UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN LATTA; et al., Plaintiffs - Appellees, v. C. L. OTTER, "Butch"; Governor of the State of Idaho, in his official capacity, Defendant - Appellant, and CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity, Defendant, STATE OF IDAHO, Intervenor-Defendant.	No. 14-35420 D.C. No. 1:13-cv-00482-CWD District of Idaho, Boise ORDER

SUSAN LATTA; et al., Plaintiffs - Appellees, v. C. L. OTTER, "Butch"; Governor of the State of Idaho, in his official capacity,	No. 14-35421 D.C. No. 1:13-cv-00482-CWD District of Idaho, Boise

AT/MOATT

Defendant,

and

CHRISTOPHER RICH, Recorder of Ada County, Idaho, in his official capacity,

Defendant - Appellant,

STATE OF IDAHO,

Intervenor-Defendant - Appellant.

Before: LEAVY, CALLAHAN, and HURWITZ, Circuit Judges.

Appellants' motions to stay the district court's May 13, 2014 order pending appeal are granted. *See Herbert v. Kitchen*, 143 S.Ct. 893 (2014).

The court sua sponte expedites the briefing and calendaring of these appeals. The previously established briefing schedule is vacated. The opening brief(s) are due June 19, 2014; the answering brief(s) are due July 18, 2014; and the optional reply brief(s) are due within 14 days after service of the answering brief(s). The provisions of Ninth Circuit Rule 31-2.2(a) (pertaining to grants of time extensions) shall not apply to these appeals.

These appeals shall be calendared during the week of September 8, 2014, at The James R. Browning Courthouse in San Francisco, California.

HURWITZ, Circuit Judge, concurring:

I concur in the order granting the stay pending appeal. But I do so solely because I believe that the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays in the circumstances before us today. If we were writing on a cleaner state, I would conclude that application of the familiar factors in *Nken v. Holder*, 556 U.S. 418, 434 (2009), counsels against the stay requested by the Idaho appellants.

Under *Nken*, we consider a stay application under a four-factor test: "(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." *Id*. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) (internal quotation marks omitted). I do not think the Idaho appellants have made a strong case on any of these grounds.

It is almost certain that the Supreme Court will eventually resolve the merits of this appeal, and I do not venture to predict the Court's ultimate conclusion. But, in light of this court's recent decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), I find it difficult to conclude that the Idaho ban on same-sex marriage would survive interim Ninth Circuit review.

SmithKline applied "heightened scrutiny to classifications based on sexual orientation for purposes of equal protection." *Id*. at 484. Given that high burden, it is difficult to see how the Idaho appellants can make a "strong showing" that they will prevail in their defense of a measure that denies the individual appellees the right to marry because of their sexual orientation.

Nor have the Idaho appellants demonstrated that they will be irreparably harmed without a stay. The irreparable harm justifying a stay must be posed to the parties seeking a stay, not to others. *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011). Any harm resulting from the possible invalidity of marriage licenses issued *pendente lite* to same-sex couples would be primarily suffered by the plaintiffs, not the State.

In contrast, the issuance of a stay undoubtedly poses harm to the plaintiffs. Deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And, as the district court noted, from "the deathbed to the tax form, property rights to parental rights," marriage "provides unique and undeniably important protections." *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999, at *2 (D. Idaho May 13, 2014).

The public interest question is somewhat closer, but without guidance from a higher court, I would not find that it justified a stay. But it seems evident that the Supreme Court harbors a different view. Just five months ago, a district court enjoined the State of Utah from enforcing its prohibition on same-sex marriage. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013). The district court denied the State's motion for a stay pending appeal, *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013), and the next day, two judges of the Tenth Circuit did the same, *Kitchen v. Herbert*, No. 13-4178 (10th Cir. Dec. 24, 2013).

On January 6, 2014, the Supreme Court granted the State's application for a stay pending the disposition of the appeal in the Tenth Circuit. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014). Although the Supreme Court's terse two-sentence order did not offer a statement of reasons, I cannot identify any relevant differences between the situation before us today and *Herbert*. And, although the Supreme Court's order in *Herbert* is not in the strictest sense precedential, it provides a clear message—the Court (without noted dissent) decided that district court injunctions against the application of laws forbidding same-sex unions should be stayed at the request of state authorities pending court of appeals review.

For that reason, I concur in the court's order today granting a stay pending resolution of this appeal.