

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

December 24, 2013

FOR THE TENTH CIRCUIT

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)

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

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

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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

A handwritten signature in black ink, reading "Elisabeth A. Shumaker". The signature is written in a cursive style with a long, sweeping underline.

ELISABETH A. SHUMAKER, Clerk