enforcement &
Special Prosecutions Division
P.O. Box 20207
Nashville, TN 37202
Scott.Sutherland@ag.tn.gov (615) 532-7688

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2018, a copy of the foregoing document was served via the Court's ECF system to:

Lori H. Patterson, Esq. Matthew G. White, Esq. BAKER DONELSON, BEARMAN, CALDWELL & BERKOWITZ First Tennessee Bank Bldg., 165 Madison Avenue, Suite 2000 Memphis, TN 38103	Claudia Wilner, Esq. Peter Tasheff, Esq. Edward P. Krugman, Esq. NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE 275 Seventh Avenue, Suite 1506 New York, NY 10001
Premal Dharia, Esq. Jonas Wang, Esq. CIVIL RIGHTS CORPS 910 17th Street, Suite 500 Washington, DC 20006	Josh Spickler, Esq. JUST CITY 902 South Cooper Street Memphis, TN 38104

/s/ Andrew B. Campbell
ANDREW B. CAMPBELL
Assistant Attorney General