

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

<b>JAMES OBERGEFELL, et al.,</b>	:	<b>Case No. 14-3057</b>
	:	
<b>Plaintiff-Appellees,</b>	:	<b><u>PLAINTIFF-APPELLEES’</u></b>
	:	<b><u>MOTION FOR EXPEDITED</u></b>
<b>vs.</b>	:	<b><u>BRIEFING SCHEDULE</u></b>
	:	
<b>THEODORE E. WYMYSLO, et</b>	:	
<b>al.,</b>	:	
	:	
<b>Defendant-Appellants.</b>	:	

Pursuant to Sixth Circuit Rule 27(f) and 28 U.S.C. §1657, Plaintiff-Appellees hereby move for an expedited briefing schedule and argument at the earliest available date following completion of briefing.

**MEMORANDUM**

This appeal involves an issue of profound significance to the married same-sex plaintiffs, to the citizens of Ohio, and indeed to people across this nation—whether Ohio must recognize valid out-of-state marriages between same-sex couples on death certificates. Sixth Circuit Rule 26(f) provides that a motion to expedite briefing will be granted upon a showing of “good cause.” 28 U.S.C. § 1657 also permits an action to be expedited based on “good cause,” which exists “if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit.”

That standard is met in this case. At issue is recognition by Ohio of valid out-of-state marriages between same-sex couples on death certificates. The District Court, applying principles set out in *United States v. Windsor*, 133 S.Ct. 2675 (2013), held that the married plaintiffs in this case were entitled to such recognition and that denial of marriage recognition violated equal protection and due process rights and imposed irreparable harm. Final Order, Doc. 65, Page ID 1087 (citing cases). As the Supreme Court has recognized, another state's determination that a couple is married "is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." 133 S. Ct. at 2692. The *Windsor* Court, and the District Court here, concluded that for another government to disrespect such an existing marriage violated equal protection. *Id.* at 2695-96 (when the state "imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper" for the sole purpose "to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity" such action violates equal protection); Final Order, Doc. 65, Page ID 1064-66. The District Court also held that a death certificate is "the last official document recording [a person's] existence on earth

.... Dying with an incorrect death certificate that prohibits the deceased Plaintiffs from being buried with dignity constitutes irreparable harm.” *Id.* at 1088.

As this Court is well aware, courts across the country are addressing the constitutionality of restrictions related to marriage by same-sex couples on an accelerated basis. Two other United States Circuit Courts are considering challenges to state bans on the performance and recognition of marriages between same-sex couples. Both courts have accelerated the cases on their calendars. In *Kitchen et al v. Herbert et al.*, the Tenth Circuit expedited the briefing, directing that the opening brief be filed February 3, 2014, approximately 5 weeks after its initial order, that the response brief follow on February 25, 2014, and the reply on March 4, 2014. That case will be argued April 10, 2014. *See* Orders attached as Exhibit A.

In *Bishop et al v. Smith et al.*, the Tenth Circuit ordered on January 28, 2014, that the first brief shall be filed on February 24, 2014, the second by March 17, 2014, and the last brief by April 7, 2014. *See* Order attached as Exhibit B. Finally, in *Sevcik v. Sandoval et al.*, the Ninth Circuit has also expedited the scheduling for oral argument. *See* Order attached as Exhibit C. Plaintiffs-Appellees would welcome a similar schedule in this case where the narrower question of marriage recognition on death certificates is at issue.

Uncertainty concerning marriage recognition carries significant emotional consequences for the plaintiffs whose spouses have died. The Plaintiff couples continue to live with fear that the last legal document recording their marriages may be altered (the state repeatedly indicated that death certificates can be amended, *see e.g.*, Doc. 11, Page ID 84) by the state to erase their marriages depending on the outcome of this case. Hastening resolution of these issues is important both for them and for the thousands of same-sex couples in the Sixth Circuit whose lawful marriages are not recognized by their home state. The sheer volume of same-sex marriage cases in federal and state courts across the country and the rapid pace with which they are moving indicates that the constitutionality of laws, such as Ohio's, that deny respect to the marriages of same-sex couples entered into in other states is an issue of tremendous public importance that deserves prompt attention from this Court.

Plaintiffs respectfully request that this motion be granted.

Respectfully submitted,

/s/ Alphonse A. Gerhardstein

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Trial Attorney for Plaintiffs

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Jacklyn Gonzales Martin #0090242

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Attorneys for Plaintiffs

### **CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2014, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Alphonse A. Gerhardstein

Alphonse A. Gerhardstein

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 24, 2013

Elisabeth A. Shumaker  
Clerk of Court

DEREK KITCHEN, individually;  
MOUDI SBEITY, individually;  
KAREN ARCHER, individually;  
KATE CALL, individually;  
LAURIE WOOD, individually;  
KODY PARTRIDGE, individually,

Plaintiffs-Appellees,

v.

GARY R. HERBERT, in his official  
capacity as Governor of Utah; JOHN  
SWALLOW, in his official capacity as  
Attorney General of Utah,

Defendants-Appellants,

and

SHERRIE SWENSEN, in her official  
capacity as Clerk of Salt Lake County,

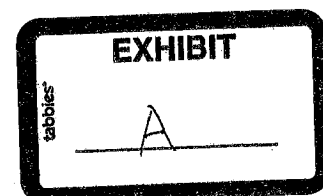
Defendant.

No. 13-4178  
(D.C. No. 2:13-CV-00217-RJS)  
(D. Utah)

**ORDER DENYING EMERGENCY MOTION FOR STAY AND TEMPORARY  
MOTION FOR STAY**

Before **HOLMES** and **BACHARACH**, Circuit Judges.

This is an appeal from a district court order concluding that Utah's prohibition on same-sex marriage is unconstitutional as a violation of due process and equal

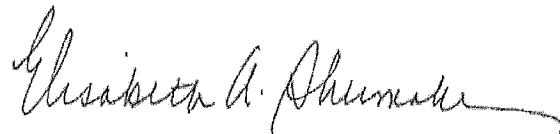


protection. Defendants-Appellants seek a stay pending appeal and a temporary stay while the court considers the stay request. Plaintiffs-Appellees have filed a response.

A stay pending appeal is governed by the following factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir.2001); 10th Cir. R. 8.1. The first two factors are the most critical, and they require more than a mere possibility of success and irreparable harm, respectively. *Nken v. Holder*, 556 U.S. 418, 434-35 (2009).

Having considered the district court's decision and the parties' arguments concerning the stay factors, we conclude that a stay is not warranted. Accordingly, we deny Defendants-Appellants' emergency motions for a stay pending appeal and for a temporary stay. In addition, we direct expedited consideration of this appeal. The Clerk is directed to issue a separate order setting deadlines for briefing.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

January 21, 2014

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

DEREK KITCHEN, individually, et al.,

Plaintiffs - Appellees,

v.

GARY R. HERBERT, in his official  
capacity as Governor of Utah, et al.,

Defendants - Appellants,

and

SHERRIE SWENSEN, in her official  
capacity as Clerk of Salt Lake County,

Defendant.

No. 13-4178  
(D.C. No. 2:13-CV-00217-RJS)

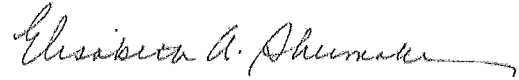
**ORDER**

This matter is before the court on appellants' motion to extend the briefing schedule. We also have a response from the appellees and a reply. Upon consideration, and at the direction of the court, the request is granted as modified. The court will extend the deadline for filing the opening brief by 7 days, and will extend the other dates outlined in our order of December 30, 2013 by a corresponding amount. The new



deadline for filing the opening brief and appendix is February 3, 2014. The deadline for the response brief is February 25, and any reply shall be filed on or before March 4, 2014.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 29, 2014

Elisabeth A. Shumaker  
Clerk of Court

DEREK KITCHEN, individually, et al.,

Plaintiffs - Appellees,

v.

GARY R. HERBERT, in his official  
capacity as Governor of Utah, et al.,

Defendants - Appellants,

and

SHERRIE SWENSEN, in her official  
capacity as Clerk of Salt Lake County,

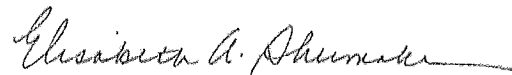
Defendant.

No. 13-4178  
(D.C. No. 2:13-CV-00217-RJS)

**ORDER**

This matter is before the court to set the date and time for oral argument. The court will hear argument on Thursday April 10, 2014 at 10:00 am at the Byron White United States Courthouse in Denver, Colorado. The parties will receive additional information regarding the argument, including acknowledgment forms, via a separate communication.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 28, 2014

Elisabeth A. Shumaker  
Clerk of Court

MARY BISHOP, et al.,

Plaintiffs - Appellees,

and

SUSAN G. BARTON, et al.,

Plaintiffs - Appellees/Cross-  
Appellants,

v.

SALLY HOWE SMITH, in her official  
capacity as Court Clerk for Tulsa County,  
State of Oklahoma,

Defendant - Appellant/Cross-  
Appellee,

and

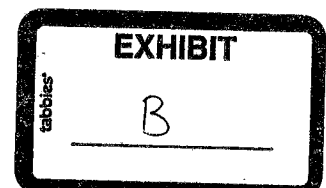
UNITED STATES OF AMERICA, ex rel.  
ERIC H. HOLDER, JR., in his official  
capacity as Attorney General of the United  
States of America,

Defendant.

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BIPARTISAN LEGAL ADVISORY  
GROUP OF THE U.S. HOUSE OF  
REPRESENTATIVES, et al.,

Intervenors-Defendants.

Nos. 14-5003 & 14-5006  
(D.C. No. 4:04-CV-00848-TCK-TLW)



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**ORDER**

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These matters are before the court on Sally Howe Smith's *Motion to Expedite Appeal*, which was filed in number 14-5003 on January 17, 2014. Since the motion was filed, we have opened cross appeal number 14-5006. The directives in this order apply in both cases.

In the motion, Ms. Smith requests an expedited briefing schedule, assignment of the cases to the same panel considering number 13-4178, *Kitchen, et al. v. Herbert, et al.*, and also asks the court to permit amicus briefs to be filed jointly in number 13-4178 and these matters. The motion notes plaintiffs consent to the requests in full.

Upon consideration, and at the direction of the court, the motion is granted. These cases will be assigned to the same panel considering number 13-4178, but the appeals will brief separately and be set for oral argument separately. The parties will be advised of the date and time for the oral argument setting in numbers 14-5003 and 14-5006 via separate order.


In addition, amicus parties may, consistent with Federal Rule of Appellate Procedure 29, file briefs jointly in all three cases. In that regard, jointly filed briefs shall be submitted electronically in these matters and number 13-4178, and shall include all three cases numbers on the brief. Counsel need only forward a total of 7 hard copies of the briefs to the clerk's office, however, consistent with 10th Circuit local rule 31.5. Unless an alternate schedule is approved via submission of a motion and upon order of

the court, any joint amicus briefs submitted shall be filed in accord with the briefing timeline in number 13-4178. *See* Fed. R. App. P. 29(e)(setting deadlines for filing amicus briefs).

These matters (numbers 14-5003 and 14-5006) will be set on a cross appeal briefing schedule. *See* Fed. R. App. P. 28.1(c). The first brief and appendix, *see* 10th Cir. R. 30, shall be filed by Ms. Smith on or before Monday February 24, 2014. The second brief and any supplemental appendix, if needed, shall be filed on or before Monday March 17. The third brief shall be filed on or before Tuesday April 1st, and the final optional reply shall be filed on or before Monday April 7, 2014. In light of the expedited nature of the schedule, requests for extension of time are discouraged.

Finally, a copy of this order shall be forwarded to all counsel of record in number 13-4178, *Kitchen, et al. v. Herbert, et al.*

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FEB 12 2014

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NATASHA N. JACKSON; et al.,

Plaintiffs - Appellants,

v.

NEIL S. ABERCROMBIE, Governor,  
State of Hawai'i,

Defendant,

LORETTA J. FUDDY, Director,  
Department of Health, State of Hawai'i,

Defendant - Appellee,

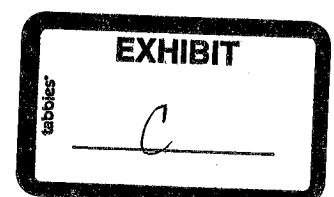
HAWAII FAMILY FORUM,

Intervenor-Defendant - Appellee.

No. 12-16995

D.C. No. 1:11-cv-00734-ACK-KSC  
District of Hawaii,  
Honolulu

ORDER



GARY BRADLEY; et al.,

Plaintiffs,

v.

NEIL S. ABERCROMBIE, Governor,  
State of Hawai'i,

Defendant - Appellant,

LORETTA J. FUDDY, Director,  
Department of Health, State of Hawai'i,

Defendant - Appellee,

HAWAII FAMILY FORUM,

Intervenor-Defendant -  
Appellee.

No. 12-16998

D.C. No. 1:11-cv-00734-ACK-KSC  
District of Hawaii,  
Honolulu

BEVERLY SEVCIK; et al.,

Plaintiffs - Appellants,

v.

BRIAN SANDOVAL, in his official  
capacity as Governor of the State of  
Nevada; et al.,

Defendants - Appellees,

COALITION FOR THE PROTECTION  
OF MARRIAGE,

Intervenor-Defendant - Appellee.

No. 12-17668

D.C. No. 2:12-cv-00578-RCJ-PAL  
District of Nevada,  
Las Vegas

ORDER

The appellants' unopposed motion to expedite calendaring of case No. 12-17668 is granted. This case will be calendared as soon as possible. Appellee Brian Sandoval's motion to withdraw the previously filed answering brief for case No. 12-17668 is granted.

The Clerk vacates the portion of the January 7, 2013 order that ordered this case to be assigned to the same panel that will consider *Jackson v. Fuddy*, case Nos. 12-16995 and 12-16698. In the event the *Jackson* cases are not dismissed, the parties may file a renewed request to have those cases assigned to the panel that will consider the above-captioned appeal.

For the Court:  
MOLLY C. DWYER  
Clerk of the Court

Teresa A. Haugen, Deputy Clerk  
9th Circuit Rules 27-7, 27-10