

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

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

Plaintiffs-Appellees,

v.

GARY R. HERBERT, in his official  
capacity of Governor of Utah; and  
BRIAN L. TARBET, in his official  
capacity as Acting Attorney General of  
Utah,

Defendants-Appellants.

No. 13-4178

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**PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR  
EXTENSION OF TIME TO FILE DEFENDANTS-APPELLANTS'  
OPENING BRIEF**

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Plaintiffs-Appellees Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge (collectively, "Plaintiffs" or "Plaintiffs-Appellees"), by and through their counsel of record, respectfully submit this Opposition to State Defendants-Appellants' ("State Defendants") Motion for Extension of Time to File Defendants-Appellants' Opening Brief [Dkt. No. 10142016] ("Motion" or "Mot.").

## INTRODUCTION

The State Defendants' Motion requesting an extension of time to file their opening brief fails even to mention the showing that Tenth Circuit Local Rule 27.4 requires for an extension of time to file a brief or the Court's previous order in this case that "[r]equests for extension of time are very strongly discouraged, and *will be considered only under extraordinary circumstances.*" Dec. 30, 2013, Order [Dkt. No. 10136661] ("Scheduling Order") at 1-2 (emphasis added). There are no extraordinary circumstances here. Granting of the Motion will result in a schedule giving the State Defendants more time (by one day) to file their brief than is ordinarily provided under the Federal Rules of Appellate Procedure. Such a result would run contrary to this Court's earlier determination that the briefing in this case should be expedited.

Meanwhile, each day that this appeal continues, the three sets of plaintiff couples are experiencing immediate and irreparable injury from being denied the right to marry or from having their marriages recognized by the State of Utah. There are thousands of other same-sex couples in Utah in similar situations, including not only those who still await the opportunity to be married or who were validly married elsewhere before this litigation began, but also more than 1,300 same-sex couples who obtained marriage licenses in Utah following issuance of

the District Court's judgment, but whose marriages Utah officials are refusing to recognize while this appeal is pending.

The duration of this appeal may have dramatic consequences on the lives of Plaintiffs and other Utah same-sex couples and their children. For some, the length of the appeal may result in their being denied any relief. For example, it is undisputed that Plaintiff-Appellee Karen Archer is suffering from two serious illnesses. Dec. 20, 2013, Mem. Decision and Order [Dkt. No. 90 in the District Court] ("Order") at 5-6. Plaintiffs respectfully request that their families not be asked to wait any longer than necessary for due consideration of their constitutional claims and that the Court deny the State Defendants' Motion.

## **ARGUMENT**

### **I. THE STATE DEFENDANTS' MOTION DOES NOT COMPLY WITH TENTH CIRCUIT RULE 27.4.**

This Court, in its Local Rules, has made clear that "[e]xtensions of time to file briefs are disfavored." 10th Cir. R. 27.4(A), 31.4. In addition, the Court's Scheduling Order in this case states that "[r]equests for extension of time are very strongly discouraged, and *will be considered only under extraordinary circumstances.*" Scheduling Order at 1-2 (emphasis added).

The State Defendants omit from their Motion *any* discussion of the Scheduling Order or of Local Rule 27.4, which provides that a motion for an extension of time "*must* establish that *it will not be possible* to file the brief on

time, even if the party exercises due diligence and gives priority to preparing the brief.” 10th Cir. R. 27.4(C) (emphases added). The State Defendants’ Motion does not state, much less establish, that it will not be possible for them to file their brief on time.

Nor have Defendants argued that any of the reasons listed in Local Rule 27.4 as possible justifications for an extension of time apply here. *See* 10th Cir. R. 27.4(D) (listing (1) scheduling conflict from other litigation, (2) “facts demonstrating” that “the case is so complex that an adequate brief cannot reasonably be prepared by the due date,” and (3) “extreme hardship” to counsel). By requesting an extension without even suggesting that they meet Local Rule 27.4’s requirements, the State Defendants essentially ask this Court to bend the rules for them. That would not contribute to the “orderly” disposition of this case of great public importance. *Cf. Hollingsworth v. Perry*, 558 U.S. 183, 196-97 (2010) (holding, in a challenge to California’s ban on marriage by same-sex couples, that a district court order regarding broadcast of trial proceedings did not “compl[y] with existing [court] rules or policies” and explaining that “the lack of a regular rule . . . could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments”).

**II. THE STATE DEFENDANTS' PROFFERED REASONS FOR AN EXTENSION ARE NOT EXTRAORDINARY AND DO NOT SATISFY TENTH CIRCUIT RULE 27.4.**

The State Defendants' Motion seeks to justify its request for an extension based on (1) the Supreme Court's stay of the District Court judgment, (2) the Attorney General's expansion of the legal team handling the appeal, and (3) the pendency of a case regarding Oklahoma's marriage statutes. None of those circumstances satisfies Tenth Circuit Rule 27.4's requirements or otherwise justifies an extension of time.

A. The Supreme Court's Issuance of a Temporary Stay Provides No Reason to Extend the Briefing Schedule.

The State Defendants' reliance on the Supreme Court's issuance of a temporary stay of the District Court's judgment while this appeal is pending before this Court is misplaced. Mot. at 3. The Supreme Court did not provide any reasons for its issuance of a stay, and there may not have been concurrence by a majority of Justices in any particular reason for the stay. Rather than provide support for the State Defendants' Motion, the existence of a stay of the District Court's judgment actually provides reason for this Court to proceed with the existing expedited schedule in this appeal, given that the District Court concluded that the challenged Utah laws violate Plaintiffs' constitutional rights and impose serious harms to Plaintiffs and other same-sex couples, and given that more than a thousand same-sex couples have married in reliance upon the District Court's

judgment and await a final judicial determination regarding the validity of Utah's marriage laws.

B. The Expansion of the State Defendants' Legal Team Does Not Justify an Extension of the Briefing Schedule.

The Utah Attorney General's adding of more lawyers to the State Defendants' legal team, *see* Mot. at 3-4, does not warrant extending the deadline for the filing of their opening brief. The Utah Attorney General's office fully defended this case in the District Court and will be limited on appeal to arguments that it preserved in the District Court. Moreover, the State Defendants filed their Notice of Appeal invoking this Court's jurisdiction on the same day that the District Court entered judgment in this case (December 20, 2013), and the parties have been on notice since December 24, 2013, that the briefing schedule would be expedited. *See* Dec. 24, 2013, Order Denying Emergency Motion for Stay [Dkt. No. 10135767] at 2 ("[W]e direct expedited consideration of this appeal."). The State Defendants therefore had no reasonable basis to delay work on their opening brief while they searched outside the state of Utah for help in defending the challenged state measures. Nor have the State Defendants identified in their Motion any reason why the State Defendants' legal team cannot complete briefing on the merits within the current schedule.

The State Defendants' hiring of outside counsel to handle their appeal is a matter within their discretion. However, the decision as to how to staff an appeal

is one that every appellant must make and is not extraordinary. This Court's Scheduling Order "very strongly discouraged" motions for extensions, Scheduling Order at 2, and the hiring of additional lawyers does not justify the filing or the granting of such a motion.

C. The Pendency of the *Bishop* Case Concerning Oklahoma Marriage Laws Provides No Basis for This Court to Extend The Briefing Schedule in This Challenge to Utah's Marriage Laws.

The State Defendants' invocation of the recent decision in *Bishop v. U.S. ex rel. Holder*, No. 04-cv-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014), *see* Mot. at 4-5, does not support their request for an extension of time. Unlike the present case, which was filed on March 25, 2013, and proceeded straight to summary judgment, *Bishop* was filed more than nine years ago, has a complex procedural history, and does not yet have a fully certified record on appeal. Moreover, the equal protection and due process standards of review that Plaintiffs-Appellees contend that the Court should apply in this case call for the Court to consider the particular legislative histories of the challenged Utah marriage laws, the history of marriage regulation in Utah since statehood (including Utah's history of recognizing marriages from other jurisdictions), the actual interests asserted by the State Defendants, and the actual intent underlying the challenged Utah marriage laws. *Cf. United States v. Windsor*, 133 S.Ct. 2675, 2689 (2013) ("[T]he *design, purpose, and effect* of DOMA [the federal Defense of

Marriage Act] should be considered as the beginning point in deciding whether it is valid under the Constitution.”) (emphasis added); *id.* at 2693 (examining “[t]he history of DOMA’s enactment,” including a House Report, “[t]he stated purpose of the law,” and “the title of the Act . . . The Defense of Marriage” in order to determine the actual purpose of DOMA). The judicial inquiry this case warrants will be specific to Utah’s laws in many ways, and the *Bishop* case concerning Oklahoma’s marriage laws should have no effect on the briefing schedule that this Court has already ordered in this case.

Moreover, this case and the *Bishop* case present several distinct issues. This case includes a viable (and thus far successful) challenge to Utah’s refusal to recognize the marriage of a same-sex couple who legally married in another state; in contrast, the district court in *Bishop* ruled that the plaintiffs in that case lacked standing to bring such a claim under Oklahoma’s distinctive statutory and constitutional scheme. The *Bishop* case also included in the district court a challenge to both sections of the federal Defense of Marriage Act and named the United States as a defendant, while this case exclusively challenges Utah laws and names only state and local defendants.

In sum, *Bishop* and *Kitchen* involve challenges to different statutory and constitutional schemes; the cases present certain distinctive issues; and the

procedural histories of the two cases are worlds apart. The pendency of an appeal in *Bishop* provides no basis for delaying the resolution of this case.

**III. THE HARMS EXPERIENCED BY PLAINTIFFS-APPELLEES AND OTHER SAME-SEX COUPLES WARRANT DENIAL OF THE STATE DEFENDANTS' EXTENSION REQUEST.**

The scheduling preferences of the State Defendants pale in comparison to the real and continuing harms that Plaintiffs and other same-sex couples and families are experiencing in Utah while this appeal continues. Indeed, the State Defendants themselves have publicly acknowledged these harms. Days before the State Defendants filed their Motion seeking an extension, Defendant-Appellant Sean D. Reyes, Attorney General of Utah, issued an "Official Statement" describing as "very difficult" and "untenable" the "situation in which many of [Utah]'s citizens find themselves" pending final resolution of this litigation. *See* Utah Attorney General Sean D. Reyes Official Statement (Jan. 8, 2014), <http://attorneygeneral.utah.gov/2014/01/08/utah-attorney-general-sean-d-reyes-official-statement/>.

Utah's continued enforcement of its discriminatory marriage laws while this appeal continues is inflicting on Utah same-sex couples and their families both dignitary and practical harms that are deeply personal and also of constitutional dimension. As the Supreme Court affirmed in *United States v. Windsor*, 133 S.Ct. 2675 (2013), marriage is a status of "immense import." *Id.* at 2692. In addition to

subjecting same-sex couples and their children to profound legal and economic vulnerability and harms, Utah's discriminatory marriage laws stigmatize same-sex couples' relationships as inferior and unequal, "demean[ing] the couple[s], whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). In *Windsor*, the Supreme Court highlighted as of particular importance that the federal government's refusal to recognize the valid marriages of same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and that "the law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S.Ct. at 2694. To such children, there can be no meaningful difference between the harm visited by the federal government's former disregard of their parents' marriage and the state of Utah's continuing disregard of their parents' marriages. As the District Court concluded below, "[i]n contrast to the State's speculative concerns, the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed." Order at 50.

The Attorney General of the United States has recognized the harmful and untenable position in which Utah same-sex couples and their families find themselves until this Court rules. The U.S. Attorney General announced on January 10, 2014, that despite the state of Utah's refusal to recognize same-sex

couples' legal marriages until this Court rules, the federal government will recognize the legality of those marriages. U.S. to Recognize Utah Gay Marriages Despite State Stance, [http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html?\\_r=0](http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html?_r=0) (quoting Attorney General's statement that "[t]hese families should not be asked to endure uncertainty regarding their status as the litigation unfolds").

### CONCLUSION

For the reasons discussed above, Plaintiffs-Appellees request that the Court deny the State Defendants' Motion.

DATED this 18th day of January, 2014.



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## CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 850, Salt Lake City, Utah 84101, and that a true and correct copy of the foregoing **PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR EXTENSION OF TIME TO FILE DEFENDANTS-APPELLANTS' OPENING BRIEF** was delivered to the following this 18<sup>th</sup> day of January, 2014, via the Court's CM/ECF system:

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