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

| | |
|---|---|
| JONELL EVANS, individually; STACIA IRELAND, individually; MARINA GOMBERG, individually; ELENOR HEYBORNE, individually; MATTHEW BARRAZA, individually; and KARL FRITZ SHULTZ, individually,<br><br>Plaintiffs - Appellees,<br><br>v.<br><br>STATE OF UTAH, GARY R. HERBERT, in his official capacity as Governor of Utah, and SEAN D. REYES, in his official capacity as Attorney General of Utah,<br><br>Defendants – Appellants, | **No. 14-4060** |

**STATE DEFENDANTS – APPELLANTS' MOTIONS FOR STAY PENDING APPEAL AND TEMPORARY STAY PENDING RESOLUTION OF MOTION TO STAY**

---

Utah State Defendants Governor Gary R. Herbert and Attorney General Sean D. Reyes ("Defendants"), through undersigned counsel, and pursuant to 28 U.S.C. § 1292(a)(1), Fed. R. App. P. 8, and 10th Cir. R. 8.1, move this Court for a stay pending appeal of the district court's order granting Plaintiffs' preliminary injunctive relief, and a temporary stay of that order pending resolution of the Defendants' present motion to stay.

## INTRODUCTION AND SUMMARY

### I. Proceedings in this Matter

Plaintiffs are four same-sex couples who received marriage licenses and had their marriages solemnized in Utah between December 23, 2013 and January 6, 2014. The marriages occurred during the period after the district court issued its injunction in *Kitchen v. Herbert*, ___F. Supp.2d ___, 2013 WL 6834634 (D. Utah Dec. 23, 2013), and before the United States Supreme Court issued its order staying the district court's injunction, pending appeal ("interim marriages").

Plaintiffs in this case sought legal recognition of their interim marriages pursuant to the due process clauses of the United States and Utah Constitutions, and an order requiring that Defendants recognize those marriages and certain attendant rights. *See* Compl. at 31. (Attached as Exhibit 1.)

The district court order granting Plaintiffs' motion for preliminary injunction appropriately details facts and the parties' legal positions. Memorandum Decision and Order ("Order" or "Op.") dated May 19, 2014 at 2–8 (A copy of the Order is attached hereto as Exhibit 2.) For the purpose of this motion and these proceedings, Defendants generally accept the district court's apt characterization of the facts, except as otherwise noted.[1]

## II. The Posture of the Present Case on This Appeal and Stay Request

After briefing and argument, the district court granted Plaintiffs' motion for preliminary injunction and denied the parties' motions for certification of issues to the Utah Supreme Court. The decision enjoins Defendants from applying Utah's same-sex marriage bans, contained in Article I, § 29 of the Utah Constitution, Utah Code § 30-1-2, and § 30-1-4.1 to Plaintiffs' or any other same-sex marriages that were entered into and solemnized between December 20, 2013 and January 6, 2014. Op. at 34.

Responding to the Defendants' request that any injunction be stayed pending appeal, the district court denied the stay, but in its discretion stayed

[1] Defendants object to the district court's characterization of the State's motion to certify a question to the Utah Supreme Court. Op. at 33 & n.5. Rather than seek to delay, State Defendants were notifying the district court that a matter of clarification on Utah law, from the state's highest court, and of direct relevance to the matters at issue in this case, was pending.

enforcement of the preliminary injunction for twenty-one days. Order at 34. That temporary stay expires Monday, June 9, 2014 at 11:59 p.m.

### III. Parallel and Independent Proceedings in Utah State Courts

While the federal case was pending, a number of same-sex couples filed petitions for step-parent adoptions in Utah state district court. Under Utah law, the state is not a party in these actions, though in nine cases, the district court notified the Attorney General of his right to be heard pursuant to local rules, because the constitutionality of a state statute was at issue. The Attorney General filed briefs in each case in which he was notified, setting out legal analysis that due to the stay issued by the United States Supreme Court, Utah law was currently in effect and prevented the State from recognizing same-sex marriages or granting state benefits to those marriages. *See, e.g.,* Attorney General's Position on Constitutionality of State Law Regarding Petitioner's Adoption. (Attached as Exhibit 3.)

Nonetheless, the Utah Department of Health, Office of Vital Statistics was subsequently presented with four orders from district court judges requiring the Department to issue amended birth certificates identifying the same-sex couple as parents of the child on the certificate. *See, e.g.,* Petition for Extraordinary Relief, Utah Department of Health v. Stone (Attached as Exhibit 4.)

On April 7, 8, and 10, 2014, the Department of Health petitioned the Utah Supreme Court for emergency relief in the four cases, and followed with petitions for extraordinary relief. The issue presented to the Utah Supreme Court is: Is the Department of Health required to comply with an order issued in an adoption proceeding that requires the Department to violate Utah statutory law and the Utah Constitution, both of which forbid the State from recognizing same-sex marriage?[2] No hearing has been set on the petitions for extraordinary relief.

## SUBJECT MATTER JURISDICTION

As this action alleges violation of rights arising under the Fourteenth Amendment of the Constitution, the district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) (authorizing appeal of non-final preliminary injunction).

## THIS COURT SHOULD STAY THE DISTRICT COURT'S INJUNCTION ORDER PENDING APPEAL

The Court should stay pending appeal the district court's order mandating that Defendants immediately recognize the interim marriages, an

[2] The Department has been served with two orders to show cause as to why it should not be found in contempt for failing to comply with the adoption orders. Although the Utah Supreme Court has entered a per curiam order staying all proceedings related to the petitions for extraordinary relief, the order to show cause hearings are still set for June 16, 2014. (Attached as Exhibit 5.)

action which is contrary to current and presumptively constitutional Utah laws. To the extent that a resolution of this motion cannot be completed before the temporary stay deadline of June 9, the Court should continue the stay until such time as this motion can be resolved.

The importance of granting a stay pending appeal in this matter of such profound societal importance is self-evident. Furthermore, the question of whether the interim marriages must be recognized under Utah law even if *Kitchen* is reversed is currently pending before the Utah Supreme Court. A stay will allow that court to rule on critical state law issues. As set out below, Defendants' request satisfies all factors justifying a stay.

## I. LEGAL STANDARD

Defendants' request is governed by Federal Rule of Appellate Procedure 8, and Tenth Circuit Rule 8.1. To be entitled to a stay, the movant must first show that this Court has jurisdiction over the appeal, and that the issue was presented to the district court. Fed. R. App. P. 8(a)(1), (2)(A)(i).[3]

Next, the movant must show: (1) a likelihood of success on appeal, (2) a 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

[3] Jurisdiction is established, *see supra,* page 4, and the motion was presented to and considered by the district court. The district court denied the stay pending appeal but granted a 21-day stay in order for the Defendants to present their claims to this Court. Op. 28–30, 34.

public interest. 10th Cir. R. 8.1(B)-(E); *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). In reviewing the factors, this Court "makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (per curiam).

If there is a showing that the three "harm" factors "tip decidedly" in favor of the movant, the "probability of success" requirement may be "somewhat relaxed." *Mainstream Mktg.*, 345 F.3d at 852. In those circumstances "probability of success is demonstrated when the petitioner seeking the stay has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Id.* (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246–47 (10th Cir. 2001)).

## II. LIKELIHOOD OF SUCCESS ON THE MERITS

The district court reached its merits conclusion based on an analysis of federal due process. The district court also determined that the marriage rights permanently vested under Utah state law. The district court's analysis of likelihood of success on the merits is erroneous because: (1) the district court incorrectly interpreted and applied *Elwell v. Byers*, 699 F.3d 1208 (10th Cir. 2012), and *United States v. Windsor*, 133 S. Ct. 2675 (2013); (2) the court incorrectly interpreted Utah state law to mean that Plaintiffs'

marriages would be valid if *Kitchen* is overturned, even though Utah law declares marriages void if prohibited under Utah law; (3) the district court incorrectly determined that staying recognition of Plaintiffs' marriages until *Kitchen* is decided is tantamount to retroactive application of the law; and (4) the district court erroneously determined that the legal status of Plaintiffs' marriages is independent of *Kitchen,* and independent of the petition for extraordinary relief pending before the Utah Supreme Court.

### A. The District Court Incorrectly Applied *Elwell*, *Windsor*, and Other Federal Decisions

This Court in *Elwell v. Byers*, 699 F.3d 1208 (10th Cir. 2012), rejected a district court's determination that Kansas statutes created a liberty interest in a foster parent/child relationship. The Court held instead that under the facts in that case, where the foster child had lived with the family since birth and had never known any other family, there was a liberty interest under the Federal Due Process Clause. The court ruled that interest was not clearly established for purposes of qualified immunity—noting that both the Tenth Circuit and the United States Supreme Court had avoided resolving that question in prior cases. *Elwell* neither examined nor held that once a couple is lawfully married, that marriage is protected by federal substantive due process. Yet looking only to dicta the district court here reached that exact conclusion. *See* Op. at 13–14 (citing *Elwell* (quoting *Cleveland Bd. of*

*Education v. LaFleur*, 414 U.S. 632, 639–40 (1923) and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

This dicta begs the question of whether a liberty interest in same-sex marriages solemnized during the interim period vests permanently, even if this Court determines there is no liberty interest in same-sex marriages, overruling *Kitchen*. Moreover, it is plain that the freedom of choice to marry is not unlimited, as states may regulate, prohibit, and invalidate certain types of marriage (e.g., first cousins; marriage to someone under 16; and, as is directly at issue in the *Kitchen* case, same-sex marriage). Insofar as the district court relied upon *Elwell, Cleveland*, and *Meyer*, none of those cases addresses the question of whether a marriage entered into under the authority of a federal court injunction—that is later stayed pending appeal and could be reversed—is protected by federal substantive due process.

The existence and nature of a liberty interest in same-sex marriage is a much-debated topic and is directly related to the proceedings in the *Kitchen* appeal. If *Kitchen* is upheld, then the couples in this case would have vested rights in their marriages that could not be taken away. Yet, if the district court's decision in *Kitchen* is reversed, then under current Utah statutory law, such marriages may be "void." Utah Code Ann. § 30-1-2.

*Elwell* does not support the district court's conclusion that once Plaintiffs were married, they acquired liberty interests under the Substantive

Due Process Clause. The district court's citation to *Windsor* is no more supportive of its conclusion. The district court's error in relying on *Windsor* is twofold. First, it assumes that the interim marriages were irrevocably vested—an open question that is likely to be answered as a matter of Utah law by the Utah Supreme Court. And second, it overlooks that the Supreme Court in *Windsor* was addressing a situation where the federal government had refused to recognize valid *state* marriages, not whether all states must be required to recognize same-sex marriage. *Windsor*, 133 S. Ct. at 2692–93. The district court's legal conclusion is erroneous, as no appellate court has applied the rule of *Windsor* to the states.

### B. The District Court's State Law Analysis Is Erroneous

#### 1. The District Court Incorrectly Applied Utah Law

The district court incorrectly interpreted Utah state law to create a vested property interest in Plaintiffs' interim marriages.

Plaintiffs' right to marry was not created by state law; indeed, state law (both statutory and constitutional) prohibited their marriages. Rather, Plaintiffs' right to marry was created by a suspension of state law, which was mandated by a *non-final* federal district court opinion, *Kitchen v. Herbert,* ___ F. Supp. 2d ___, 2013 WL 6697874 (D. Utah Dec. 20, 2013), which has been stayed, ___ S. Ct. ___, 2014 WL 30367 (Jan. 6, 2014), and is currently on appeal. *Kitchen v. Herbert*, No. 13-4178. The very fact that Plaintiffs' right

to marry in Utah was created by a non-final order means Plaintiffs' rights in their marriages have not vested, and thus are not entitled to due process protection. *Plyler v. Moore,* 100 F.3d 365, 374 (4th Cir. 1996) (holding no due process violation because plaintiffs did not have vested property interest in rights created by non-final consent decree); *Gavin v. Branstad*, 122 F.3d 1081, 1091 n.10 (8th Cir. 1997) ("If the right is not vested—that is, if the judgment is not final—it is not a property right, and due process is not implicated . . . .").

But if *Kitchen* is reversed, the same-sex marriages entered into only by virtue of the temporary enforcement of *Kitchen* (prior to the Supreme Court stay) will be void under Utah law.[4] This is because section 30-1-2, which is currently in effect, declares certain marriages "void," including marriage "between persons of the same sex." Utah Code § 30-1-2(5).

Under the plain language of the statute and Utah case law interpreting it, Plaintiffs' marriages are "invalid from [their] inception" and "void ab initio." *State v. Chaney*, 989 P.2d 1091, 1096, 1999 UT App 309, ¶ 24. In such

[4] Defendants have repeatedly stated that the validity of Plaintiffs' and other same-sex couples' marriages performed in Utah prior to the stay will ultimately be determined in the *Kitchen* appeal. Defendants are not trying to void Plaintiffs' marriages pending appeal. Rather, Defendants argument shows that Plaintiffs' marriages cannot be recognized under the current state of the law, and, if *Kitchen* is reversed, the marriages will be void under Utah law. Whether the interim marriages are ultimately found to be void could depend on any number of actions, including, for example, the scope of a remand in *Kitchen* itself, or state action if the *Kitchen* decision is overturned.

cases, the marriage is void ab initio even if the marriage were recognized and believed to be valid for many years. *See, e.g., Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah Ct. App. 1991) (marriage performed when wife's divorce was not finalized was void ab initio, even though couple was married for years and legally divorced; Utah law declares marriage to more than one person void).

Plaintiffs' marriages are analogous to the marriage in *Van Der Stappen*. Once it was finally determined that the marriage was not lawful, it was void, even though the marriage had been recognized for years, and the couple enjoyed the benefits of marriage, and were even formally divorced for a time. Here, the legal basis for Plaintiffs' marriage—the *Kitchen* injunction—has been suspended. If *Kitchen* is overturned, then Plaintiffs' marriages would have been based on an erroneous, temporary legal ruling—a legal error. Although, as the district court recognized, the marriages were lawful when entered, Op. at 22–23, if *Kitchen* is reversed, then the legal basis for the marriage will have been in error.

### 2. The District Court's Retroactivity Analysis Is Erroneous

The district court incorrectly determined that the rule against retroactive application of the law was present in this instance. The district court found that the "only" case to consider the direct issue was the California

Supreme Court's decision in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). But *Strauss* is inapposite. Unlike California's Proposition 8, enacted in reaction to a decision from the California Supreme Court, the Utah statutes at issue here were enacted *prior* to the interim marriages.

More importantly, under Utah and federal law concerning retroactivity, the prohibition does not apply. As the district court noted, Op. 16–17, under Utah law, "Constitutions, as well as statutes, should operate prospectively only unless the words employed show a clear intention that they should have a retroactive effect." *Shupe v. Wasatch Elec. Co.*, 546 P.2d 896, 898 (Utah 1976). But the district court failed to recognize relevant United States Supreme Court law which requires a common-sense approach:

> The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment. This judgment should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

*Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (citations and quotations omitted).

The presumption against retroactivity may be overcome by "explicit statements that the statute should be applied retroactively or by *clear and unavoidable implication that the statute operates on events already past*."

*Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997) (emphasis added).

Under both federal and state law, the district court's retroactivity conclusions are unfounded. First, unlike *Strauss*, the provisions at issue here were not passed in reaction—they were presumed to apply to all same-sex marriages. The drafters and ratifiers had no reason to think that they should add a provision making retroactive application explicit because they had no reason at the time to envision any court striking the provision. However, the language of the Utah Constitution and relevant statute[5] use the term "recognize," which demonstrates that the statute operates on events already past as well as events contemplated in the future. To "recognize" means "to acknowledge formally: as . . . to admit as being of a particular status." Merriam-Webster.com, "Recognize," http://www.merriam-webster.com/dictionary/recognize (last visited June 4, 2014). This plain language, coupled with the common-sense context that those who passed the provisions would not have had a reason for addressing retroactivity, leads to

[5] *See* Utah Const. art. I, § 29(2) ("No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); Utah Code Ann. § 30-1-4.1(1)(a) ("It is the policy of this state to recognize as marriage only the legal union of a man and a woman . . . ."); *id.* § 30-1-4.1(1)(b) ("[T]his state will not recognize, enforce, or give legal effect to any law creating any legal status [to same-sex marriages or unions].").

the "clear and unavoidable implication that the statute operates on events already past." *Evans & Sutherland*, 953 P.2d at 437 (emphasis added).

The district court's analysis is also incorrect because the ban against retroactive application of a law does not apply when, as here, the judicial decision giving rise to the asserted rights is not final. "[T]he vested rights doctrine provides that '[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment.'" *Plyler,* 100 F.3d at 374 (quoting *McCullough v. Virginia*, 172 U.S. 102, 123 (1898)). However, the doctrine applies "only when a *final* judgment has been rendered." *Id.* (emphasis added).

The *Kitchen* order, which gave Plaintiffs the right to marry in Utah, is not final, and therefore their right to marry has not vested. If *Kitchen* is reversed, the legal effect is that the judgment never existed. "To 'reverse' a judgment means to 'overthrow, vacate, set aside, make *void*, annul, repeal, or revoke it.'" *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) (quoting *Black's Law Dictionary* 1319 (6th ed. 1990)) (emphasis added). A judgment reversed by a higher court is "'without any validity, force or effect, and ought never to have existed.'" *Id.* (quoting *Butler v. Eaton,* 141 U.S. 240, 244 (1891)). Because the validity of Plaintiffs' marriages was based on the *Kitchen* decision which is not final and may be reversed, the rule barring retroactive application of the law does not apply to Plaintiffs' marriages.

### III. The Balance of Harms Favors Entering the Stay

If a stay pending appeal is not granted, the State will be irreparably harmed. The State will be required to "recognize" marriages that are plainly prohibited by Utah law. Such recognition, even for a short time, would render this appeal, which presents novel and difficult questions of federal constitutional law, moot. And the Supreme Court has already conducted the balancing in a nearly identical situation, by granting the stay pending appeal in the *Kitchen* litigation.

In deciding to stay the *Kitchen* decision, the Supreme Court necessarily decided that the balance of harms favors the State. *Cf. Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curium) (when ruling on stay, court must consider "likelihood that irreparable harm will result *from the denial of a stay*") (emphasis added)). If a stay is not issued, Utah would suffer the irreparable harm of being forced to suspend its laws as to Plaintiffs' marriages and the other interim marriages. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). That is, if the district court's injunction is not stayed, Defendants would be required to act as if its laws were no longer in effect. But, as set out above, the Supreme Court's stay put the parties back to where they were before

*Kitchen*: Utah's laws are in effect.

The Supreme Court also "balance[s] the so-called 'stay equities'" when deciding whether to issue a stay. *San Diegans for Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). No doubt the Supreme Court recognized that the validity of marriages performed after *Kitchen* but before it issued the stay would likely be called into question, and probably "put on hold" if *Kitchen* was stayed. Nonetheless, the Court concluded a stay was necessary.

Beyond the considerations of the *Kitchen* stay, the State will suffer irreparable harm if this Court does not grant a stay pending appeal because the appeal will be moot, and this Court will be deprived of the opportunity to review the critical and novel constitutional issues presented. *Garrison v. Hudson,* 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) ("When . . . the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted." (citation and internal quotation marks omitted)).

In this case, approximately 1300 couples seek to have their marriage "recognized" by the State of Utah. That recognition may exist in any number of ways—from the grant of same-sex adoptions to the provision of health care benefits, and many others. If the stay is not granted, a large number of the 1300 couples will seek recognition of their marriages while the case is on

appeal. The recognition may interfere with the Utah Supreme Court's state law determinations pending before it, and the denial of a stay will "frustrate the jurisdiction of the appellate court, and, necessarily the Supreme Court." *Townley v. Miller*, 693 F.3d 1041, 1043 (Reinhardt, J., concurring); *see also McClendon v. City of Albuquerque*, 49 F.3d 1014, 1022 (10th Cir. 1996) (granting a stay pending appeal when a district court's order demanding release of state inmates and prison population caps "will interfere with . . . state judicial power").

This high degree of irreparable harm tilts in favor, and itself could be sufficient for the Court to grant a stay. *See In re Bart*, 82 S. Ct. 675, 675 (1962) (Warren, C.J., Circuit Justice) (granting motion to stay execution of contempt citation, in part because "the normal course of appellate review might otherwise cause the case to become moot by the petitioner serving the maximum term of commitment before he could obtain a full review of his claims"); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., Circuit Justice) (granting stay pending certiorari petition in a FOIA case because "disclosure would moot that part of the Court of Appeals' decision [and] create an irreparable injury").

### IV. Plaintiffs Will Not Be Irreparably Harmed by A Stay

If this Court stays the district court injunction, Plaintiffs will not suffer irreparable harm. First, for the reasons articulated above, they have not

demonstrated a substantial likelihood of success on the merits. Second, they have several means of otherwise protecting their asserted interests. For example, a Plaintiff-partner can draft a medical directive to participate in the other partner's medical decisions, execute a power of attorney for legal decisions, or create other enforceable documents to protect private and public rights. Although Utah law does not allow the State to recognize same-sex marriages. Utah law does not preempt "contract or other rights, benefits, or duties that are enforceable independently" of same-sex marriage rights. Utah Code Ann. § 30-1-4.1(2). If *Kitchen* is upheld, Plaintiffs will have access to rights attendant to marriage in Utah. Indeed, as set out below, Plaintiffs would suffer more harm if a stay is not issued, and the district court and *Kitchen* are both reversed.

### V. A Stay Pending Appeal Does Not Harm the Public Interest

Finally, issuing a stay would serve Utah's interest in enforcing its laws and the public's interest of having certainty and clarity in the law. Currently, requiring Utah to recognize Plaintiffs' marriages is specifically prohibited by the Utah Constitution and its laws. Utah Const. art. I, § 29. Declining to issue a stay would upset the status quo imposed by the Supreme Court stay and threaten "the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments." *Hollingsworth*, 558 U.S. at 197. Once *Kitchen* is fully resolved, Defendants and Plaintiffs

will know the status of the interim marriages. Until then, requiring Defendants to recognize Plaintiffs' marriages and provide marital benefits is premature and unwarranted.

It is possible, if this Court does not issue a stay, that this Court may nonetheless conclude that the district court erred and the injunction must be reversed; if *Kitchen* is also subsequently reversed, Plaintiffs' marriages will technically be void under Utah law. How will the State and Plaintiffs address the problems such a scenario would create? Neither Plaintiffs nor the State should be subjected to this possibility. Plaintiffs, Defendants, and the public are best served if a stay is issued so that the complex, important legal issues surrounding this case and *Kitchen* can be resolved, fully and finally.

## CONCLUSION

For the foregoing reasons, this Court should grant a stay pending its decision to enter a stay, and a stay pending disposition of this appeal.

Dated this 5th day of June, 2014.

Respectfully submitted,

s/ Parker Douglas
PARKER DOUGLAS
Federal Solicitor & Chief of Staff
JONI J. JONES
KYLE J. KAISER
Assistant Utah Attorneys General
Office of the Utah Attorney General
350 N. State Street, Ste. 230
Salt Lake City, Utah 84114
801-366-0100 (phone)
pdouglas@utah.gov

## ECF CERTIFICATIONS

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;

2. hard copies of the foregoing motion required to be submitted to the clerk's office are exact copies of the brief as filed via ECF; and

3. the brief filed via ECF was scanned for viruses with the most recent version of Microsoft Security Essentials v. 4.5.216.0, and according to the program is free of viruses.

s/ Parker Douglas

## CERTIFICATE OF SERVICE

I hereby certify that on the 5th of June, 2014, a true, correct and complete copy of the foregoing Motion to Stay Pending Appeal was filed with the Court and served on the following via the Court's ECF system:

s/ Parker Douglas

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

| | |
|---|---|
| JONELL EVANS, individually;<br>STACIA IRELAND, individually;<br>MARINA GOMBERG, individually;<br>ELENOR HEYBORNE, individually;<br>MATTHEW BARRAZA, individually;<br>and<br>KARL FRITZ SHULTZ, individually,<br><br>Plaintiffs - Appellees,<br><br>v.<br><br>STATE OF UTAH, GARY R. HERBERT, in his official capacity as Governor of Utah, and SEAN D. REYES, in his official capacity as Attorney General of Utah,<br><br>Defendants – Appellants, | **APPENDIX OF EXHIBITS**<br><br>**No. 14-4060** |

1. Complaint, Case No. 2:14-cv-55, January 21, 2014
2. Memorandum Decision and Order, Case No. 2:14-cv-55, May 19, 2014
3. Attorney General's Position on Constitutionality of State Law Regarding Petitioners' Adoption, Case No. 132900582, February 24, 2014
4. Petition for Extraordinary Relief, Case No. 20140272, April 9, 2014
5. Department of Health v. Stone, et al., Per Curiam Order, Case No's. 20140272-SC; 20140280-SC; 20140281-SC; 20140292-SC

# Exhibit 1

# Complaint

Erik Strindberg (Bar No. 4154)
Lauren I. Scholnick (Bar No. 7776)
Kathryn Harstad (Bar No. 11012)
Rachel E. Otto (Bar No. 12191)
**STRINDBERG & SCHOLNICK, LLC**
675 East 2100 South, Ste. 350
Salt Lake City, UT 84106
Telephone: (801) 359-4169
Facsimile: (801) 359-4313
erik@utahjobjustice.com
lauren@utahjobjustice.com
kass@utahjobjustice.com
rachel@utahjobjustice.com

John Mejia (Bar No. 13965)
Leah M. Farrell (Bar No. 13696)
**ACLU of Utah**
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9862
Facsimile:
jmejia@acluutah.org
lfarrell@acluutah.org

Joshua A. Block*
**ACLU LGBT Project**
125 Broad Street, Floor 18
New York, New York, 10004
Telephone: (212) 549-2593
Facsimile: (212) 549-2650
jblock@aclu.org

*Attorneys for Plaintiffs*

**Pro hac vice* motion to follow

**IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH**
**SALT LAKE COUNTY, WEST JORDAN DEPARTMENT*

| | |
|---|---|
| **JONELL EVANS, STACIA IRELAND, MARINA GOMBERG, ELENOR HEYBORNE, MATTHEW BARRAZA, TONY MILNER, DONALD JOHNSON**, and **CARL FRITZ SHULTZ,**<br><br>Plaintiffs,<br><br>vs.<br><br>**STATE OF UTAH, GOVERNOR GARY HERBERT**, in his official capacity; and **ATTORNEY SEAN REYES**, in his official capacity,<br><br>Defendants. | **COMPLAINT**<br><br>**TIER 2**<br><br>Case No.<br><br>Judge |

Plaintiffs JoNell Evans, Stacia Ireland, Marina Gomberg, Elenor Heyborne, Matthew Barraza, Tony Milner, Donald Johnson and Carl Fritz Shultz (collectively referred to as the

"Plaintiffs") by and through their undersigned attorneys, hereby file this Complaint against the State of Utah, Governor Gary Herbert ("Governor Herbert") and Attorney General Sean Reyes ("Attorney General Reyes") (Defendants will collectively be referred to as "Defendants" or "State of Utah"):

**NATURE OF THE CLAIMS**

1. Plaintiffs are four same-sex couples who were legally married in Utah between December 20, 2013, and January 6, 2014, the period from the day a federal district court in *Kitchen v. Herbert* enjoined Utah from enforcing its statutory and constitutional bans on allowing same-sex couples to marry to the day that injunction was stayed pending appeal. The moment Plaintiffs solemnized their marriages in accordance with Utah law, they immediately obtained vested rights in the validity and recognition of their marriages under Utah law. Those vested rights are protected by the Due Process Clauses of the Utah and United States Constitutions and must be recognized regardless of the ultimate outcome of the *Kitchen* litigation.

2. In violation of those constitutional protections, the State of Utah has unilaterally decided to place recognition of these valid marriages "on hold." By retroactively stripping Plaintiffs' marriages of legal recognition, the State of Utah has put these couples and their families in legal limbo and prevented legally married same-sex couples from accessing critical protections for themselves and their children.

3. Plaintiffs seek to have the Court declare that their valid marriages must be given immediate and ongoing recognition by the State of Utah and grant all injunctive relief necessary to ensure that recognition.

**BACKGROUND FACTS**

4. In 1977, the Utah Legislature amended Section 30-1-2 of the Utah Code to "prohibit[] and declare[] void" marriages "between persons of the same sex" (the "Marriage Limitation Statute").

5. In 2004, the Utah Legislature added Section 30-1-1.4 to the Utah Code, which reads "the policy of this state [is] to recognize as marriage only the legal union of a man and a woman," and "this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties [to same sex-couples] that are substantially equivalent to those provided under Utah law to a man and woman because they are married" (the "Marriage Recognition Statute").

6. Also in 2004 the Utah Legislature passed a "Joint Resolution of Marriage" proposing to amend the Utah Constitution by adding Article I, Section 29, to read: "(1) Marriage consists of only the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

7. This proposed amendment, known as "Amendment 3," was on the ballot in the November 2, 2004 general election. Amendment 3 passed and became effective on January 1, 2005.

8. On March 25, 2013, three same-sex couples living in Utah filed a lawsuit in the Federal District Court for the District of Utah against Governor Gary Herbert, then-Utah Attorney General John Swallow, and Salt Lake County Clerk Sherrie Swensen, all acting in their

official capacities. *See Kitchen v. Herbert*, 2:13-cv-217 RJS (D. Utah) (referred to herein as *Kitchen*).

9. The plaintiffs in *Kitchen* asserted that Amendment 3 and the Marriage Limitation and Recognition Statutes violated the Equal Protection and Due Process Clauses of the U.S. Constitution. The plaintiffs sought declaratory relief that Amendment 3 and the Marriage Limitation and Recognition Statutes are unconstitutional under the Constitution. The parties filed cross-motions for summary judgment.

10. On December 20, 2013, the U.S. District Court in *Kitchen* denied the defendants' motion for summary judgment, granted plaintiffs' motion for summary judgment, and issued a permanent injunction barring Utah officials from enforcing Amendment 3 and the Marriage Limitation and Recognition Statutes. (Attached as Ex. A).

11. The Memorandum Decision and Order by the *Kitchen* court concluded as follows:

> The court hereby declares that Amendment 3 is unconstitutional because it denies the Plaintiffs their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The court hereby enjoins the State from enforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex.

12. The county clerks for Salt Lake County and Washington County began to issue marriage licenses to same-sex couples that same day, in accordance with the *Kitchen* court's injunction. Many same-sex couples promptly obtained marriage licenses and solemnized their marriages that same day.

13. Governor Herbert and the acting Utah Attorney General then filed motions with the U.S. District Court and with the U.S. Court of Appeals for the Tenth Circuit to stay the district court's order, pending appeal.

14. On December 22, 2013, the U.S. Court of Appeals for the Tenth Circuit denied Governor Herbert and the acting Utah Attorney General's motion for a stay without prejudice for failing to "meet the requirements of the Federal or local appellate rules."

15. On December 23, 2013, Governor Herbert and the acting Utah Attorney General filed a second motion to stay the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit denied the second motion the same day.

16. On December 23, 2013, the U.S. District Court also denied defendants' motion for a stay of the December 20 injunction. The District Court stated in its written Order denying the motion that "The court's Order [of December 20] specifically mentioned Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution. The court's Order also applies to any other Utah laws that prohibit same-sex couples from marrying."

17. On December 23, 2013, following the U.S. District Court's denial of a stay, Governor Herbert and the acting Utah Attorney General filed a third motion with the U.S. Court of Appeals for the Tenth Circuit to stay the district court's order.

18. As of December 23, 2013, officials in seven counties in Utah had either closed their offices or were publicly refusing to issue marriage licenses to same-sex couples, while officials in the other 22 counties publicly stated that they would. (*See* Utah counties split on issuing same-sex marriage licenses, Salt Lake Trib., Dec. 23, 2013, accessible at http://www.sltrib.com/sltrib/news/57302939-78/counties-county-couples-issuing.html.csp.)

19. On December 24, 2013, Governor Herbert's office sent an email to his cabinet with the following directive: "Where no conflicting laws exist you should conduct business in compliance with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court." (Attached as Ex. B.)

20. Also on December 24, 2013, a spokesman for the Utah Attorney General's Office publicly stated that county clerks who did not issue licenses could be held in contempt of the court and the law. (*See* Denying same-sex marriage licenses illegal, says A.G. office, Salt Lake Trib., Dec. 24, 2013, accessible at http://www.sltrib.com/sltrib/news/57306295-78/county-sex-marriage-office.html.csp.)

21. Later that day, also on December 24, 2013, the U.S. Court of Appeals for the Tenth Circuit for the third time denied Governor Herbert and the acting Utah Attorney General's motion for a stay.

22. By December 26, 2013, officials in 28 of Utah's 29 counties stated that they would issue marriage licenses to same-sex couples. (*See* Same-sex couples shatter marriage records in Utah, Salt Lake Trib., Dec. 26, 2013, accessible at http://www.sltrib.com/sltrib/mobile/57310957-68/marriages-sex-county-total.html.csp.)

23. An official in Piute County, the one county that was not making public statements on December 26, 2013 about whether it would issue licenses, later stated that the county had decided to issue same-sex licenses on December 24, 2013, but had received no applications. (Utah issues hundreds of marriage licenses to gay couples, Associated Press, Dec. 28, 2013, accessible at http://www.krextv.com/story/utah-issues-hundreds-of-marriage-licenses-to-gay-couples-20131228.)

24. Governor Herbert and Attorney General Reyes waited until December 31, 2013 to file a request for a stay of the district court's order with the U.S. Supreme Court.

25. Between December 20, 2013 and January 6, 2014, it is estimated that over 1,300 same sex couples were issued Utah marriage licenses. (Same-sex couples denied Utah marriage licenses in court order's wake, Salt Lake Trib., Jan. 6, 2014, accessible at http://www.sltrib.com/sltrib/news/57357867-78/county-marriage-couple-sex.html.csp.)

26. While there are no reported counts of how many of those granted licenses solemnized their marriages before January 6, 2014, on information and belief, over 1,000 same-sex couples solemnized their marriages before that date. It is reported that all but seven counties in Utah issued at least one marriage license to a same-sex couple during that period. (*Id.*)

27. On January 6, 2014, the United States Supreme Court ruled on Governor Herbert and Attorney General Reyes's motion in *Kitchen* and issued the following Order:

> "The application for stay presented to Justice Sotomayor and by her referred to the Court is granted. The permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13-cv-217, on December 20, 2013, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit."

28. The Supreme Court's Order staying the *Kitchen* court's decision did not address the legal status of the marriages that same-sex couples entered into in Utah between December 20, 2013, and January 6, 2014.

29. That same day, January 6, 2014, Attorney General Reyes issued a statement that reads in part, "Utah's Office of Attorney General is carefully evaluating the legal status of the marriages that were performed since the District Court's decision and will not rush to a decision that impacts Utah citizens so personally." (Attached as Ex. C.)

30. On January 8, 2014, Governor Herbert's chief of staff issued an email to the Governor's cabinet members instructing them to refuse to grant recognition to same-sex couples married pursuant to Utah marriage licenses (the "Directive"). (Attached as Ex. D.)

31. The Directive begins by stating that soon after the December 20, 2013 injunction, "this office sent an email to each of you soon after the district court decision, directing compliance" with that order. (*Id.*)

32. The Directive explained that the Supreme Court had stayed the *Kitchen* order and stated that "[b]ased on counsel from the Attorney General's Office regarding the Supreme Court decision, state recognition of same-sex marital status is ON HOLD until further notice." (*Id.*)

33. The Directive then stated that its recipients should "understand this position is not intended to comment on the legal status of those same-sex marriages – that is for the courts to decide. The intent of this communication is to direct state agency compliance with current laws that prohibit the state from recognizing same-sex marriages." (*Id.*)

34. The Directive went on to give the following instruction to state agencies:

> Wherever individuals are in the process of availing themselves of state services related to same-sex marital status, that process is on hold and will stay exactly in that position until a final court decision is issued. For example, if a same-sex married couple previously changed their names on new drivers licenses, those licenses should not be revoked. If a same-sex couple seeks to change their names on drivers licenses now, the law does not allow the state agency to recognize the marriage therefore the new drivers licenses cannot be issued. (*Id.*)

35. On January 9, 2014, Attorney General Reyes issued a letter to county attorneys and county clerks which states that he seeks to provide "legal clarification about whether or not to mail or otherwise provide marriage certificates to persons of the same sex whose marriage

ceremonies took place between December 20, 2013 and January 6, 2014, prior to the issuance of the stay by the U.S. Supreme Court." (Attached as Ex. E.)

36. Attorney General Reyes continued that "[a]lthough the State of Utah cannot currently legally recognize marriages other than those between a man and a woman, marriages between persons of the same sex were recognized in the state of Utah between the dates of December 20, 2013 until the stay on January 6, 2014. *Based on our analysis of Utah law, the marriages were recognized at the time the ceremony was completed*." (*Id.*, emphasis added.)

37. Attorney General Reyes further indicated that the State of Utah would not challenge the validity of those marriages for the purposes of recognition by the federal government or other states, nonetheless "the validity of the marriages in question must ultimately be decided by the legal appeals process presently working its way through the courts." (*Id.*)

38. Attorney General Reyes also explained that "the act of completing and providing a marriage certificate for all couples whose marriage was performed prior to the morning of January 6, 2014, is administrative and consistent with Utah law" and "would allow, for instance, same-sex couples who solemnized their marriage prior to the stay to have proper documentation in states that recognize same-sex marriage." (*Id.*)

39. On January 15, 2014, the Utah State Tax Commission issued a notice stating that same-sex couples "may file a joint return if they [were] married as of the close of the tax year" for 2013 because "[a]s of December 31, 2013, the Supreme Court had not yet issued its stay of the District Court's injunction." (Attached as Ex. F.)

40. The notice further states: "This notice is limited to the 2013 tax year. Filing information for future years will be provided as court rulings and other information become available." (*Id.*)

## PLAINTIFFS

**Marina Gomberg and Elenor Heyborne**

41. Plaintiffs Marina Gomberg and Elenor Heyborne were both born and raised in Utah. Ms. Gomberg was raised in a Jewish family in Ogden, and Ms. Heyborne comes from an LDS family in Salt Lake City.

42. Ms. Gomberg and Ms. Heyborne met nine years ago through mutual friends, and have been in a committed relationship ever since.

43. Ms. Gomberg and Ms. Heyborne both work in communications and Ms. Heyborne is a State employee.

44. Ms. Gomberg and Ms. Heyborne had a commitment ceremony in May 2009 but the State did not recognize their union or afford them any of the rights of married couples.

45. For the last couple of years they have been contemplating having a baby, but they are worried about protecting their family because the State will only allow one of them to be a legal parent to any children they have together. They had hoped being legally married would resolve this concern.

46. Within an hour of learning of the *Kitchen* decision, Ms. Gomberg and Ms. Heyborne rushed to the Salt Lake County building to obtain their marriage license and solemnized their marriage that same day. They were thrilled that their State was finally going to sanction their union and recognize their marriage.

47. Although they have supportive and loving family and friends, once they were legally married, Ms. Gomberg and Ms. Heyborne realized how anxious they had been in what the State considered a second-class relationship. The disadvantageous tax status, lack of guaranteed hospital visitation, and inability to both be legal guardians of their future children had created an enormous emotional weight, which was lifted by their legal marriage.

48. The State's refusal to continue to recognize their marriage raises again all their concerns and anxiety.

49. Despite the fact that Ms. Gomberg and Ms. Heyborne feel disregarded and insulted by the State, it rankles them when people suggest they move elsewhere. They are committed to their community in Utah – they have jobs, family, and friends here. They are hoping to raise a family in the State they grew up in and continue to love.

**Matthew Barraza and Tony Milner**

50. Plaintiffs Matthew Barraza and Tony Milner have been in a committed and loving relationship for nearly 11 years.

51. Mr. Barraza is an attorney and Mr. Milner is the executive director of a non-profit organization serving homeless families.

52. Mr. Barraza and Mr. Milner are lifelong Utahns. Mr. Milner was born and raised in an LDS family in West Jordan. Mr. Barazza, one of six siblings, was born in California but his family, who are also LDS, moved to Ogden when he was one year old.

53. In 2007, Mr. Barraza and Mr. Milner held a religious commitment ceremony officiated by their pastor, Erin Gilmore of Holladay United Church of Christ, and have since referred to themselves as husbands and married. But this commitment was not recognized by the

State of Utah.

54. Mr. Barraza and Mr. Milner had been contemplating starting a family when, in 2009, a struggling couple they knew who were expecting a baby approached them and asked if they would consider adopting the child. Mr. Barraza and Mr. Milner were overjoyed by the prospect of welcoming a child into their family. They attended all of the birth mother's prenatal appointments with her and attended the birth, where Mr. Milner got to cut their son's umbilical cord.

55. Their son, "J.," is now four years old. Although Mr. Barraza and Mr. Milner have raised J. from birth, only one of them was able to adopt J. and establish legal parentage under Utah law. Mr. Barraza is the adoptive parent, which means that Mr. Milner is treated as a legal stranger to their son, and if something were to happen to Mr. Barraza, J. could potentially be placed in foster care.

56. In 2010, Mr. Barraza and Mr. Milner traveled to Washington, D.C., to get married. Although they were legally married in D.C., Amendment 3 prevented them from having their marriage recognized in Utah.

57. Even though that marriage was not recognized by the State, they chose to remain in Utah where they have tremendous family and community support. They want to continue to live, work and raise their son here.

58. When they heard that Amendment 3 was ruled unconstitutional, Mr. Barraza and Mr. Milner were thrilled to finally have all of the legal protections that come with marriage. Most importantly, their marriage would allow Mr. Milner to establish legal parentage with J. through a second-parent adoption. They wanted to give J. the security of having two legal

parents, and they wanted the peace of mind knowing that if something were to happen to Mr. Barraza, J. would have another legally recognized parent who could care and provide for him.

59. On December 20, 2013, Mr. Barraza and Mr. Milner obtained a Utah marriage license and were married by Pastor Tom Nordberg of Holladay United Church of Christ that same day.

60. Immediately after Christmas, on December 26, 2013, Mr. Barraza and Mr. Milner initiated proceedings in the court for Mr. Milner to adopt their son. They received a hearing date of January 10, 2014.

61. On January 9, 2014, however, the court contacted Mr. Barraza and Mr. Milner and informed them that because of the stay in *Kitchen*, and because of Governor Herbert's and Attorney General Reyes's announcements to State agencies to not recognize same-sex marriages, the court had decided that it should provide notice of the adoption proceedings to the Attorney General's office so that the Attorney General could intervene.

62. Faced with the potential that the State could attempt to thwart J.'s adoption, Mr. Barraza and Mr. Milner requested that the court continue the hearing to January 31, 2014.

63. At this point, Mr. Barraza and Mr. Milner will have to put the proceedings completely on hold until they are sure that Mr. Milner can adopt J. without State interference.

64. The State's refusal to recognize their legal marriage has again destroyed the peace of mind they would have received by providing J. two legal parents.

**JoNell Evans and Stacia Ireland**

65. Plaintiffs JoNell Evans, 61 years old, and Stacia Ireland, 60 years old, have been in a committed relationship for 13 years.

66. Ms. Ireland taught math to junior high and high school students for 30 years before semi-retiring. She now works part-time at a community college helping students with disabilities.

67. Ms. Evans is an artist and a human resources director for a non-profit organization.

68. Ms. Evans and Ms. Ireland have lived in Utah their entire adult lives. Their home is located on property in West Valley City that has been in Ms. Evans's family for generations. Much of their family lives in the same neighborhood.

69. In 2007, Ms. Evans and Ms. Ireland affirmed their commitment with a religious marriage ceremony at the Unitarian Church in Salt Lake City. But their commitment was not recognized by the State of Utah.

70. In 2008, Ms. Evans and Ms. Ireland had wills and medical powers of attorney drawn up. They knew other same-sex couples who had been treated as legal strangers by hospitals, and they wanted to ensure this would not happen to them, should either of them be hospitalized.

71. In 2010, Ms. Ireland suffered a heart attack. Before they left for the hospital, Ms. Evans scrambled to locate a copy of Ms. Ireland's power of attorney. With documents in hand, the hospital tolerated Ms. Evans's insistence that she stay by Ms. Ireland's side during her treatment, but the hospital did not treat Ms. Evans like it would a spouse. As Ms. Evans describes it, "It felt like I wasn't even in the room."

72. On December 20, 2013, Ms. Evans learned of the *Kitchen* decision. She rushed to the Salt Lake County building and called Ms. Ireland to meet her there. After standing in line for

a few hours, the couple received their marriage license, and Salt Lake City Mayor Ralph Becker solemnized their marriage. They were surrounded by other couples and friends, all there to celebrate the right of same-sex couples to finally marry. The only downside to the whirlwind wedding was that their families could not make it there to witness their ceremony.

73. On January 1, 2014, Ms. Evans again had to rush Ms. Ireland to the emergency room because Ms. Ireland was experiencing severe chest pains. Prior to their visit, Ms. Ireland had informed the hospital that she had married Ms. Evans and during their stay in the hospital, Ms. Evans was afforded all the courtesies and rights given to the married spouse of a patient. For example, the hospital allowed Ms. Evans to sign paperwork for Ms. Ireland and consulted with her on all aspects of Ms. Ireland's treatment.

74. On the day after Governor Herbert directed State agencies to no longer recognize the marriages of same-sex couples in Utah, Ms. Ireland had to return to the hospital for a follow-up procedure. Once again, they had to face uncertainty and anxiety that the hospital would treat Ms. Evans like a non-entity instead of a spouse.

75. Ms. Evans and Ms. Ireland now worry that during any future emergency hospital visits, and even during routine care, they will no longer be afforded the same protections as other married couples.

**Donald Johnson and Carl Fritz Shultz**

76. Plaintiffs Donald Johnson and Carl Fritz Shultz met in 1992, and have been "best friends and partners" for over 21 years.

77. Mr. Johnson was born and raised in Utah, attended the University of Utah, and has taught special education high school juniors and seniors in the same school district for 37

years.

78. Mr. Shultz was raised in southern Idaho and attended Idaho State University. He came to Utah to begin his career in retail sales.

79. Mr. Johnson and Mr. Shultz started dating around Labor Day in 1992. After having to spend Thanksgiving apart that year, they both realized that they wanted to spend their lives together. When Mr. Shultz returned from his family trip, Mr. Johnson proposed to him. They have celebrated the Sunday after Thanksgiving as their anniversary ever since.

80. Mr. Johnson and Mr. Shultz have been a vital and important part of their close-knit neighborhood for many years. They describe themselves as the "neighbors who lend a hand" when it is needed. They love taking care of their neighbors' dogs, and keeping an eye on neighbors' houses when they go on vacation. Mr. Johnson and Mr. Shultz are always pitching in to shovel neighbors' walks and mow lawns.

81. On the Saturday morning after the *Kitchen* decision, Mr. Johnson and Mr. Schultz were sitting at breakfast when Mr. Shultz reached over the table, took Mr. Johnson's hand, and suggested they get married.

82. Mr. Johnson and Mr. Shultz had been considering going to California to marry, but were elated to be able to marry in their home state.

83. On December 22, 2013, Mr. Johnson got up at midnight, put on a suit, and went to stand in line at the Salt Lake County building at 2 a.m. Mr. Shultz joined him at 6 a.m. They finally got their marriage license at around 10 a.m. on December 23, 2013, and solemnized their marriage immediately.

84. For Mr. Johnson, being able to stand in front of his classroom of high school

juniors and seniors and tell them that he had married his partner of 21 years over the holidays and that "yes, indeed, [he] was a gay man" meant he no longer had to hide who he is and made him immensely proud and happy. When he told them, Mr. Johnson's students burst into applause for him.

85. Now that the State of Utah has refused to continue to recognize same-sex marriages, Mr. Johnson and Mr. Shultz feel that they have again been relegated to second-class citizenship in their own state.

86. Mr. Johnson is 61 years old, and Mr. Shultz is 58 years old. Mr. Johnson researched insurance coverage for himself and Mr. Shultz and discovered that they could have access to savings of approximately $8,000 per year on health insurance that they will lose without State recognition of their marriage.

**FIRST CAUSE OF ACTION**
**(*Deprivation of Plaintiffs' Property and Liberty Interests without Due Process in Violation of the Utah Constitution*)**

87. Plaintiffs reallege and incorporate by reference the allegations set forth above.

88. After the December 20, 2013 *Kitchen* ruling, Plaintiffs and other same-sex couples were legally permitted to marry in the State of Utah.

89. To perfect that legal right, Plaintiffs completed each step required by the state of Utah under Utah Code Title 30 Chapter 1: They acquired valid marriage licenses from a county clerk and solemnized their marriages before an authorized person who then returned the license and marriage certificate to the county clerk. Upon information and belief, the county clerk then filed and preserved the license and certificate.

90. The validity of those marriages was contemporaneously recognized by the State of Utah as evidenced by an email from Governor Herbert's office to his cabinet dated December 24, 2013, in which his office directed them to comply "with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court." The State of Utah's contemporaneous recognition of these marriages is further evidenced by a statement made by the Attorney General's Office that same day warning county officials that denying same sex couples marriage licenses could constitute contempt of the court and the law.

91. The validity of those marriages, including Plaintiff's marriages at the time they were solemnized, was further recognized by the State of Utah in another email from Governor Herbert's office to his cabinet dated January 8, 2014, in which his office stated, in part, "[a]fter the district court decision was issued on Friday, December 20th, some same-sex couples availed themselves of the opportunity to marry and to the status granted by the state to married persons. This office sent an email to each of you soon after the district court decision, directing compliance."

92. The validity of those marriages, including Plaintiffs' marriages, was also recognized and acknowledged the next day when Attorney General Reyes directed the county clerks to provide a marriage certificate to all couples whose marriage was performed between December 20, 2013, and January 6, 2014.

93. Further recognition of those marriages, including Plaintiffs' marriages, occurred on January 15, 2013, when the Utah State Tax Commission issued a notice that same-sex couples could file as married for the 2013 tax year if they were married as of December 31, 2013.

94. By properly availing themselves of their legal right to marry and completing the necessary steps to solemnize their marriages, Plaintiffs – like any legally married different-sex couples – acquired certain property and liberty interests under Utah law attendant upon and arising from their marriages.

95. Those interests are fundamental and encompass a panoply of rights. These interests have been described by the U.S. Supreme Court, in discussing the liberty interest protected by the U.S. Constitution, as the right to establish a home, raise children, and enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

96. Plaintiffs' vested rights in the recognition of their marriages do not depend on the ultimate outcome of the *Kitchen* litigation in federal court. Whether or not the U.S. District Court's decision in *Kitchen* is ultimately affirmed, Plaintiffs obtained vested rights in the validity and recognition of their marriages once those marriages were solemnized in accordance with Utah law.

97. Article I, Section 7 of the Utah Constitution guarantees that "[n]o person shall be deprived of life, liberty or property, without due process of law." Because those liberty and property interests and rights vested once the Plaintiffs were married, they are subject to the protections of Article 1, Section 7 and thereafter, the State of Utah could not interfere with those rights, or otherwise interfere in the Plaintiffs' marriages.

98. Nonetheless, on January 7, 2014, Governor Herbert, on advice of Attorney General Reyes, directed his Cabinet to place "on hold" recognition of same-sex marriages,

including those of Plaintiffs, who had already completed the legal requirements required by the State of Utah and therefore were validly married under then-existing law.

99. By taking this action, and retroactively stripping Plaintiffs' marriages of legal recognition, the State of Utah acted without legal authority and deprived Plaintiffs, and all other same-sex couples who had been legally married, of those liberty and property rights and interests protected by Article 1, Section 7 of the Utah Constitution.

100. By placing recognition of their marriages "on hold," the State of Utah has placed the legal status of all same-sex married couples, including Plaintiffs and their families and children, in legal limbo and created uncertainty as to their rights and status in virtually all areas of their lives. For example, they may be unable to obtain health insurance for their spouses and children, may not be able to make medical decisions about their spouses and family members if the need arises, may not complete stepparent adoptions to protect the legal status of their families, and if the biological parent of their child or children dies, may not be able to retain custody of their children, who may be placed into foster care.

101. This uncertainty leaves Plaintiffs in a constant state of insecurity and uncertainty that is emotionally devastating. And because their marriages are valid and must be recognized regardless of the outcome of the *Kitchen* appeal, and because the Directive is indefinite in nature, this state of insecurity may last for years.

102. The State of Utah's actions also imposed immediate dignitary harm on married same-sex couples and their families, including Plaintiffs, by creating second-class marriages in Utah that do not enjoy the rights and privileges of different-sex marriages. Like the law struck down in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the State of Utah's decision to place

same-sex couples' marriages "on hold" "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2694. "By this dynamic [the Governor's Directive] undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of [Utah's] recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. . . .And it humiliates [the] children now being raised by same-sex couples." *Id.*

103. As a result, Plaintiffs have been injured and are entitled to declaratory, injunctive, and equitable relief as set forth in the Prayer for Relief.

**SECOND CAUSE OF ACTION**
**(*Deprivation of Plaintiffs' Property and Liberty Interests Protected by The United States Constitution in Violation of 42 U.S.C. § 1983 – Against Defendants Governor Herbert and Attorney General Reyes*)**

104. Plaintiffs reallege and incorporate by references the paragraphs set forth above.

105. After the December 20, 2013, ruling Plaintiffs were legally permitted to marry in Utah.

106. To perfect that legal right, Plaintiffs completed each step required by the State of Utah under Utah Code Title 30 Chapter 1: They acquired valid marriage licenses from a county clerk; solemnized their marriages before an authorized person who then returned the license and marriage certificate to the county clerk; and, upon information and belief, the county clerk then filed and preserved the license and certificate.

107. The validity of those marriages, including Plaintiffs' marriages, was recognized by the State of Utah as evidenced by an email from Governor Herbert's office to his cabinet

dated December 24, 2013, in which his office directed them to comply "with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court." It was further evidenced by a statement made by the Utah Attorney General's Office that same day that warned county clerks denying same sex couples marriage licenses could constitute contempt of the court and the law.

108. The validity of those marriages, including Plaintiffs' marriages, at the time they were solemnized, was further recognized by the State in another email from Governor Herbert's office to his cabinet dated January 8, 2014, in which his office stated, in part, "[a]fter the district court decision was issued on Friday, December 20th, some same-sex couples availed themselves of the opportunity to marry and to the status granted by the state to married persons. This office sent an email to each of you soon after the district court decision, directing compliance."

109. Further recognition of the validity of those marriages, including Plaintiffs' marriages, also occurred the next day when Attorney General Reyes directed the county clerks to provide a marriage certificate to all couples whose marriage was performed between December 20, 2013, and January 6, 2014.

110. Further recognition of those marriages, including Plaintiffs' marriages, occurred on January 15, 2013, when the Utah State Tax Commission issued a notice that same-sex couples could file as married for the 2013 tax year if they were married as of December 31, 2013.

111. By properly availing themselves of their legal right to marry and completing the necessary steps to solemnize their marriages, Plaintiffs – like any legally married different-sex couples – acquired certain property and liberty interests under Utah law attendant upon and arising from their marriages.

112. Those interests are fundamental and encompass a panoply of rights. These have been described by the U.S. Supreme Court, in discussing the liberty interest protected by the U.S. Constitution, as the right to establish a home, raise children, and enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

113. Plaintiffs' vested rights in the recognition of their marriages do not depend on the ultimate outcome of the *Kitchen* litigation in federal court. Whether or not the U.S. District Court's decision in *Kitchen* is ultimately affirmed, Plaintiffs obtained vested rights in the validity and recognition of their marriages once those marriages were solemnized in accordance with Utah law.

114. The due process clause of the Fourteenth Amendment of the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend XIV, § 1.

115. Nonetheless, on January 7, 2014, Governor Herbert, on advice of Attorney General Reyes, directed his Cabinet place "on hold" recognition of same-sex marriages, including those of Plaintiffs and not to afford them any of the protections that the State will continue to afford to different-sex couples who were married during the same period.

116. By taking this action, and retroactively stripping Plaintiffs' marriages of legal recognition, the State of Utah acted without legal authority and deprived Plaintiffs, who had been legally married, of those liberty and property rights and interests protected by the Due Process Clause of the Fourteenth Amendment.

117. By placing recognition of their marriages "on hold," the State of Utah has placed the legal status of Plaintiffs' families, including their children, in legal limbo and created uncertainty as to their rights and status in virtually all areas of their lives. For example, they may be unable to obtain health insurance for their spouses and children, will not be able to make medical decisions about their spouses and family members if the need arises, may not complete stepparent adoptions to protect their families, and if the biological parent of their child or children dies, may not be able to retain custody of their children, who may be placed into foster care.

118. This uncertainty leaves Plaintiffs in a constant state of insecurity and uncertainty which is emotionally devastating, and which is likely to significantly and negatively impact them, their spouses, and their children in a multitude of ways. And because these marriages are valid and must be recognized regardless of the outcome of the *Kitchen* appeal, and because the Directive is indefinite in nature, this state of insecurity may last for years.

119. The State of Utah's actions also imposed immediate dignitary harm on married same sex couples and their families by creating second-class marriages that do not enjoy the rights and privileges of different-sex marriages. Like the law struck down in *United States v. Windsor*, 133 S. Ct. 2675 (2013), Utah's decision to place same-sex couples' marriages "on hold" "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2694. "By this dynamic [the Governor's Directive] undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of

[Utah's] recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. . . .And it humiliates [the] children now being raised by same-sex couples." *Id.*

120. At all times, the Defendants were acting under color of state law when committing the complained of acts. In addition, the Governor is the final policy making authority for the State of Utah and exercised that authority in violating Plaintiffs' constitutional rights.

121. As a result, Plaintiffs have been injured and are entitled to declaratory, equitable, and injunctive relief pursuant to 42 U.S.C. § 1983. Plaintiffs are also entitled to recover their attorney's fees and costs incurred in bringing this action pursuant to 42 U.S.C. § 1988.

**THIRD CAUSE OF ACTION**
***(Relief under Rule 65B)***

122. Plaintiffs reallege and incorporate by reference the paragraphs set forth above.

123. Rule 65B of the Utah Rules of Civil Procedure allows a person to seek extraordinary relief from acts involving the wrongful use of public authority, or when a governmental official has failed to perform an act required by law, "where no other plain, speedy and adequate relief is available."

124. More specifically, under subpart (c)(2)(A) of Rule 65B, relief may be granted when a government employee engages in the wrongful use of his public authority. This includes "where a person usurps, intrudes into, or unlawfully holds or *exercises* a public office . . ." (emphasis added).

125. Appropriate relief may also be granted under subpart (d)(2): "(B) where an inferior court, administrative agency, corporation, or persons has failed to perform an act required by law as a duty of office, trust or station . . . "

126. As set forth above, each of Plaintiff couples obtained marriage licenses as required by, and in conformance with, Utah Code Ann. § 30-1-7. Thereafter, each Plaintiff couple had their marriages solemnized within 30 days in front of a person authorized by statute to solemnize their marriage, and otherwise fully complied with, Utah Code Ann.§ 30-1-6.

127. Each of Plaintiffs' marriages was complete and valid and they were thereafter entitled to all of the rights, benefits and privileges afforded to married couples, as well as being subject to all obligations and responsibilities attendant upon married couples.

128. The validity of those marriages was recognized by the State of Utah as evidenced by an email from the Governor to his cabinet dated December 24, 2013; in another email dated January 8, 2014; when the Attorney General directed the county clerks to provide marriage certificates to Plaintiffs and other same-sex couples; and when the Utah State Tax Commission issued a notice that same-sex couples could file as married for the 2013 tax year if they were married as of December 31, 2013.

129. Notwithstanding that Plaintiffs have fully complied with the requirement of Utah Code Ann.§ 30-1-1, *et seq.*, and are now validly married under the laws of Utah, the State of Utah now refuses to "recognize" those marriages, or provide Plaintiffs with any of the protections and responsibilities attendant upon and to all other valid marriages.

130. By placing recognition of their marriages "on hold," the State of Utah has placed the legal status of Plaintiffs' families, including their children, in legal limbo, which creates

uncertainty as to their rights and status in virtually all areas of their lives. For example, they may be unable to obtain health insurance for their spouses and children, will not be able to make medical decisions about their spouses and family members if the need arises, and if the biological parent of their child or children dies, may not be able to retain custody of their children, who may be placed into foster care.

131. This uncertainty leaves Plaintiffs in a constant state of insecurity and uncertainty which is emotionally devastating, and which is likely to significantly and negatively impact them, their spouses, and their children in a multitude of ways. And because these valid marriages must be recognized regardless of the outcome of the *Kitchen* appeal, and because the Directive is indefinite in nature, this state of insecurity may last for years.

132. By taking this action, and retroactively stripping plaintiffs' marriages of legal recognition, the State of Utah acted without legal authority, arbitrarily and capriciously, and deprived Plaintiffs, and all other same-sex couples who had been legally married, of those liberty and property rights and interests protected by Article 1, Section 7 of the Utah Constitution and the Due Process Clause of the Fourteenth Amendment.

133. Plaintiffs and their families have been injured by the illegal conduct of the Defendants, and will continue to be injured until the State of Utah recognizes their marriages. Plaintiffs are accordingly entitled to the relief detailed in the Prayer for Relief.

134. Plaintiffs have no other plain, speedy, and adequate remedy available as to the issues raised in this Complaint because Plaintiffs' vested rights in the recognition of their marriages do not depend on the ultimate outcome of the *Kitchen* litigation in federal court. Whether or not the U.S. District Court's decision in *Kitchen* is ultimately affirmed, Plaintiffs

obtained vested rights in the validity and recognition of their marriages once those marriages were solemnized in accordance with Utah law.

135. Plaintiffs request that if this Court cannot resolve this matter based on the pleadings that it issue an order requiring the parties to appear at an expedited hearing on the merits as provided for under Rule 65B(d)(3).

**FOURTH CAUSE OF ACTION**
***(Declaratory Judgment)***

136. Plaintiffs reallege and incorporate by reference the paragraphs set forth above.

137. Pursuant to Utah Code Ann. § 78B-6-401(1) this Court has the authority to issue a declaratory judgment that determines the "rights, status and other legal relations within its respective jurisdiction." Further, that declaration may be either affirmative or negative in form and effect. Utah Code Ann. § 78B-6-401(2).

138. A person whose rights, status, and legal relations are affected by a statute may also request that "the district court to determine any question of construction or validity arising under that . . . statute" and "obtain a declaration of rights, status or other legal relations." Utah Code Ann. § 78B-6-401(2).

139. Importantly, the Utah Legislature has mandated that the declaratory judgment act must be liberally construed. Utah Code Ann. § 78B-6-412 reads as follows:

> This chapter is to be remedial. Its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

140. As set forth above, Plaintiffs fully complied with the requirements of Utah law regarding marriage, and therefore have valid marriages according to Utah law. In addition, the State of Utah recognized those marriages as valid at the time they were performed.

141. Notwithstanding the validity of those marriages and the prior recognition given to them by the State of Utah, the State of Utah has now unilaterally declared that it will no longer recognize those marriages or afford Plaintiffs the protections and responsibilities that it legally affords to all other married couples.

142. By placing recognition of their marriages "on hold," the State of Utah has placed the legal status of Plaintiffs' families, including their children, in legal limbo, which creates uncertainty as to their rights and status in virtually all areas of their lives. For example, they may be unable to obtain health insurance for their spouses and children, will not be able to make medical decisions about their spouses and family members if the need arises, and if the biological parent of their child or children dies, may not be able to retain custody of their children, who may be placed into foster care.

143. This uncertainty leaves Plaintiffs in a constant state of insecurity and uncertainty which is emotionally devastating, and which is likely to significantly and negatively impact them, their spouses, and their children in a multitude of ways. And because these valid marriages must be recognized regardless of the outcome of the *Kitchen* appeal, and because the Directive is indefinite in nature, this state of insecurity may last for years.

144. By taking this action, and retroactively stripping plaintiffs' marriages of legal recognition, the State of Utah acted without legal authority, arbitrarily and capriciously, and deprived Plaintiffs and all other same-sex couples who had been legally married of those liberty

and property rights and interests protected by Article 1, Section 7 of the Utah Constitution and the Due Process Clause of the Fourteenth Amendment.

145. Plaintiffs seek a declaration from the Court that because their marriages are valid under Utah Code Ann. § 30-1-1, *et seq.*, and have been previously recognized by the State of Utah, that:

a. The State of Utah must continue to recognize the marriages by all same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014, including Plaintiffs' marriages, and afford those couples and their families with all of the protections and responsibilities given to married couples under Utah law.

b. The State must withdraw its Directive not to recognize the marriages by all same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014, including Plaintiffs' marriages, and must in all respects treat and recognize them as married.

c. The reimplementation of Amendment 3, the Marriage Limitation Statute, the Marriage Recognition Statute, and any other statute preventing same-sex couples from marrying does not retroactively strip recognition from the same-sex marriages entered into pursuant to Utah marriage licenses issued between December 20, 2013 and January 6, 2014, or otherwise impair the protections and responsibilities that such marriages are subject to under Utah law.

146. Plaintiffs also request that the court award them the costs they incurred in bringing this action, pursuant to Utah Code Ann. § 78B-6-411.

**PRAYER FOR RELIEF**

Wherefore, Plaintiffs pray for the following relief:

A. A declaratory judgment stating that because the marriages by same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014, including Plaintiffs' marriages, are valid under U.C.A. §30-1-1, et seq., and have been previously recognized by the State of Utah, that the State of Utah must continue to recognize those marriages, and afford those couples, including Plaintiffs, and their families with all of the protections and responsibilities given to all married couples under Utah law.

B. An injunction ordering the State of Utah to withdraw any of its officials' instructions, such as the Directive, not to recognize the marriages by same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014, including Plaintiffs' marriages, and must in all respects treat them as married.

C. A declaratory judgment stating that the reimplementation of Amendment 3, the Marriage Limitation Statute, the Marriage Recognition Statute, and any other statute preventing same sex couples from marrying does not retroactively strip recognition from the marriages by same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013 and January 6, 2014, including Plaintiffs'

marriages, or otherwise impair the protections and responsibilities that such marriages are subject to under Utah law.

D. An order pursuant to Rule 65B of the Utah Rules of Civil Procedure directing State officials as follows: to immediately recognize the marriages by same-sex couples entered into pursuant to Utah marriage licenses issued between December 20, 2013, and January 6, 2014, including Plaintiffs' marriages, as valid marriages; to afford all such couples, including Plaintiffs, and their families with all of the protections and responsibilities given to all married couples under Utah law; and to cease making representations that the federal appellate courts will decide whether their current refusals are lawful in the *Kitchen* suit.

E. Attorneys' fees and costs related to the litigation of this action.

F. Any other relief the court deems just and proper.

DATED this 21st day of January, 2014.

**STRINDBERG & SCHOLNICK, LLC**

/s/ Erik Strindberg

Erik Strindberg
Lauren Scholnick
Kathryn Harstad
Rachel Otto

*Attorneys for Plaintiffs*

# Exhibit 2

# Memorandum Decision and Order

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**CENTRAL DIVISION**

**JONELL EVANS, STACIA IRELAND, MARINA GOMBERG, ELENOR HEYBORNE, MATTHEW BARRAZA, TONY MILNER, DONALD JOHNSON, and KARL FRITZ SHULTZ,**

Plaintiffs,

vs.

**STATE OF UTAH, GOVERNOR GARY HERBERT, ATTORNEY GENERAL SEAN REYES,**

Defendants.

**MEMORANDUM DECISION AND ORDER**

**Case No. 2:14CV55DAK**

**Judge Dale A. Kimball**

This matter is before the court on Plaintiffs JoNell Evans, Stacia Ireland, Marina Gomberg, Elenor Heyborne, Matthew Barraza, Tony Milner, Donald Johnson, and Karl Fritz Shultz's Motion for Preliminary Injunction, Plaintiffs' Motion to Certify Questions of Utah State Law to the Utah Supreme Court, and Defendants State of Utah, Governor Gary Herbert, and Attorney General Sean Reyes' (collectively, "the State") Motion to Certify Questions of Utah State Law to the Utah Supreme Court. The court held a hearing on Plaintiffs' Motions on March 12, 2014.[1] At the hearing, Plaintiffs were represented by Erik Strindberg, Joshua A. Block, and John Mejia, and the State was represented by Joni J. Jones, Kyle J. Kaiser, and Parker Douglas.

[1] The State's Motion to Certify Questions of Utah State Law was not filed until after the hearing was held. The motion is fully briefed, and the court concludes that a separate hearing on the motion is unnecessary.

After carefully considering the parties' arguments, as well as the law and facts relevant to the motions, the court enters the following Memorandum Decision and Order.

## FACTUAL BACKGROUND

The present lawsuit is brought by four same-sex couples who were married in Utah between December 20, 2013, and January 6, 2014. Plaintiffs allege deprivations of their property and liberty interests under Utah and federal law resulting from the State of Utah's failure to recognize their marriages.

### A. *Kitchen v. Herbert* Case

On December 20, 2013, United States District Judge Robert J. Shelby issued a ruling in *Kitchen v. Herbert*, 2:13cv217RJS, 2013 WL 6834634 (D. Utah Dec. 23, 2013), enjoining the State of Utah from enforcing its statutory and constitutional bans on same-sex marriages (collectively, "marriage bans").[2] The State did not request a stay of the ruling in the event that it lost, and the court's decision did not *sua sponte* stay the ruling pending appeal. After learning of the adverse ruling, the State then requested a stay from the district court, which Judge Shelby denied on December 23, 2013. The Tenth Circuit denied the State's subsequent request for a

[2] In 1977, the Utah Legislature amended Utah Code Section 30-1-2 to state "[t]he following marriages are prohibited and declared void": [marriages] "between persons of the same sex." Utah Code Ann. § 30-1-2(5). In 2004, the Utah Legislature added Utah Code Section 30-1-4.1, which provides: "It is the policy of this state to recognize as marriage only the legal union of a man and a woman;" and "this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties [to same-sex couples] that are substantially equivalent to those provided under Utah law to a man and woman because they are married." *Id.* § 30-1-4.1(1)(a), (b). In the November 2004 general election, Utah voters passed Amendment 3, which added Article I, Section 29 to the Utah Constitution, effective January 1, 2005, which provides: "(1) Marriage consists of only the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

stay on December 24, 2013. The State moved for a stay with the United States Supreme Court on December 31, 2013, and the Supreme Court granted a stay on January 6, 2014 ("Stay Order").

**B. State's Response to *Kitchen* Decision**

After the *Kitchen* decision was issued on December 20, 2013, some county clerks began issuing marriage licenses to same-sex couples that same day. On December 24, 2013, Governor Herbert's office sent an email to his cabinet, stating: "Where no conflicting laws exist you should conduct business in compliance with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court." Also on that day, a spokesperson for the Utah Attorney General's Office publicly stated that county clerks who did not issue licenses could be held in contempt of court.

Between December 20, 2013 and January 6, 2014, the State of Utah issued marriage licenses to over 1,300 same-sex couples. While it is not known how many of those couples granted licenses solemnized their marriages before January 6, 2014, news reports put the number at over 1,000.

The United States Supreme Court's January 6, 2014 Stay Order did not address the legal status of the marriages entered into by same-sex couples in Utah between December 20, 2013, and January 6, 2014, as a result of the *Kitchen* decision. The Supreme Court's Stay Order stated:

> The application for stay presented to Justice Sotomayor and by her referred to the Court is granted. The permanent injunction issued by the United States District Court for the District of Utah, case no. 2:13-cv-217, on December 20, 2013, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.

Also on January 6, 2014, after the Supreme Court's Stay Order, Utah Attorney General Sean Reyes issued the following statement: "Utah's Office of Attorney General is carefully

evaluating the legal status of the marriages that were performed since the District Court's decision and will not rush to a decision that impacts Utah citizens so personally."

Two days later, Governor Herbert's chief of staff sent an email to the Governor's cabinet informing them of the Supreme Court's stay and stating that "[b]ased on counsel from the Attorney General's Office regarding the Supreme Court decision, state recognition of same-sex marital status is ON HOLD until further notice." The email stated that the cabinet members should "understand this position is not intended to comment on the legal status of those same-sex marriages – that is for the courts to decide. The intent of this communication is to direct state agency compliance with current laws that prohibit the state from recognizing same-sex marriages." Furthermore, the email instructed that "[w]herever individuals are in the process of availing themselves of state services related to same-sex martial status, that process is on hold and will stay exactly in that position until a final court decision is issued."

The next day, Attorney General Reyes issued a letter to county attorneys and county clerks to provide "legal clarification about whether or not to mail or otherwise provide marriage certificates to persons of the same sex whose marriage ceremonies took place between December 20, 2013, and January 6, 2014, prior to the issuance of the stay by the U.S. Supreme Court." Attorney General Reyes continued that "although the State of Utah cannot currently legally recognize marriages other than those between a man and a woman, marriages between persons of the same sex were recognized in the State of Utah between the dates of December 20, 2013 until the stay on January 6, 2014. Based on our analysis of Utah law, the marriages were recognized at the time the ceremony was completed." He explained that "the act of completing and providing a marriage certificate for all couples whose marriage was performed prior to the morning of January 6, 2014, is administrative and consistent with Utah law" and "would allow, for instance,

same-sex couples who solemnized their marriage prior to the stay to have proper documentation in states that recognize same-sex marriage."

Furthermore, Attorney General Reyes stated that the State of Utah would not challenge the validity of those marriages for the purposes of recognition by the federal government or other states. But, "the validity of the marriages in question must ultimately be decided by the legal appeals process presently working its way through the courts."

On January 15, 2014, the Utah State Tax Commission issued a notice stating that same-sex couples "may file a joint return if they [were] married as of the close of the tax year" for 2013 because "[a]s of December 31, 2013, the Supreme Court had not yet issued its stay of the District Court's injunction." The notice further stated: "This notice is limited to the 2013 tax year. Filing information for future years will be provided as court rulings and other information become available."

**C. Plaintiffs' Responses to *Kitchen* Decision**

Plaintiffs Marina Gomberg and Elenor Heyborne obtained their marriage license and solemnized their marriage on December 20, 2013. They had been in a relationship for nine years and had previously performed a commitment ceremony in May 2009, even though the State of Utah did not recognize the union. They have been contemplating having a baby but are worried about protecting their family because the State of Utah will only allow one of them to be a legal parent to any children that they raise together. Gomberg and Heyborne do not want to move to another state to have their marriage recognized.

Plaintiffs Matthew Barraza and Tony Milner also obtained their marriage license and solemnized their marriage on December 20, 2013. They had been in a committed relationship for nearly 11 years. In 2010, Barraza and Milner traveled to Washington, D.C., and got married.

However, Utah law prevented any recognition of their marriage in Utah. In 2009, Barraza adopted a son, J., who is now four years old. Under Utah law, Milner was not allowed to be an adoptive parent to J. even though he and Barraza are jointly rasing J.

On December 26, 2013, Barraza and Milner initiated court proceedings for Milner to adopt their son. The court scheduled a hearing date for January 10, 2014. On January 9, 2014, the court informed them that the court had decided to stay the adoption proceedings to consider whether the Utah Attorney General's Office should be notified of the proceedings and allowed to intervene. The court held a hearing on January 29, 2014, and ruled that the Attorney General's Office should be given notice. The Attorney General's Office declined to intervene but filed a brief stating that the court should stay the proceedings until the Tenth Circuit decided the appeal in *Kitchen.* On March 26, 2014, the state court judge, the Honorable Andrew H. Stone, rejected the Attorney General's arguments and ordered that Milner should be allowed to adopt J.

On April 1, 2014, Milner and Barraza's attorney went to the Utah Department of Health, Office of Vital Records, to obtain a new birth certificate for J. based on Judge Stone's Decree of Adoption. Although he presented a court-certified decree of adoption and report of adoption, which are the only records needed under Utah law and regulation to create a new birth certificate based on adoption, the registrar refused to issue a new birth certificate. The registrar asked for a copy of Barraza and Milner's marriage certificate, even though a marriage certificate is not usually required, and contacted the Utah Attorney General's Office. Two attorneys from the Utah Attorney General's Office instructed the registrar not to issue the amended birth certificate for J.

On April 7, 2014, the Utah Department of Health served Milner and Barraza with a Petition for Emergency Extraordinary Relief, which it had filed in the Utah Supreme Court. In

that Petition, the Department of Health requests a court order relieving it from recognizing Judge Stone's decree of adoption because it recognizes Milner and Barraza's same-sex marriage. On May 7, 2014, Judge Stone issued an order for the Attorney General and other state officials to show cause why they should not be held in contempt for refusing to comply with the court's order to issue an amended birth certificate. On May 16, 2014, the Utah Supreme Court issued an order staying enforcement of the state court orders and stating that a briefing schedule on the writ would be set.

Plaintiffs JoNell Evans and Stacia Ireland also obtained a marriage license and solemnized their marriage on December 20, 2013. Evans and Ireland had been in a relationship for 13 years. In 2007, they had a religious marriage ceremony at the Unitarian Church in Salt Lake City, but the marriage was not recognized by the State of Utah.

Evans and Ireland have tried to obtain rights through the use of medical powers of attorney because Ireland has had serious health issues recently. In 2010, Ireland suffered a heart attack. With the power of attorney, Evans was allowed to stay with Ireland during her treatment but did not feel as though she was given the same rights as a spouse. On January 1, 2014, Evans again had to rush Ireland to the hospital emergency room because Ireland was experiencing severe chest pains. Unlike her previous experience, Evans was afforded all courtesies and rights given to the married spouse of a patient. Now that the State no longer recognizes their marriage, Evans does not know how she will be treated if there is another medical situation.

Plaintiffs Donald Johnson and Karl Fritz Shultz got their marriage license and solemnized their marriage on December 23, 2013, after waiting in line for approximately eight hours. Johnson and Shultz have been in a relationship for over 21 years. Johnson first proposed to Shultz the Sunday after Thanksgiving in 1992, and the couple had continued to celebrate that day

as their anniversary. Johnson researched insurance coverage for himself and Shutlz and discovered that they could save approximately $8,000.00 each year on health insurance. They will lose that savings without state recognition of their marriage.

## LEGAL ANALYSIS

### Plaintiffs' Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction requiring the State to continue recognizing the marriages Plaintiffs entered into pursuant to valid Utah marriage licenses between December 20, 2013, and January 6, 2014. The State continues to recognize Plaintiffs' marriages for purposes of joint state tax filings for 2013 and already-issued state documents with marriage-related name changes. However, for all other purposes, the State is applying its marriage bans retroactively to Plaintiffs' marriages. Plaintiffs seek an injunction requiring the State to continue recognizing their marriages as having all the protections and responsibilities given to all married couples under Utah law.

**I. Preliminary Injunction Standard**

Preliminary injunctive relief is appropriate if the moving party establishes: "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Because a preliminary injunction is an extraordinary remedy, the "right to relief must be clear and unequivocal." *SCFC LLC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991).

In the Tenth Circuit, certain types of injunctions are disfavored: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary

injunctions that afford the movant to all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. University of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 977 (10th Cir. 2004). "Such disfavored injunctions 'must be more closely scrutinized to assure that the exigencies of that case support the granting of a remedy that is extraordinary even in the normal course.'" *Id.* "Movants seeking such an injunction are not entitled to rely on this Circuit's modified-likelihood-of-success-on-the-merits standard." *O Centro*, 389 F.3d at 976. The moving party must make "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Awad v. Ziriax*, 670 F.3d 111, 1125 (10th Cir. 2012).

The status quo for purposes of a preliminary injunction is "the 'last peaceable uncontested status existing between the parties before the dispute developed.'" *Schrier*, 427 F.3d at 1260. In this case, the last peaceable uncontested status between the parties was when the State recognized Plaintiffs' marriages. Therefore, the requested preliminary injunction does not disturb the status quo.

However, the State argues that Plaintiffs' requested preliminary injunction is a disfavored injunction because it is mandatory rather than prohibitory. An injunction is mandatory if it will "affirmatively require the nonmovant to act in a particular way, and as a result . . . place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *Id.* at 1261. The Tenth Circuit has recognized that "[t]here is no doubt that determining whether an injunction is mandatory as opposed to prohibitory can be vexing." *O Centro*, 389 F.3d at 1006. "'In many instances, this distinction is more semantical than substantive. For to order a party to refrain from performing a given act is to limit his ability to perform any alternative act; similarly, an order to perform in a particular

manner may be tantamount to a proscription against performing in any other.'" *Id.* (citation omitted).

In this case, the court could characterize Plaintiffs' requested injunction as prohibiting the State from enforcing its marriage bans against couples who already have vested marriage rights or affirmatively requiring the State to recognize Plaintiffs' vested marriage rights. In large part, it is a matter of semantics rather than substance. Preventing the State from applying its marriage bans retroactively is the same thing as requiring the State to recognize marriages that were entered into when such marriages were legal.

As to the second element of a mandatory injunction, however, there is no evidence to suggest that this court would be required to supervise the State if the court granted Plaintiffs' requested injunction. The State's position is that it is required by Utah law to apply Utah's marriage bans to all same-sex marriages until a court decides the issue. The Directive that went to Governor Herbert's cabinet stated that the "legal status" of the same-sex marriages that took place before the Supreme Court stay was "for the courts to decide." And Attorney General Reyes recognized that the validity of the marriages in question must ultimately be decided by the legal process. Based on the State's compliance with the injunction in *Kitchen* prior to the Supreme Court's Stay Order, there is no basis for assuming that the State would need supervision in implementing an order from this court recognizing the same-sex marriages.

Neither party raised the issue of whether this is an injunction that would provide Plaintiffs with all the relief they could receive from a trial on the merits. Plaintiffs seek declaratory and injunctive relief that their marriages continue to be valid under Utah and federal law. However, Plaintiffs have pleaded a cause of action for the deprivation of property and liberty interests in violation of the United States Constitution under 42 U.S.C. § 1983. A determination that the

State has deprived Plaintiffs of their constitutional rights could, therefore, result in at least nominal damages at trial.[3]

The court concludes, therefore, that the requested injunction is not a disfavored injunction which would require the clear and unequivocal standard to apply to the likelihood of success on the merits element. Based on this court's analysis, the preliminary injunction does not alter the status quo, is not mandatory, and does not afford Plaintiff all the relief that could be awarded at trial. However, to the extent that the requested injunction could be construed as a mandatory injunction, the court will analyze the likelihood of success on the merits under the clear and unequivocal standard.

**II. Merits**

Because the court is applying the heightened standard to Plaintiffs' request for a preliminary injunction, the court will address the likelihood of success on the merits first and then each element in turn.

**A. Likelihood of Success on the Merits**

Plaintiffs argue that they are likely to succeed on their state and federal claims because they became vested in the rights attendant to their valid marriages at the time those marriages were solemnized and the State is required, under the state and federal due process clauses, to continue recognizing their marriages despite the fact that Utah's same-sex marriage bans went back into effect on January 6, 2014. In their Complaint, Plaintiffs bring causes of action for violations of their due process and liberty interests under the Utah and United States

[3] Plaintiffs allege financial damages due to a deprivation of rights, such as Johnson and Shutlz's $8,000.00 yearly loss for insurance premiums. Plaintiffs, however, do not specifically request monetary damages in their Prayer for Relief. Rather, Plaintiffs state only "any other relief the court deems just and proper."

Constitutions. Article I, Section 7 of the Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." The Fourteenth Amendment to the United States Constitution guarantees that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Utah Supreme Court has recognized that "the standards for state and federal constitutional claims are different because they are based on different constitutional language and different interpretive law." *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 477 (Utah 2011). While the language may be similar, the Utah Supreme Court has explained that federal standards do not "foreclose [its] ability to decide in the future that [its] state constitutional provisions afford more rights than the federal Constitution." *Id.* at 478 (concluding that conduct that did not give rise to a federal constitutional violation could still give rise to a state constitutional violation). Recognizing that the Utah Supreme Court has the prerogative to find that the state due process clause affords more protections, the court will analyze the issue under only federal due process standards.

As an initial matter, the court notes that this case is not about whether the due process clause should allow for same-sex marriage in Utah or whether the *Kitchen* decision from this District was correct. That legal analysis is separate and distinct from the issues before this court and is currently on appeal to the Tenth Circuit Court of Appeals. This case deals only with whether Utah's marriage bans preclude the State of Utah from recognizing the same-sex marriages that already occurred in Utah between December 20, 2013, and January 6, 2014.

Plaintiffs bring their federal violation of due process and liberty interests claim under 42

U.S.C. § 1983. While Section 1983 "does not provide any substantive rights" of its own, it provides "a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979); *Baker v. Mccollan*, 443 U.S. 137, 144 n.3 (1979).

"To state a claim for a violation of due process, plaintiff must first establish that it has a protected property interest and, second, that defendants' actions violated that interest." *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1216 (10th Cir. 2003). "The Supreme Court defines 'property' in the context of the Fourteenth Amendment's Due Process Clause as a 'legitimate claim of entitlement' to some benefit." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). These claims of entitlement generally "arise from independent sources such as state statutes, local ordinances, established rules, or mutually explicit understandings." *Dickeson v. Quarberg*, 844 F.2d 1435, 1437 (10th Cir. 1988). In assessing a due process claim, the Tenth Circuit has recognized that "a liberty interest can either inhere in the Due Process Clause or it may be created by state law." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012).

***1. Interest Inherent in the Due Process***

In finding a liberty interest inherent in the Due Process Clause, the Tenth Circuit explained that "[t]here can be no doubt that 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Id.* at 1215 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)). "As the Court declared in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the liberty guaranteed by the Due Process Clause 'denotes not merely freedom from bodily restraint but also

the right of the individual . . . to marry, establish a home and bring up children." *Id.*

In *Windsor*, the United States Supreme Court struck down the federal Defense of Marriage Act because it was "unconstitutional as a deprivation of the liberty of the person protected by" the Due Process Clause. *Id.* In prior cases, the court has also found that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

In this case, Plaintiffs solemnized legally valid marriages under Utah law as it existed at the time of such solemnization. At that time, the State granted Plaintiffs all the substantive due process and liberty protections of any other marriage. The *Windsor* Court held that divesting "married same-sex couples of the duties and responsibilities that are an essential part of married life" violates due process. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

As in *Windsor*, the State's decision to put same-sex marriages on hold, "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2694. Similarly, the "principal effect" of the State's actions "is to identify a subset of state-sanctioned marriages and make them unequal." The court, therefore, concludes that under Tenth Circuit law, Plaintiffs have demonstrated a liberty interest that inheres in the Due Process Clause.

***2. Interest Created by State Law***

Plaintiffs have also asserted that they have a state property interest in their valid marriages under Utah state law. The only state court to look at an issue similar to the one before this court is the California Supreme Court in *Strauss v. Horton*, 207 P3d 48 (Cal. 2009). The *Strauss* court addressed the continuing validity of the same-sex marriages that occurred after the California Supreme Court decision allowing same-sex marriage under the California Constitution

and the passage of Proposition 8, which amended the California Constitution to preclude same-sex marriages. *Id.* at 119-22. The *Strauss* court began its analysis by recognizing the presumption against finding an enactment to have retroactive effect and examining the language of Proposition 8 to determine whether the amendment could be applied retroactively. *Id.* at 120-21. The court concluded that Proposition 8 did not apply retroactively. *Id.*

In making its determination on retroactivity, the court also acknowledged that its "determination that Proposition 8 cannot properly be interpreted to apply retroactively to invalidate lawful marriages of same-sex couples that were performed prior to the adoption of Proposition 8 is additionally supported by our recognition that a contrary resolution of the retroactivity issue would pose a serious potential conflict with the state constitutional due process clause." *Id.* at 121.

The *Strauss* court explained that its "past cases establish that retroactive application of a new measure may conflict with constitutional principles 'if it deprives a person of a vested right without due process of law.'" *Id.* (citations omitted). "In determining whether a retroactive law contravenes the due process clause," the court must "consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." *Id.*

Applying these principles to whether the same-sex marriages entered into prior to Proposition 8 should remain valid, the *Strauss* court concluded that applying Proposition 8 retroactively "would create a serious conflict between the new constitutional provision and the protections afforded by the state due process clause." *Id.* at 122. The court reasoned that the

same-sex couples "acquired vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances." *Id.* Furthermore, the couples' reliance was "entirely legitimate," and "retroactive application of the initiative would disrupt thousands of actions taken in reliance on the [prior court ruling] by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families, and potentially undermining the ability of citizens to plan their lives according to the law as it has been determined by this state's highest court." *Id.* "By contrast, a retroactive application of Proposition 8 is not essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively and by having the traditional definition of marriage enshrined in the state Constitution where it can be altered only by a majority of California voters." *Id.*

In this case, the State seeks to apply its marriage bans retroactively to Plaintiff's previously-entered marriages. The marriage bans were legal nullities at the time Plaintiffs were married. However, once the Supreme Court entered its Stay Order, the State asserts that the marriage bans went back into effect.

Like California, Utah law has a strong presumption against retroactive application of laws. "Constitutions, as well as statutes, should operate prospectively only unless the words employed show a clear intention that they should have a retroactive effect." *Shupe v. Wasatch Elec. Co.*, 546 P.2d 896, 898 (Utah 1976). The presumption against retroactive application of changes in the law is deeply rooted in principles of fairness and due process. The United States Supreme Court has explained that "the presumption against retroactive legislation . . . embodies a

legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.*

Because retroactive application of a law is highly disfavored, "a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of parties." *Thomas v. Color Country Mgmt.*, 84 P.3d 1201, 1210 (Utah 2004) (Durham, C.J., concurring). Utah's presumption against retroactivity can be overcome only by "explicit statements that the statute should be applied retroactively or by clear and unavoidable implication that the statute operates on events already past." *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997).

In this case, Utah's statutory and constitutional provisions do not explicitly state that they apply retroactively. Utah Code Section 30-1-2 states that marriages "between persons of the same sex" "are prohibited and declared void." Utah Code Ann. § 30-1-2(5). Utah Code Section 30-1-4.1 provides: "It is the policy of this state to recognize as marriage only the legal union of a man and a woman;" and "this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties [to same-sex couples] that are substantially equivalent to those provided under Utah law to a man and woman because they are married." *Id.* § 30-1-4.1(1)(a), (b). Article I, Section 29 to the Utah Constitution provides: "(1) Marriage consists of only the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

The use of the present tense in these same-sex marriage bans indicates that the bans do not apply retroactively. In *Waddoups v. Noorda*, 2013 UT 64, the Utah Supreme Court stated: "It

simply cannot be said that the use of the present tense communicates a clear and unavoidable implication that the statute operates on events already past. If anything, use of the present tense implies an intent that the statute apply to the present, as of its effective date, and continuing forward." *Id.* at ¶ 7.

The *Waddoup* court's analysis is consistent with the *Strauss* court's conclusion that Proposition 8's use of the present tense did not retroactively apply to prior marriages because "a measure written in the present tense ('is valid or recognized') does not clearly demonstrate that the measure is intended to apply retroactively." *Strauss*, 207 P.3d at 120. The *Waddoup*'s decision is further consistent with other courts concluding that statutes stating that a marriage "is prohibited and void" does not apply retroactively. *See Cook v. Cook*, 104 P.3d 857, 865 n.2 (Ariz. Ct. App. 2005) (finding "[m]arriage . . . between first cousins is prohibited and void" does not apply retroactively); *Succession of Yoist*, 61 So. 384, 385 (La. 1913) (statute declaring, "Marriages between white persons and persons of color are prohibited, and the celebration of such marriages is forbidden, and such celebration carries with it no effect, and is mull and void," does not apply retroactively).

Thus, the use of present and future tenses in Utah's marriage bans does not provide a "clear and unavoidable" implication that they "operate on events already past." *Waddoups*, 2013 UT at ¶ 7. The court concludes that, under Utah law, nothing in the language of Utah's marriage bans indicates or implies that the bans should or can apply retroactively.

Moreover, nothing in the United States Supreme Court's Stay Order speaks to the legal status of the marriages that had already taken place or whether Utah's marriage bans would have retroactive effect when they were put back in place. While the State asserts that the Stay Order placed the marriage bans back into effect as of December 20, 2013, the State cites to no language

in the Stay Order that would support that assertion. In addition, the State has not presented any case law indicating that a Stay Order has that effect.

The State argues that application of Utah's previously existing marriage bans after the Supreme Court's Stay Order is not retroactive application of the bans because the laws were enacted long before Plaintiffs entered into their marriages. However, this argument completely ignores the change in the law that occurred. The marriage bans became legal nullities when the *Kitchen* decision was issued and were not reinstated until the Stay Order. In addition, the State's argument fails to recognize that Utah law defines a retroactive application of a law as an application that "'takes away or impairs vested rights acquired under existing laws . . . in respect to transactions or considerations already past.'" *Payne By and Through Payne v. Myers*, 743 P.2d 186, 190 (Utah 1987). Under this definition, the State's application of the marriage bans to place Plaintiffs' marriages "on hold," necessarily "takes away or impairs vested rights acquired under existing law."

When discussing the due process concerns implicated in a retroactive application of Proposition 8, the *Strauss* court had clear California precedents to rely upon that identified the state's recognition of vested rights in marriage. 207 P.3d at 121. In this case, however, the State disputes whether Plaintiffs have vested rights in their marriages under Utah law.

Under Utah law, a marriage becomes valid on the date of solemnization. *See Walters v. Walters*, 812 P.2d 64, 68 (Utah Ct. App. 1991); *State v. Giles*, 966 P.2d 872, 877 (Utah Ct. App. 1998) (marriage valid from date of solemnization, even if officiant does not return certificate to county clerk). There is no dispute in this case that Plaintiffs' marriages were valid under the law as it existed at the time they were solemnized. In *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663, 674 (Utah 2002), the Utah Supreme Court recognized that the due process protection in the Utah

Constitution "is not confined to mere tangible property but extends to every species of vested rights." And, as early as 1892, the Utah Supreme Court recognized the fundamental vested rights associated with marriage. *Tufts v. Tufts*, 30 P. 309, 310 (Utah 1892).

In *Tufts v. Tufts*, the court addressed the retroactive application of divorce laws and stated that the rights and liabilities of spouses "grew out of a contract governing the marriage relation which existed at the time" the alleged conduct occurred. *Id.* The court relied on precedent stating that "[w]hen a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or any action for its enforcement. It has then become a vested right, which stands independent of the statute." *Id.* The court also stated that the rights and liabilities of spouses are "sacred" and, "while the relation is based upon contract," "it is a contract that differs from all others, and is the basis of civilized society." *Id.* at 310-11.

In this case, Plaintiffs' marriages were authorized by law at the time they occurred. The marriages were solemnized and valid under the existing law so that nothing remained to be done. No separate step can or must be taken after solemnization for the rights of a marriage to vest. Moreover, Plaintiffs began to exercise the rights associated with such valid marriages prior to the entry of the Supreme Court's Stay Order. As in *Tufts*, therefore, the change in the law does not affect the vested rights associated with those marriages. The vested rights in Plaintiffs' validly-entered marriages stand independent of the change in the law. For over a hundred years, the *Tufts* decision has never been called into question because it states a fundamental principle of basic fairness.

This application of Utah law is consistent with the *Strauss* court's recognition that the

"same-sex couples who married after the [court's] decision in the Marriage Cases . . . and before Proposition 8 was adopted, acquired vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances." 207 P.3d at 121. Moreover, the State has failed to cite any law from any jurisdiction supporting the proposition that rights in a valid marriage do not vest immediately upon valid solemnization of the marriage.

Plainly, to deprive Plaintiffs of the vested rights in their validly-entered marriages raises the same due process concerns that were addressed in *Strauss*. The State argues that Plaintiffs in this case do not have a property interest in their marriages because their right to marry was based on a non-final district court opinion instead of a decision by the state's highest court as in *Strauss*. To make this argument, however, the State cites to cases involving non-final consent decrees that are factually distinct from a final district court judgment and that are wholly irrelevant to the issue before this court.

While a factual difference exists between this case and *Strauss*, the court finds no basis for legally distinguishing between the final judgment in *Kitchen* and the California Supreme Court's decision in its marriage cases. Both decisions allowed for same-sex couples to marry legally. "[A]n appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effects." *Hovey v. McDonald*, 109 U.S. 150, 161 (1883). "The general rule is that the judgment of a district court becomes effective and enforceable as soon as it is entered; there is no suspended effect pending appeal unless a stay is entered." *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006).

The State's arguments as to Plaintiffs' reliance on the final judgment in *Kitchen* also ignore the fact that Plaintiffs are claiming a vested right in their validly-entered legal marriages.

Plaintiffs are not claiming they have a vested right in the continuation of the *Kitchen* injunction or judgment. Plaintiffs contend that their rights vested upon the solemnization of their valid marriages and that their validly-entered marriages do not rely on the continuation or reinstatement of the *Kitchen* injunction. Thus Plaintiffs seek recognition of their marriages separate and apart from the ultimate outcome of the *Kitchen* appeals.

Plaintiffs' claims, therefore, are factually and legally distinguishable from the cases the State cites applying the "vested rights doctrine." *See Axel Johnson, Inc. v. Arthur Andersen & Co.,* 6 F.3d 78 (2d Cir. 1993); *Casiano-Montanez v. State Ins. Fund Corp*., 707 F.3d 124 (1st Cir. 2013). In those cases, the plaintiffs were relying on rights fixed by a district court judgment, whereas, Plaintiffs, in this case, are relying on the validity of their marriage licenses. The State, in this case, issued and recognized Plaintiffs' marriage licenses, which became valid under Utah law when the marriages were solemnized. The State did not issue provisionally-valid marriage licenses. Moreover, Plaintiffs' vested rights in their legally recognized marriages are not dependent on the ultimate outcome in *Kitchen.* Whether or not *Kitchen* is ultimately upheld, the district court's injunction was controlling law and Utah's marriage bans were a legal nullity until the Supreme Court issued the Stay Order on January 6, 2014. *See Howat v. State of Kansas*, 258 U.S. 181, 189-90 (1922) ("An injunction duly issuing out of a court . . . must be obeyed . . . however erroneous the action of the court may be.").

The State further argues that Plaintiffs' marriages can be declared legal nullities if the *Kitchen* decision is overturned because the law has recognized instances when traditional marriages thought to be valid are later declared legal nullities. However, the instances in which courts have declared such marriages void involve mistakes of fact. In *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah Ct. App. 1991), the wife discovered that she had not

completed a previous divorce at the time of her subsequent marriage. In the present case, the marriages were valid under the law at the time they were solemnized and there is no alleged mistake of fact. Therefore, the comparison is inapposite. Cases involving marriages that were invalid at their inception are not helpful or relevant. This case is also distinguishable from cases where county clerks spontaneously started issuing same-sex marriage licenses without any court order or basis in state law. Unlike the cases before this court, those cases were also invalid at their inception.

The more analogous case is presented in *Cook v. Cook*, where the court recognized that refusing to recognize an out-of-state marriage that had previously been recognized within the state would violate constitutional due process guarantees. 104 P.3d 857, 866 (Ariz. App. 2005). In *Cook*, the statutory scheme in place when the couple moved to the state expressly allowed the marriage, but a subsequent amendment made such a marriage void. *Id.* The court refused to find all such marriages in the state on the date of the amendment void because the couples in the state with such marriages already had constitutionally vested rights in their marriages. *Id.*

The State believes that all the actions taken in response to the final judgment in *Kitchen* can be considered a nullity if the decision is ultimately overturned. However, there are several instances in which courts recognize that actions taken in reliance on an injunction cannot be reversed. *See University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981) (injunctions have legal effects that will be "irrevocably carried out" and cannot be unwound if the injunction is subsequently overturned on appeal); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 (10th Cir. 2001) (recognizing certain types of injunctions "once complied with, cannot be undone"). Moreover, a person who disobeys a district court injunction that has not been stayed may be punished with contempt even if the underlying injunction is subsequently

reversed. *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967).

The State further fails to recognize that Plaintiffs are claiming a violation of substantive due process rights, not merely procedural due process rights. Plaintiffs allege that they have substantive vested rights in their marriages–such as, the right to family integrity, the right to the custody and care of children of that marriage–that the State cannot take away regardless of the procedures the State uses. Once Plaintiffs solemnized a legally valid marriage between December 20, 2013, and January 6, 2014, Plaintiffs obtained all the substantive due process and liberty protections of any other marriage.

As stated above, the Supreme Court recently held that divesting "married same-sex couples of the duties and responsibilities that are an essential part of married life" violates due process. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). The State's decision to put same-sex marriages on hold, "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2694.

Prior Supreme Court cases also establish that there "is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude." *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring).[4] The State has not attempted to argue that they have a constitutionally adequate justification for overcoming Plaintiffs' due process and liberty interests. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Ordinarily, "the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.") The State has not provided the court with a compelling state interest for divesting Plaintiffs of the

[4] Utah courts have also recognized "[t]he rights inherent in family relationships–husband-wife, parent-child, and sibling–are the most obvious examples of rights" protected by the Constitution. *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982).

substantive rights Plaintiffs obtained in their marriages. The State asserts merely that Plaintiffs improperly relied on the ruling of a United States District Court. The State's argument, however, fails to acknowledge that the State also relied on the *Kitchen* decision. The State notified its county clerks that they were required to issue marriage licenses. The State now seems to be claiming that while it reasonably required its county clerks to act in response to the *Kitchen* decision, Plaintiffs unreasonably acted on that same decision. However, the court has already discussed the operative effect of a district court injunction. That operative effect applies to all parties equally.

Even though the Supreme Court's Stay Order put Utah's marriage bans back in place, to retroactively apply the bans to existing marriages, the State must demonstrate some state interest in divesting Plaintiffs of their already vested marriage rights. The State has failed to do so. Although the State has an interest in applying state law, that interest is only in applying the controlling law at the time. In *Strauss*, the court found that a retroactive application of Proposition 8 was "not essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively and by having the traditional definition of marriage enshrined in the state Constitution." 207 P.3d at 122. In comparison, "a retroactive application of the initiative would disrupt thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families, and potentially undermining the ability of citizens to plan their lives according to the law as it has been determined." *Id.*

As in *Strauss*, this court concludes that the State has not demonstrated a state interest that

would overcome Plaintiffs' vested marriage rights. The State's decision to retroactively apply its marriage bans and place Plaintiffs' marriages "on hold" infringes upon fundamental constitutional protections for the marriage relationship. Therefore, Plaintiffs have demonstrated a clear and unequivocal likelihood of success on the merits of their deprivation of federal due process claim under 42 U.S.C. § 1983.

**B. Irreparable Harm**

Under Tenth Circuit law, "[t]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). The State argues that the court should not find irreparable harm because, even though Plaintiffs have the option of living in a state that would recognize their marriage, Plaintiffs have chosen to live in Utah for years without enjoying the rights of marriage. This argument ignores the changes in the law that occurred and the fact that Plaintiffs' situations were materially altered when they became validly married in the State of Utah.

The Tenth Circuit recognizes that "'[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). As stated above, Plaintiffs have demonstrated a likelihood of success on the merits that the State is violating their due process and liberty interests by refusing to recognize their validly-entered marriages. The State has placed Plaintiffs and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights associated with marriage. These legal uncertainties and lost rights cause harm each day that the marriage is not recognized. The court concludes that these circumstances

meet the irreparable harm standard under Tenth Circuit precedents.

**C. Balance of Harms**

"[I]f the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). In this case, the laws themselves may not be unconstitutional, but the State's retroactive application of the marriage bans likely violates Plaintiffs' constitutional rights. The State has no legitimate interest in depriving Plaintiffs of their constitutional rights.

Although the State has a general interest in representing the wishes of its voters, that interest does not outweigh the harms Plaintiffs face by having their constitutional rights violated. Plaintiffs face significant irreparable harms to themselves and their families–inability to inherit, inability to adopt, loss of custody, lost benefits. The State, however, has demonstrated no real harm in continuing to recognize Plaintiffs' legally-entered marriages. The State's harm in the *Kitchen* litigation with respect to continuing to issue same-sex marriage licenses is not the same as the harm associated with recognizing previously-entered same-sex marriages that were valid at the time they were solemnized. The only relevant harm in this case is the harm that results from requiring the State to recognize Plaintiffs' marriages.

The State asserts that it is harmed by not being able to enforce the marriage bans retroactively. But the court has already discussed the constitutional concerns associated with a retroactive application of the marriage bans and finds no harm to the State based on an inability to apply the marriage bans retroactively. The State's marriage bans are currently in place and can

stop any additional marriages from occurring. The State's interest is in applying the current law. The court, therefore, concludes that the balance of harms weighs decidedly in Plaintiffs' favor and supports the court's issuance of a preliminary injunction.

**D. Public Interest**

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132. In this case, the court agrees with Plaintiffs that the public is well served by having certainty about the status of Plaintiffs' marriages. That certainty not only benefits Plaintiffs and there families but State agencies, employers, and other third parties who may be involved in situations involving issues such as benefits, employment, inheritance, child custody, and child care.

For the foregoing reasons, the court concludes that Plaintiffs have met the clear and unequivocal standard for obtaining a preliminary injunction during the pendency of this litigation. Plaintiffs have demonstrated that they are likely to succeed on the merits of their federal due process claims, that they will be irreparably harmed if a preliminary injunction does not issue, that the balance of harms weighs in their favor, and that the injunction is in the public interest. Accordingly, Plaintiffs' motion for a preliminary injunction is granted and the court will enter a preliminary injunction preventing the State from enforcing its marriage bans with respect to the same-sex marriages that occurred in Utah between December 20, 2013, and January 6, 2014.

**The State's Request for Stay Pending Appeal**

In the event that the court decided to grant Plaintiffs' motion for a preliminary injunction, the State requested that the court stay the injunction pending appeal. Rule 62(c) provides that "[w]hile an appeal is pending from an interlocutory order . . . that grants . . . an injunction, the

court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Rule 8(a)(1) of the Federal Rules of Appellate Procedure provides that a party must ordinarily first move in the district court to obtain a stay of the judgment or order of a district court pending appeal. Fed. R. App. P. 8(a)(1).

The purpose of a stay is to preserve the status quo pending appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996). The court has already determined that the status quo in this case is the State recognizing Plaintiffs' marriages. Therefore, the State's request would alter the status quo.

The court considers the following four factors when considering a motion to stay pending appeal:

> (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.

*Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "With respect to the four stay factors, where the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed.'" *F.T.C. v. Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (citations omitted). If the State "can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation.'" *McClendon*, 79 F.3d at 1020 (quoting *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.), *cert. denied*, 516 U.S. 974, 116 S. Ct. 474, 133 L. Ed. 2d 403 (1995).

Based on the court's analysis above, this court believes that its decision is correct and that Plaintiffs, not the State, have demonstrated a clear likelihood of success on the merits. Also, the court has already weighed and balanced the harms involved in issuing its preliminary injunction. Plaintiffs have demonstrated existing clear and irreparable harms if an injunction is not in place. As discussed above, the balance of harms is necessarily tied to the merits of the decision because harm to Plaintiffs' constitutional rights are given significantly more weight than the State's harm in not being able to apply its marriage bans retroactively to legally-entered marriages. The irreparable nature of Plaintiffs harms involve fundamental rights such as the ability to adopt, the ability to inherit, child care and custody issues, and other basic rights that would otherwise remain in legal limbo. For these reasons, the court cannot conclude that the harm to the State outweighs the harm to Plaintiffs during pendency of the appeal. The need for certainty also weighs heavily in determining the public interest. Recognition of Plaintiffs' marriages impacts extended families, employers, hospitals, schools, and many other third parties. The court, therefore, concludes that the State has not met its burden of establishing the factors required for a stay pending appeal.

In its discretion, however, the court grants the State a limited 21-day stay during which it may pursue an emergency motion to stay with the Tenth Circuit. The court recognizes the irreparable harms facing Plaintiffs every day. However, the court finds some benefit in allowing the Tenth Circuit's to review whether to stay the injunction prior to implementation of the injunction. Therefore, notwithstanding the many factors weighing against a stay, the court, in its discretion, grants the State a temporary 21-day stay.

**Motion to Certify Questions of State Law**

In addition to their Motion for a Preliminary Injunction, Plaintiffs also ask the court to

certify questions of law to the Utah Supreme Court. Specifically, Plaintiffs ask the court to certify two specific questions: (1) Under Utah law, do same-sex couples who were legally married between December 20, 2013, and January 6, 2014, have vested rights in their marriages which are protected under Article I, Section 7 of the Utah Constitution?; and (2) Once the State of Utah recognized the marriages of same-sex couples entered into between December 20, 2013, and January 6, 2014, could it apply Utah's marriage bans to withdraw that recognition?

The State opposed Plaintiffs' motion to certify but has now brought its own Motion to Certify, asking the court to certify the following question: Do same-sex couples who received marriage licenses, and whose marriages were solemnized, between December 20, 2013 and January 6, 2014, have vested property rights in their marriages which now require recognition under present Utah law?

The State opposed Plaintiffs' motion to certify on the grounds that the answers to Plaintiffs' proposed questions were clear and the questions were vague and unhelpful to the court. However, after briefing and argument on Plaintiffs' motion to certify, the State alleges that circumstances changed when some district court judges in Utah's state courts began ruling that Plaintiffs had vested rights in their marriages.

Rule 41(a) of the Utah Rules of Appellate Procedure provides that "the Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court . . . if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain." Utah R. App. P. 41(a). The certification order must state (1) the "question of law to be answered," (2) "that the question certified is a controlling issue of law in a proceeding pending before the certifying court," and (3) "that there appears to be no controlling Utah law." *Id.* 41(c).

The parties' requests to certify come to this court in a fairly unusual procedural posture. Claiming that the heart of Plaintiffs' claims is whether the State's failure to recognize their marriages violates the Due Process Clause of the Fourteenth Amendment, the State removed Plaintiffs' case from state court to federal court. The State then opposed Plaintiffs' motion to certify question to the state court. Now, based on rulings favorable to Plaintiffs in state district courts, the State argues that this court should certify the vested right question to the Utah Supreme Court "to ensure consistency and fairness."

As demonstrated by the parties' competing motions, both parties in this case seek a determination from the Utah Supreme Court as to whether Plaintiffs have vested rights in their marriages under Utah law. In determining Plaintiffs' federal due process claim, this court concluded that Plaintiffs have liberty interests inherent in the Due Process Clause and created by state law. Therefore, the vested rights issue is an important issue of law in this case, but it does not appear to be essential to Plaintiffs' federal due process claim. However, with respect to the final requirement for certification – that there is no controlling Utah law – this court concluded that, under Utah state law, Plaintiffs clearly and unequivocally demonstrated that they have vested rights in their legally-entered marriages and their vested marriage rights are protected by the federal due process clause regardless of the ultimate outcome of the *Kitchen* case.

The State asserts that this court should certify the vested rights question to the Utah Supreme Court because state district court judges in several adoption cases have ruled that Plaintiffs' have vested marriage rights and the State has sought review of those decisions through a writ to the Utah Supreme Court. Although the Utah Supreme Court has granted a stay of the adoption decrees while it considers the issue, the court's decision to have the issue briefed makes no comment on the merits of the writs. As Plaintiffs' asserted in their oppositions, there may be

procedural grounds for dismissal or denial of the writs that would preclude the Utah Supreme Court from reaching the merits of the issue.

The State asserts that this court could have determined the state law enmeshed with the federal due process challenge but for the state adoption rulings. This court, however, is not aware of any case in the Utah state courts that have been favorable to the State's position. At most, some district courts have chosen to stay the adoption cases pending a decision on the validity of the marriages. Several state rulings consistent with this court's determination that Plaintiffs have vested rights in their marriages does not provide a basis for concluding that the issue of state law is uncertain.

Finally, if the court is to consider fairness as the State requests, the court notes that the State chose this forum by removing the action from state court. Unlike Plaintiffs who seek certification in order to obtain favorable rulings from both courts, the State seeks to begin the process anew in a different forum from the one it chose. The court agrees with Plaintiffs that the State's late-filed motion to certify, asserting a nearly identical question to those posed by Plaintiffs, appears to be a delay tactic.[5]

---

[5] The State includes a footnote in its motion to certify stating that the factors warranting the application of the *Colorado River* abstention doctrine apply in this case. *See Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976). However, this case and the current state proceedings are not parallel actions. *See Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) ("[A] federal court must first determine whether the state and federal proceedings are parallel."). The state actions were instituted as adoption proceedings and are before the Utah Supreme Court on emergency writs. The case before this court is a deprivation of due process and liberty interest under state and federal due process. Only one couple in the adoption proceedings overlap with the Plaintiffs in this case. Also, significantly, the rights and remedies at issue in this case are far broader than those at issue in the state court proceedings. Moreover, the only reason both cases are not in State court is because the State removed this case from State court. It strikes the court as procedural gamesmanship for the State to remove a case to federal court and then ask the court in the forum the State chose to abstain from acting. "The decision whether to defer to the state courts is necessarily left to the discretion of the district court in the first instance." *Id.* at 1081. Such discretion must be exercised "in light of 'the virtually

Utah law clearly provides that rights in a valid marriage vest immediately upon solemnization. There is no further action required to be taken or that could be taken by either party to create the vested right. There is no basis under Utah law for finding that Plaintiffs in this case were required to take steps beyond solemnization in order to obtain vested rights when such steps are not required for other marriages. Because Utah law is clear and not ultimately controlling of the case before this court, the court concludes that there is no basis for certifying the state law questions to the Utah Supreme Court. Accordingly, the parties' motions to certify state law questions are denied.

## CONCLUSION

Based on the above reasoning, Plaintiffs Motion for Preliminary Injunction [Docket No. 8] is GRANTED; Plaintiffs' Motion to Certify Questions of Utah State Law to the Utah Supreme Court [Docket No. 10] is DENIED; and Defendants' Motion to Certify Questions of Utah State Law to the Utah Supreme Court [Docket No. 34] is DENIED. The following Preliminary Injunction Order is temporarily stayed for twenty-one (21) days to allow the State to seek an emergency stay pending appeal from the Tenth Circuit.

## PRELIMINARY INJUNCTION ORDER

The court issues the following Preliminary Injunction against Defendants:

Defendants State of Utah, Governor Gary Herbert and Attorney General Sean Reyes are prohibited from applying Utah's marriage bans retroactively to the same-sex marriages that were entered pursuant to Utah marriage licenses issued and solemnized between December 20, 2013, and January 6, 2014. Accordingly, Defendants State of Utah, Governor Gary Herbert and

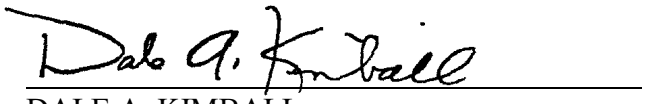
---

unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Id.* (citations omitted). Because these cases are not parallel actions, the court has no discretion to abstain and must exercise its obligation to hear and decide the case presented to it.

Attorney General Sean Reyes shall immediately recognize the marriages by same-sex couples entered pursuant to Utah marriage licenses issued and solemnized between December 20, 2013, and January 6, 2014, and afford these same-sex marriages all the protections, benefits, and responsibilities given to all marriages under Utah law.

DATED this 19th day of May, 2014.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

# Exhibit 3

# Attorney General's Position on Constitutionality of State Law Regarding Petitioners' Adoption

JONI J. JONES (7562)
Assistant Utah Attorney General
SEAN D. REYES (7969)
Utah Attorney General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Facsimile: (801) 366-0101
e-mail: jonijones@utah.gov

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| IN THE MATTER OF THE ADOPTION OF J.D.B., a minor child. | **ATTORNEY GENERAL'S POSITION ON CONSTITUTIONALITY OF STATE LAW REGARDING PETITIONERS' ADOPTION**<br><br>Case No. 132900582<br><br>Judge Andrew H. Stone |

Pursuant to Rule 24(d)(1) of the Utah Rules of Civil Procedure, Utah Attorney General Sean Reyes files this memorandum addressing whether section 30-1-2 of the Utah Code, which was temporarily enjoined by a federal district court judge who declared it unconstitutional, currently applies to prohibit the adoption of J.D.B.

In this case, Petitioners seek to adopt based on section 78B-6-117, which allows a child to be adopted by adults whose marriage is valid under Utah law, and conversely prohibits adoption by adults who live together in a relationship not recognized as a lawful marriage under Utah law.

As set out more fully below, the Attorney General's position is that once the United States Supreme Court stayed the injunction issued in *Kitchen v. Herbert*, ____ F.Supp.2d ____, 2013 WL 6697874, the *Kitchen* injunction halting enforcement of Utah laws banning same-sex marriage was no longer in effect, and Utah's laws immediately were in force. Section 30-1-2(5), which prohibits same-sex marriage and declares such marriages void, is now in effect. Therefore section 30-1-2(5) prohibits adoption proceedings based on same-sex marriages.

The Attorney General recognizes that *Kitchen v. Herbert* may be upheld. If so, section 30-1-2(5) would be permanently enjoined, and Petitioners would be able to adopt under section 78B-6-117. Because Petitioners may have the right to adopt in the future based on the outcome of *Kitchen*, the Attorney General maintains that Petitioners' adoption proceedings should be stayed until *Kitchen* is finally resolved. Alternatively, Petitioners can voluntarily dismiss their petition and re-file, if appropriate, once the *Kitchen* litigation is resolved.

**BASED ON THE CURRENT STATE OF THE LAW, THE PETITION FOR ADOPTION SHOULD BE STAYED OR VOLUNTARILY DISMISSED**

On December 20, 2013, United States District Court Judge Robert Shelby issued *Kitchen v. Herbert*, ____F.Supp.___, 2013 WL 6697874 (D. Utah). In his ruling, Judge Shelby held that Utah's laws banning same-sex marriage violated the Federal Constitution, and he enjoined them

from being enforced. ("The court hereby enjoins the state from enforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex.") The Attorney General properly directed state agencies to comply with the federal order. Petitioners were originally married in Washington, D.C., in 2010, and reaffirmed their marriage in Salt Lake County on December 20, 2013. (Amended Petition to Adopt Minor Step-Child, ¶ 3.) Because they were married in Utah while Utah laws were enjoined, and *Kitchen* was in effect; Petitioners' Utah marriage was entered into pursuant to the authority of the *Kitchen* order.

On January 6, 2014, the United States Supreme Court granted the State's motion for stay. *Kitchen v. Herbert*, 134 S. Ct. 893, 2014 WL 30367 (U.S. Utah). The legal effect of a stay is to take the parties back to the status quo, to "the state of affairs before the . . . order was entered." *Nken v. Holder*, 556 U.S. 418, 420 (2009). A stay "temporarily suspend[s] the source of authority to act—the order or judgment in question." *Id.* at 428-29. Thus as soon as the stay was issued, the *Kitchen* order was suspended, and no longer had any effect. The law went back to the status quo: resumption of Utah's statutes and Constitutional Amendment 3, which prohibit recognition of same-sex marriages.

Under section 30-1-2, certain marriages, including marriage "between persons of the same sex," Utah Code § 30-1-2(5), are "declared void." *Id.* § 30-1-2. Consequently, with Utah's laws barring same-sex marriage back in force, same-sex marriages such as Petitioners' are

technically void under Utah law.[1]

The term "'[v]oid' is commonly understood to mean 'null, ineffectual,' and in the case of marriages, 'invalid from its inception.'" *State v. Chaney*, 989 P.2d 1091, 1096, 1999 UT App 309 ¶ 23 (quoting *Black's Law Dictionary*, 1573-74 (6th ed. 1990)). Notably, Utah law does not use the term "voidable." "We assume 'the Legislature used [the] term ["void"] advisedly,' and declined to use the more liberal term 'voidable' in this context." *State v. Chaney*, 989 P.2d 1091, 1096 (Utah Ct. App. 1999) (brackets in original) (quoting *Versluis v. Guaranty Nat'l Cos.*, 842 P.2d 865, 867 (Utah 1992)).

Under the plain language of the statute and Utah case law interpreting it, same-sex marriages performed before the stay was issued are "invalid from [their] inception" and "void ab initio." *Chaney*, 909 P.2d at 1086, 1999 UT App ¶ 24. In such cases, a marriage is deemed void ab initio even if it were recognized and believed to be valid for many years. For example, in *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah Ct. App. 1991), a couple's marriage was solemnized on June 15, 1984, but the wife's divorce decree from another man was not entered until July 11, 1984. *Id.* at 1336. The couple held themselves out as married for several years, and divorced in December 1989. A month later, the husband moved to set aside the decree on the ground that the couple's marriage was void from the beginning.

[1] To be sure, the Attorney General is not trying to void Petitioners' marriage, or any of the same-sex marriages that were performed before the stay was issued. The Attorney General has repeatedly stated that the validity of same-sex couples' marriages performed in Utah prior to the stay will ultimately be determined in the *Kitchen* appeal. The analysis above, however, shows that these same-sex marriages cannot be recognized under the current state of the law, and, if *Kitchen* is reversed, the marriages will be void under Utah law.

The Utah Court of Appeals agreed because under Utah's marriage statute "a marriage taking place when a party is still married to someone else is void." *Id.* at 1337 (citing Utah Code Ann. § 30-1-2(5) (Supp. 1991)). "[U]nder section 30-1-2, the marriage of the parties was void at its inception, and no court action was required to establish this." *Id.* at 1338. *See also State v. Stewart*, 193 P. 855, 856 (1920) (stating that marriage without parental consent is void based on statute if male is under 16 or female under 14).

Petitioners' marriages are analogous to the marriage in *Van Der Stappen*. As in *Van Der Stappen* at the time the marriages were entered into, the couples marrying and the officials issuing licenses and solemnizing the marriages believed the marriages were lawful. Once it was finally determined that the marriage in *Van Der Stappen* was not lawful, it was void, even though the marriage had been recognized for years and the couple enjoyed the benefits of marriage, and were even formally divorced for a time. Here, the legal basis for Petitioners' marriage—the injunction issued in *Kitchen*—is no longer in effect. If *Kitchen* is overturned, then Petitioners' marriages would have been based on an erroneous, temporary legal ruling—a legal error. Although *Van Der Stappen* involved a mistake of fact and Petitioners' marriages involve a potential mistake of law, the practical effect is the same.

Under section 30-1-2, which is now in effect, Petitioners' marriage is not valid and technically void from the date entered into. If *Kitchen* is upheld on appeal and subsection (5), which declares same-sex marriage void, is effectively repealed, Petitioners' marriage will be valid, and their adoption of J.D.B. will be lawful. Because Petitioners' adoption will not be lawful unless *Kitchen* is upheld by a final, non-appealable order, the Attorney General's position

is the proceeding should be stayed. Or, Petitioners can voluntarily dismiss their adoption action, and re-file, if appropriate, once a final, non-appealable ruling is issued in *Kitchen.*

In addition, Utah law which is now in effect expressly prohibits the State from recognizing same-sex marriage. Section 30-1-4.1 provides that except for marriages between a woman and a man, "this state will not recognize, enforce, or give legal effect" to any law that gives marriage rights to same-sex couples. Utah Code § 30-1-4.1(1)(b). Amendment 3, which also is currently in effect, similarly prevents the State from recognizing same-sex marriage. Article I, Section 29 of the Utah Constitution provides that "(1) Marriage consists of only the legal union between a man and a woman," and "(2) No other domestic union, however denominated, maybe be recognized as a marriage or given the same or substantially equivalent effect." Utah Const. art. I, § 29. The Attorney General maintains that under the current state of the law, Petitioners' marriage cannot be recognized.

Petitioners may assert that their marriage has fully vested, and cannot be retroactively invalidated. The Attorney General recognizes that Utah, like most states and the federal courts, has adopted the rule that new legislation cannot be retroactively applied to take away a right that has fully vested. *See, e.g., Shupe v. Wasatch Elec. Co.*, 546 P.2d 896, 898 (Utah 1976) ("[c]onstitutions, as well as statutes, should operate prospectively only unless the words employed show a clear intention that they should have a retrospective effect."). However, Petitioners were married after section 30-1-2, and Amendment 3 to Utah's Constitution—which also bans same-sex marriage—were adopted. Therefore, the bar against legislation that applies to rights that vested before the legislation was enacted does not apply.

The bar against retroactive application of laws also does not apply because Petitioners' rights to their marriage never fully vested. "[T]he vested rights doctrine . . . provides that '[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment.'" *Phyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996) (quoting *McCullough v. Virginia*, 172 U.S. 102, 123 (1898)). However, the doctrine applies "only when a *final* judgment has been rendered." *Id.* (emphasis added). The *Kitchen* order, which gave Petitioners the right to marry in Utah, is not a final order, and therefore their right to marry did not vest. This is because if *Kitchen* is reversed, the legal effect is that the judgment never existed. "To 'reverse' a judgment means to "overthrow, vacate, set aside, make *void*, annul, repeal, or revoke it." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) (quoting *Black's Law Dictionary* 1319 (6th ed. 1990)) (emphasis added). A judgment reversed by a higher court is "'without any validity, force or effect, and ought never to have existed.'" *Id.* (quoting *Butler v. Eaton*, 141 U.S. 240, 244 (1891)). Because the validity of Petitioners' marriage was based on the *Kitchen* decision, which is not final and may be reversed, the rule barring retroactive application of the law does not apply to Petitioners' marriage.

Petitioners assert that the Due Process Clause of the Federal and State Constitutions require the State to recognize Petitioners' marriage. (Am. Petition to Adopt Step-Child at ¶¶ 4-5.) However, as set out above, Petitioners' marriage was entered into based on a non-final district court order which is on appeal, and as such the rights to the marriage have not vested for purposes of Federal Due Process Protection. *Plyer v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996) (holding no due process violation because plaintiffs did not have vested property interest in

rights created by non-final consent decree); *Gavin v. Branstad*, 122 F.3d 1081, 1091 n.10 (8th Cir. 1997) (" If the right is not vested—that is, if the judgment is not final—it is not a property right, and due process is not implicated . . . ."). Moreover, because the *Kitchen* injunction halting enforcement of Utah laws is stayed and Utah laws banning same-sex are in effect, Petitioners' marriage is currently void, and will be under Utah law unless *Kitchen* is upheld. Federal Due Process cannot protect a marriage that, under state law, is not recognized and technically void.

Utah's Due Process Clause likewise does not require Petitioners' marriage to be recognized because Amendment 3 banning recognition of same-sex marriage means such marriages are not entitled to due process protection. It is hornbook law that a constitutional amendment must be read in context of the entirety of the constitution, and that amendments must be read in harmony with the constitution if possible, but that the amendment is the final word of the citizens of the state on an issue. *E.g.*, 16 C.J.S. *Constitutional Law* § 68. As stated by the Utah Supreme Court:

> To understand the meaning and effect of the constitutional amendment, we shall review some of the fundamental principles which are controlling.…The different sections, provisions, and amendments relating to the same subject-matter must be construed together and read in the light of each other, as far as possible, to effect a harmonious construction of the whole. At the same time full force and effect must be given every provision where this can be done.… A clause in an amendment will prevail over a provision of the original instrument inconsistent with it, but the amendment should not be construed as affecting any greater innovation of the existing Constitution than is reasonably necessary to accomplish the purposes of its adoption.

*Wadsworth v. Santaquin City*, 28 P.2d 161, 167 (Utah 1933) (citing 12 C.J. 708, et seq.) (further citations omitted). Moreover, one constitutional amendment cannot "violate" a different part of the constitution. *Id.*; *see also E. Okla. Bldg. & Constru. Trades Council v. Pitts*, 82 P.3d 1008, 1012 (Okla. 2003) ("We fail to understand how an amendment to the Oklahoma Constitution could be found to violate that constitution."). The canon of judicial interpretation is well-settled in the constitutional analysis from appellate courts of other states. [2]

**CONCLUSION**

In response to Petitioners' notice, the Attorney General has provided the Court with legal analysis on the current state of Utah law banning same-sex marriage. Based on United States Supreme Court law on the effect of a stay, as soon as the stay was issued, Utah laws banning same-sex marriage were no longer enjoined and were in effect. Under current law, Petitioners'

[2] *See, e.g.*, *State ex rel. Moreau v. Castillo*, 971 So. 2d 1081, 1083 (La. Ct. App. 2007) *writ denied*, 964 So. 2d 349 (holding that specific provision of constitution denying felon from holding office superseded restoration of "full rights of citizenship" granted by separate provision of state constitution); *State ex rel. Lashly v. Becker*, 235 S.W. 1017, 1020 (Mo. 1921) (en banc) ("If the [later amendment], on any given subject, conflicts with portions of the [constitution] as it stood before the amendment, those portions must fall in obedience to the latter expressions found in the amendment."); *City of Albuquerque v. N.M. State Corp. Comm'n*, 605 P.2d 227, 229 (N.M. 1979) (recognizing that when constitutional provisions conflict, the specific prevails over the general and the later prevails over the earlier, in determining whether a city or a corporation commission could set rates for transportation); *State ex rel. Lein v. Sathre*, 113 N.W.2d 679, 682–83 (N.D. 1962) (recognizing that a constitutional amendment changing the apportionment of state legislators "prevails over all preexisting inconsistent constitutional provisions"); *Oakley v. State*, 830 S.W.2d 107, 109–111 (Tex. Ct. Crim. App. 1992) (op. on pet. for discretionary review en banc) (holding that constitutional amendment permitting trial court to describe parole, meant to overturn a Texas court case, also overrode claim for violation of due process); *Commonwealth ex rel. Specter v. Vignola*, 285 A.2d 869, 871–72 (Pa. 1971) (holding that a specific constitutional amendment relating to the appointment of judges prevails over a general provision for the removal of civil officers).

marriage is not valid in Utah and Utah may not give legal effect to the marriage. Recognizing that *Kitchen* may ultimately be upheld, in which case Petitioners' marriage would be valid, the Attorney General recommends staying the action. Or, Petitioners may choose to voluntarily dismiss without prejudice and re-file if *Kitchen* is upheld in a final, non-appealable order.

DATED this 24th day of February, 2014.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ Joni J. Jones
JONI J. JONES
Assistant Utah Attorney General

**CERTIFICATE OF SERVICE**

I certify that on February 24, 2014, I caused a copy of the foregoing, **ATTORNEY GENERAL'S POSITION ON CONSTITUTIONALITY OF STATE LAW REGARDING PETITIONERS' ADOPTION**, to be served on the following via electronic mail:

janetmb@utcourts.gov

Shane A. Marx
shane@dolowitzhunnicutt.com
DOLOWITZ HUNNICUTT

/s/ Cecilia Lesmes

# Exhibit 4

# Petition for Extraordinary Relief

PEGGY E. STONE (6658)
JONI J. JONES (7562)
Assistant Utah Attorneys General
SEAN D. REYES (7969)
Utah Attorney General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Facsimile: (801) 366-0101
e-mail: pstone@utah.gov
jonijones@utah.gov

**IN THE UTAH SUPREME COURT**

| | |
|---|---|
| Utah Department of Health, Petitioner<br><br>v.<br><br>Honorable Judge Andrew Stone,<br>Third District Court Judge, Respondent | PETITION FOR EXTRAORDINARY RELIEF<br><br><br><br>Case No. 20140272 |

Pursuant to Rule 19(a) of the Utah Rules of Appellate Procedure and Rule 65B(d) of the Utah Rules of Civil Procedure, Petitioner Utah Department of Health, Bureau of Vital Statistics (the Department of Health, or the Department) asks this Court to relieve it from compliance with an order issued by the Honorable Judge Andrew Stone which directs the State to act in contravention of Utah law banning recognition of same-sex marriage, including Amendment 3 to the Utah Constitution.

## INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 19(b)(1), the Department of Health identifies the following persons or entities whose interests may be substantially affected by this Petition: (1) the petitioners in the underlying adoption case, M.A.B. and R.A.M., from which Judge Stone issued the order; (2) other same-sex couples married in Utah before the United States Supreme Court issued a stay of *Kitchen v. Herbert,* Case No. 2:13-cv-217 (D. Utah), 961 F. Supp. 2d 1181 (D. Utah 2013), and who have filed petitions to adopt minor children and seek or have obtained orders requiring state entities to act in violation of Utah law banning same-sex marriage.

## ISSUES PRESENTED AND RELIEF SOUGHT

**Issue:** Is the Utah Department of Health required to comply with an order issued in an adoption proceeding that requires the Department to violate Utah statutory law and the Utah Constitution, both of which forbid the State from recognizing same-sex marriage?

**Relief:** The Department of Health seeks a ruling from this Court that it is not required to violate Utah law by complying with Judge Stone's order until and unless the Tenth Circuit of Appeals upholds *Kitchen v. Herbert*, and the U.S. Supreme Court stay on *Kitchen v. Herbert* injunction has been lifted.

## STATEMENT OF FACTS

On December 20, 2013, the United States District Court issued *Kitchen v. Herbert,* 961 F. Supp. 2d 1181 (D. Utah 2013). *See* Memorandum Decision and Order, *Kitchen v. Herbert*, Case

No. 2:13-cv-217, Addendum A.[1] There, the Court held that Utah's laws banning same-sex marriage violated the Federal Constitution, and the Court enjoined them from being enforced. Memorandum Decision, Addendum A, at 53 ("The court hereby enjoins the state from enforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex."). Within hours after the *Kitchen* ruling was issued, the State orally requested a stay, which was denied. Order on Stay, Addendum B, at 2. Later that day, the State filed a written motion for a stay; argument on which the district court heard on December 23, 2013, and which the district court denied that same day. *Id.* at 2, 6. The Attorney General directed state agencies to comply with the *Kitchen* order, and county clerks began issuing marriage licenses to same-sex couples on December 20, 2013.

In the meantime, the State filed an appeal of the *Kitchen* ruling and moved the Tenth Circuit Court of Appeals to stay that ruling. That motion was denied. *See* Tenth Circuit Court of Appeals Order Denying Stay, Addendum C, and. *See* Tenth Circuit Court of Appeals Docket in *Kitchen v. Herbert,* Addendum D. Oral argument on *Kitchen* is set for April 10, 2014. *See id.*

On January 6, 2014, in a unanimous order, the United States Supreme Court granted the State's motion for stay. *Kitchen v. Herbert,* 134 S. Ct. 893, 2014 WL 30367 (U.S. Utah). The stay immediately suspended the effect of the district court's injunction, so that Utah laws banning same-sex marriage have been back in effect since January 6, 2014. On January 8, 2014,

[1] For the convenience of the Court and related parties, Petitioner Department of Health has attached all orders and pleadings referred to herein in a separate addendum.

Governor Herbert directed state agencies not to provide benefits or otherwise recognize same-sex marriages performed in Utah between December 20, 2013 and January 6, 2014. *See* Letter From Gov. Herbert to Cabinet, Addendum E. The Governor directed that recognition of these marriages would be suspended, pending the outcome of the State's appeal to the Tenth Circuit Court. *See id.*

M.A.B. and R.A.M. were originally married in Washington, D.C., in 2010, and reaffirmed their marriage in Salt Lake County on December 20, 2013. Redacted Amended Petition to Adopt Minor Step-Child, Addendum F, at ¶ 3, On or about January 22, 2014, four same-sex couples who were also married in Utah before the United States Supreme Court issued a stay of *Kitchen,* filed a lawsuit, *Evans v. Herbert,* Case No. 2:14-cv-00055, requesting, *inter alia*, an order requiring the State to immediately and permanently recognize their marriages. *See* Complaint, *Evans, et al, v. State of Utah, Governor Herbert, and Attorney General Reyes*, Addendum G. M.A.B. and R.A.M. are plaintiffs in *Evans.*[2] The *Evans* complaint alleges plaintiffs' rights to their marriages immediately vested once their marriages were solemnized and therefore are protected by the Due Process Clause of the Federal Constitution and Utah Constitution. *Evans* Complaint, Addendum G, at ¶¶ 87 -121. The State Defendants removed *Evans* to federal court, Notice of Removal, Addendum H. On February 2, 2014, Plaintiffs filed a motion for a preliminary injunction requiring the state to immediately recognize their marriages, Motion and Memorandum In Supp. of P.I., Addendum I, and a motion to certify to the Court the

[2] Although M.A.B. and R.A.M. did not conceal their identify in *Evans,* their names are redacted from the complaint so as not to identify the parties to the adoption case in which Judge Stone issued the order at issue in this Petition.

question of whether the Utah Constitution required the State to recognize their marriages. Motion to Certify, Addendum J. Oral argument on the preliminary injunction and motion to certify was held on March 12, 2014. Minute Entry, doc. 28 on *Evans* Docket, Addendum K. No decision has been issued. *See Evans* Docket, Addendum K.

On or about February 14, 2014, the Attorney General was served with notice, pursuant to Utah Civil Rule 24(d)(1), that the M.A.B. and R.A.M. second-parent adoption petition implicated the constitutionality of a State statute and the State accordingly had a right to be heard. *See* Rule 24(d)(1) Notice to Attorney General, Addendum L. The Attorney General filed a memorandum setting out the State's position on the status of Utah law banning same-sex marriage and recognition of same-sex marriage. The Attorney General recommended that the adoption proceeding be stayed pending the outcome of *Kitchen v. Herbert,* now before the United States Court of Appeals, because the constitutionality of the statutes at issue in *In re J.D.B.,* would be resolved in *Kitchen. See* Attorney General's Position on Constitutionality of State Law Regarding Petitioners' Adoption, Addendum M.

The Attorney General was not a party to the adoption proceeding, which was sealed, and the Attorney General was required to file the brief by emailing a copy of the brief to Judge Stone's clerk. *See* Email to Janet Banks, Addendum N. The Attorney General was not notified of argument nor of the Court's decision regarding the adoption.

But on April 1, 2014, the Utah Department of Health, Bureau of Vital Statistics, was presented with an order from Judge Stone requiring it to "issue an amended birth certificate, changing the child's name to [J.D. M-B.] and recording [M.A.B. and R.A.M.] as the child's legal

parents." *See* Affidavit of Marrisa Sowards, Addendum O; Decree of Step-Parent Adoption (Redacted), herein referred to as "the Order" or "Judge Stone's Order," Addendum P.

**NO OTHER PLAIN, SPEEDY, OR ADEQUATE REMEDY EXISTS**

The Department of Health has been presented with a court order which requires it to act in violation of Utah law. The Department of Health is not a party to M.A.B.'s and R.A.M.'s adoption and therefore cannot directly challenge the Order in that proceeding. The only available relief from compliance with the Order is through a writ directed to Judge Stone suspending enforcement of the Order. The Department finds itself in an untenable position. It cannot comply with the court Order without violating state constitutional and statutory law and absent an order from this Court freeing it from doing so, should the Department follow Utah law, and not the district court order, it runs the risk of being ordered to show cause why it should not be found in contempt. The writ should be issued because in the absence of a writ, the Department of Health would be required to violate Utah statutes and Amendment 3 of the Utah Constitution.

**CONCLUSION**

Judge Stone's March 26, 2014 Order requires the Department of Health to violate Utah law and Amendment 3 to the Utah Constitution by recognizing a same-sex marriage and also by according that marriage governmental rights or benefits. For the reasons set out more fully in its memorandum of points and authorities filed concurrently, the Department asks this Court to relieve it from complying with that Order, unless and until the United States Tenth Circuit Court

of Appeals upholds *Kitchen v. Herbert*, and the United States Supreme Court stay on *Kitchen v. Herbert* is lifted.

Dated this 9th day of April, 2014

OFFICE OF THE UTAH ATTORNEY GENERAL

Peggy E Stone

PEGGY E. STONE
JONI J. JONES
Assistant Utah Attorneys General
Attorneys for the Department of Health

## CERTIFICATE OF SERVICE

I certify that on April 9, 2014 I filed the foregoing, **PETITION FOR EXTRAORDINARY RELIEF**, by hand-delivering documents to the Clerk of the Court and also caused to be served to the following:

Shane A. Marx
DOLOWITZ HUNNICUTT
299 South Main Street, Suite 1300
Salt Lake City, UT 8411
*Via Hand-Delivery*

Brent Johnson
Administrative Office of the Courts
450 South State Street
Salt Lake City, UT 84114
*Via Hand-Delivery*

**CERTIFICATE OF SERVICE**

I certify that on April 9, 2014 I filed the foregoing, **PETITION FOR EXTRAORDINARY RELIEF**, by hand-delivering documents to the Clerk of the Court and also caused to be served to the following:

Shane A. Marx
DOLOWITZ HUNNICUTT
299 South Main Street, Suite 1300
Salt Lake City, UT 84111
*Via Hand-Delivery*

Brent Johnson
Administrative Office of the Courts
450 South State Street
Salt Lake City, UT 84114
*Via Hand-Delivery*

# Exhibit 5

# Utah Supreme Court Per Curiam Order

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Utah Department of Health,

Petitioner,

v.

Honorable Judges Andrew Stone, Elizabeth A. Hruby-Mills, and L.A. Dever,

Respondents.

Case No. 20140272 -SC
Case No. 20140280-SC
Case No. 20140281-SC
Case No. 20140292-SC

---

**PER CURIAM ORDER**

These matters are before the Court on Petitioner's petitions for extraordinary relief and requests for emergency relief in the form of a stay. Enforcement of the district court orders mandating or authorizing Petitioner to issue birth certificates is stayed until the Court can address the petitions for extraordinary relief. The parties are directed to provide full briefing on the issues presented by those petitions according to a schedule to be established by the Clerk of Court. The Clerk of Court also will notify the parties of the date and time for oral argument.

Issued May 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2014, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

BRENT M JOHNSON
jeniw@utcourts.gov

PEGGY E. STONE
pstone@utah.gov

JONI J JONES
jonijones@utah.gov

DAVID S DOLOWITZ
DAVID S DOLOWITZ PLLC
299 S MAIN ST STE 1300
SALT LAKE CITY UT 84111

JAMES HUNNICUTT
sandy@dolowitzhunnicutt.com

SHANE A MARX
sandy@dolowitzhunnicutt.com

THIRD DISTRICT, SALT LAKE
ATTN: cheryla@utcourts.gov
julier@utcourts.gov

Dated this May 16, 2014.

By Marilyn Hammond
Judicial Assistant

Case No. 20140292
THIRD DISTRICT, SALT LAKE, 132900578