UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN LATTA, et al., Plaintiffs - Appellees, vs. C.L. "BUTCH" OTTER, et al., Defendants - Appellants, and STATE OF IDAHO, Defendant - Intervenor - Appellant.	)	**Nos. 14-35420 & 14-35421** D.C. No. 1:13-cv-00482-CWD U.S. District Court for Idaho, Boise

Appeal from the United States District Court for the District of Idaho
(Dale, M.J. Presiding)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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May 14, 2014

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Ninth Circuit Rule 27-3, counsel for movants state:

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2. On May 13, 2014, the United States District Court for the District of Idaho entered a Memorandum Decision and Order declaring unconstitutional Idaho's marriage laws that define marriage as between one man and one woman. The court permanently enjoined enforcement of Idaho's marriage laws, effective this Friday, May 16, 2014, at 9:00 a.m. (MDT). On May 14, 2014, the court entered judgment declaring Idaho's marriage laws unconstitutional and permanently enjoining their enforcement, effective May 16, 2014 at 9:00 a.m. (MDT). Also on May 14, 2014, the court denied the motions for stay pending appeal filed by one of the defendants, Governor Otter.

Unless the court's order and judgment are stayed before May 16, 2014, Idaho and its political subdivisions will be required to permit same-sex couples to marry, contrary to Idaho law, and before any appellate review of the district court's decision. Such a result would be contrary to the way in which the Supreme Court, this Court, and numerous other courts have handled appeals of similar decisions; the federal courts have consistently stayed enforcement of district court orders striking down state marriage laws pending appellate review. This case should be treated precisely the same to avoid unnecessary uncertainty and potential harm for all parties.

3. On May 14, 2014, I sent an e-mail to all counsel of record notifying them of this motion. I also spoke to plaintiffs' counsel, Deborah Ferguson. Ms. Ferguson told me that her clients oppose this motion. I am serving all counsel with this motion by CM/ECF at the same time I file it with the Court.

s/ W. Scott Zanzig

INTRODUCTION

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, appellants Christopher Rich and the State of Idaho move this Court for an order staying the Memorandum Decision and Order of the district court entered on May 13, 2014 (D.C. Dkt. 98) and the attendant Judgment (D.C. Dkt. 101), pending conclusion of the appeal to this Court. In similar cases involving constitutional challenges to other States' marriage laws, the Supreme Court, this Court, and a number of district courts have concluded that a decision invalidating such laws should be stayed pending appeal. This case is no different. Accordingly, this Court should stay the district court's decision in this case until this appeal is concluded.

BACKGROUND

Plaintiffs are four same-sex couples. They challenged the constitutionality of Idaho's marriage laws that limit civil marriage to a union between one man and one woman, contending that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs named Idaho's governor, C.L. "Butch" Otter, and Ada County Recorder Christopher Rich as defendants. The State of Idaho intervened as a defendant to defend its laws.

Christopher Rich and the State of Idaho moved to dismiss plaintiffs' complaint. Governor Otter and plaintiffs filed cross motions for summary judgment.

On May 12, 2014, the court notified the parties that it would issue its decision on the pending motions the following day. Governor Otter filed a contingent motion, requesting that if the court enjoined enforcement of any Idaho laws, that the effect of such a ruling be stayed pending appeal. A copy of Governor Otter's motion is attached as Exhibit A.

On May 13, 2014, the district court entered a Memorandum Decision and Order (a copy of which is attached as Exhibit B). The court determined that

Idaho's marriage laws violated the Due Process Clause by denying the plaintiff same-sex couples their fundamental right to marry. It also determined that Idaho's marriage laws violated the Equal Protection Clause. The court applied heightened equal protection scrutiny, based on its conclusion that the laws discriminated on the basis of sexual orientation. The court declared Idaho's marriage laws unconstitutional and permanently enjoined their enforcement, effective at 9:00 a.m. (MDT) on May 16, 2014.

Later on May 13, 2014, Governor Otter filed an emergency motion requesting a hearing and a stay of the district court's order. A copy of that motion is attached as Exhibit C.

On May 14, 2014, the district court entered a final judgment (a copy of which is attached as Exhibit D). The judgment declares Idaho's marriage laws unconstitutional and permanently enjoins their enforcement, effective at 9:00 a.m. (MDT) on May 16, 2014. The court also entered an order denying Governor Otter's request for a stay pending appeal. A copy of the order is attached as Exhibit E.

Following entry of the court's judgment and order on May 14, 2014, all defendants filed notices of appeal to this Court.

STANDARDS FOR STAY

A stay pending appeal is "'an exercise of judicial discretion' ... [that] 'is dependent upon the circumstances of the particular case.'" *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). "Judicial discretion in exercising a stay is to be guided by the following legal principles, as distilled into a four factor analysis in *Nken*: '(1) whether the stay applicant has made a strong showing that he 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.'" *Lair*, 697 F.3d at 1203 (quoting *Nken*, 556 U.S. at 434). The first two factors "'are the most critical.'" *Id*.

In order to establish likelihood of success on the merits, the party moving for a stay "must show that there is a 'substantial case for relief on the merits.'" *Lair*, 697 F.3d at 1204 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011)). The standard does not require the moving party to show that it is more likely than not that it will win on the merits. *Lair*, 697 F.3d at 1204. It is sufficient to show that the appeal raises "'serious legal questions,'" or that the moving party has a "'reasonable probability'" of, or "'fair prospect'" for, success. *Lair*, 697 F.3d at 1204 (quoting *Leiva-Perez*, 640 F.3d at 967-68).

The second stay factor – irreparable injury – is satisfied if the applicant shows "that there is a *probability* of irreparable injury if the stay is not granted." *Lair*, 697 F.3d at 1214. The last two stay factors require the court "to weigh the public interest against the harm to the opposing party." *Lair*, 697 F.3d at 1215 (citing *Nken*, 556 U.S. at 435). "[T]he stay inquiry is 'flexible' and involves an equitable balancing of the stay factors." *Lair*, 697 F.3d at 1215 (quoting *Leiva-Perez*, 640 F.3d at 964-66).

BASIS FOR STAY

A. The *Herbert* Stay. Earlier this year, the Supreme Court stayed a district court's decision enjoining enforcement of Utah's marriage laws pending appeal. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (mem.). The stay request had been denied by the district court (*Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013)) and by the Tenth Circuit Court of Appeals (*Kitchen v. Herbert*, No. 13-4178 (10th Cir. Dec. 24, 2013)). In granting the stay, the Supreme Court necessarily concluded that the first two (and most critical) stay factors – likelihood of success and irreparable injury -- were established. *See Packwood v. Select Comm. on Ethics*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in

chambers) ("The criteria for deciding whether to grant a stay are well established. An applicant must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed. . . . Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden.") (citation omitted). The Court's decision to issue a stay also implies that the remaining stay factors – balancing the public interest against any harm to the plaintiffs – weighed in favor of the stay.

Following the Supreme Court's stay order in *Herbert v. Kitchen*, a number of federal district courts have stayed their orders invalidating or preliminarily enjoining opposite-sex only marriage laws. *E.g.*, *Bishop v. United States ex rel. Holder*, No. 04-cv-848, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *DeLeon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014).

Similarly, in 2010 this Court stayed the district court's order invalidating California's Proposition 8 pending appeal. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010). There is no valid basis to treat this case any differently. The district court's decision invalidating Idaho's marriage laws should be stayed pending appeal.

B. The Serious Questions. The district court concluded that the Supreme Court has implicitly overruled its summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972). Exhibit B at 19. It relied principally upon *United States v. Windsor*, 133 S. Ct. 2675 (2013). *Id.* at 18. Neither *Windsor* nor any other Supreme Court decisions, however, have discussed (much less overruled)

Baker. Plainly enough, the Supreme Court will be asked to review, and likely will review, lower court decisions addressing the validity of same-sex marriage prohibition. In so doing, it *per force* will revisit *Baker*. But that reassessment is a task committed to the Supreme Court, not the lower courts. The determination that *Baker* no longer embodies binding precedent raises a substantial question and, standing alone, warrants a stay.

The district court also blazed new constitutional trails on two other issues. First, it concluded that the entitlement to same-sex marriage is a fundamental right for Due Process Clause purposes. Exhibit B at 22-23. It reached this holding despite the fact that only 42 years ago in *Baker* the Supreme Court rejected precisely that contention and that the first judicial recognition of possible entitlement to such a right occurred in a different context—sex discrimination—under a *state* constitution. The stringent standards reiterated in *Washington v. Glucksburg*, 521 U.S. 702 (1992), counsel strongly against such a radical reconstruction of the civil marital institution. Second, the Court determined that homosexuals are a suspect classification for equal protection analysis purposes. *Id.* at 35-36. Once again, it relied upon *Windsor*. And, once again, it did so even though the majority opinion in *Windsor* did not address the suspect classification doctrine in its substantive analysis or, for that matter, use the term "suspect classification." In short, the district court's suspect classification holding is at best questionably moored on *Windsor*.

C. The Harm. Plaintiffs and other same-sex couples would suffer harm if a stay was not granted and they proceeded to marry during the pendency of a successful appeal. If Idaho's appeal is successful, their marriages would be deemed invalid, at the very least prospectively, because they were entered into without statutory authorization. None of the parties' interests, nor those of non-party same-sex couples, are served by the manifold complications attendant to such

"de-marriage." It cannot be forgotten, moreover, that the interests of persons or entities other than the same-sex couples themselves—*e.g.*, employers, commercial actors such as retailers, and creditors—will be affected. In short, absent a stay marriages would be entered into under a cloud of potential impermanence that has quite significant practical consequences if the district court got it wrong.

Finally, "it is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[i]t also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury")). The Supreme Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), reaffirmed the importance of the federal judiciary giving wide sway to the electoral process in matters of public policy. *Id.* at 1637 ("It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this.").

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CONCLUSION

For the foregoing reasons, this Court should grant a stay of the district court's Memorandum Decision and Order and judgment pending conclusion of Defendants' appeal to this Court. If the Court denies the requested stay, it should grant a stay for the period of time necessary for appellants to seek a stay from Circuit Justice Kennedy or the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 14, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/W. Scott Zanzig
W. SCOTT ZANZIG