

No. 13-4178

**IN THE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

DEREK KITCHEN, *et al.*,
Plaintiffs-Appellants,

v.

GARY R. HERBERT, in his official capacity as Governor of Utah, *et al.*,
Defendants-Appellees

Appeal from Order of the United States District Court for the District of Utah on
December 21, 2013, by the Honorable Robert H. Shelby in Action
No. 2:13-cv-00217-RJS

**APPELLEES' OPPOSITION TO APPELLANTS' EMERGENCY MOTION
FOR TEMPORARY STAY**

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COUNSEL FOR PLAINTIFFS-APPELLEES

Plaintiffs-Appellees Derek Kitchen, Moudy Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge respectfully submit this Opposition to Appellants' Emergency Motion for Temporary Stay.

Appellants' Emergency Motion for Temporary Stay ("Motion" or "Mot.") poses no emergency. The Emergency Motion seeks from this Court a temporary stay of the District Court's summary judgment order, entered December 20, 2013, "until the [D]istrict [C]ourt can rule on the state's written motion" for a stay pending appeal that is currently pending before the District Court." Mot. at 5. The District Court has today, December 21, 2013, issued an order setting an expedited weekend briefing schedule and scheduling a hearing on the Appellants' motion for a stay pending appeal *this coming Monday, December 23, 2013, at 9:00 a.m.* See Notice of Hearing on Motion, *Kitchen v. Herbert*, No. 13-217 (D. Utah Dec. 21, 2013) (Doc. No. 95). There is no need for this Court to step in given that the District Court is expeditiously moving forward to give Appellants a hearing on their request for a stay of the District Court's summary judgment order this coming Monday morning.

In their Motion before this Court, Appellants unilaterally chose "not [to] address the criteria for a stay set forth in [Tenth Circuit Rule 8.1]." In particular, Appellants' Motion does not address the following factors that ordinarily this Court considers pursuant to Rule 8.1 in deciding whether to stay a district court order:

- (B) the likelihood of success on appeal;
- (C) the threat of irreparable harm if the stay or injunction is not granted;
- (D) the absence of harm to opposing parties if the stay or injunction is granted; and
- (E) any risk of harm to the public interest.

Id.

This Court should deny Appellees’ Motion for a stay. The District Court based its summary judgment order on extensive findings and conclusions regarding serious constitutional harms imposed by Utah Amendment 3—including violations of and interference with the fundamental right to marry. This Court has held that the infringement of an important constitutional right “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). Moreover, as the District Court explained in its summary judgment order, “the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed” in this matter. Mem. Decision and Order at 50, *Kitchen v. Herbert*, No. 13-217 (D. Utah Dec. 20, 2013) (Doc. No. 90) (attached as Addendum A to Appellees’ Motion).¹

¹ With little explanation, Appellants cite to *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th 2001), in an effort to justify “quick

In light of the harms identified by the District Court, this Court should treat as fatal to Appellees' Motion their failure to address the factors that this Court ordinarily considers in deciding whether to issue a stay of a district court order, particularly given that the District Court plans to hold a hearing forthwith on Appellants' request for a stay in that court.

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intervention by this [C]ourt.” Mot. at 4. *Homans* does not support Appellants' Motion. In *Homans*, the district court had declined to enjoin a campaign-related statute that violated the First Amendment under directly controlling Supreme Court precedent, and an election was imminent. 264 F.3d at 1243-44. The purpose of this Court's emergency order in *Homans* was to protect constitutional rights that were immediately imperiled by continued enforcement of the challenged statute. This Court granted relief in *Homans* even though a stay had not been sought in the district court “because of the immediacy of the problem and the district court's legal error concerning the First Amendment.” *Id.* at 1243 (emphasis added). Here, unlike in *Homans*, it is the challenged state law that imperils constitutional rights and the District Court's summary judgment order that is protecting constitutional rights. Moreover, the District Court's summary judgment order is in line with Supreme Court precedent, including *United States v. Windsor*, 133 S. Ct. 2675 (2013).

CONCLUSION

For the reasons stated above, Plaintiffs-Appellees respectfully request that the Court deny Appellants' Emergency Motion for Temporary Stay.

Dated: December 21, 2013

Respectfully submitted,

/s / Jennifer Fraser Parris

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