No. A13-____

In the

Supreme Court of the United States

Gary R. Herbert, in his official capacity as Governor of Utah, and
Sean D. Reyes, in his official capacity as Attorney General of Utah,
Applicants,

v.

Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, Kody Partridge, and Sherrie Swensen, in her official capacity as Clerk of Salt Lake County,

Respondents.

Application To Stay Judgment Pending Appeal

**DIRECTED TO THE HONORABLE SONIA SOTOMAYOR
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT**

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December 31, 2013

after carefully considering the manifest benefits of gender complementarity—that a sovereign State is constitutionally *compelled* to make that choice. To hold that the Constitution allows a federal court to second-guess such a fundamental (and sometimes difficult) policy choice, lying as it does at the very heart of the State's authority over matters of domestic relations, would be a remarkable "federal intrusion on state power," *id.* at 2692—one that would make a mockery of the *Windsor* majority's rationale for invalidating Section 3 of DOMA.

Accordingly, there is a good probability that the Court will avoid that result and, accordingly, reject the district court's analysis and (if it is not overturned by the Tenth Circuit) invalidate the injunction at issue here.

III. Absent a stay, there is a likelihood—indeed, a certainty—of irreparable harm.

The injunction also imposes certain—not merely likely—irreparable harm on the State and its citizens. Members of this Court, acting as Circuit Justices, repeatedly have acknowledged that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland* v. *King*, 567 U.S. ___, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 571 U.S. ___, 134 S.Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). That same principle supports a finding of irreparable injury in this case. For the district court's order enjoins the State from enforcing not only an ordinary statute, but a constitutional provision approved by the people of Utah in the core exercise of their sovereignty.

1. That States have a powerful interest in controlling the definition of marriage within their borders is indisputable. Indeed, the *Windsor* majority acknowledged that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons

domiciled within its borders,'" *Windsor*, 133 S.Ct. at 2691 (quoting *Williams*, 317 U.S. at 298), and emphasized that "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents and citizens." *Id.* (emphasis added). Every single marriage performed between persons of the same sex as a result of the district court's injunction—and in defiance of Utah law—is thus an affront to the sovereignty of the State and its people. Each such marriage openly flouts the State's sovereign interest in controlling "the marital status of persons domiciled within its borders," *id.*, based on the unreviewed judgment of a single district court.

Utah's sovereign interest in determining who is eligible for a marriage license is bolstered by the principle of federalism, which affirms the State's constitutional authority over the entire field of family relations. As the *Windsor* majority explained, "'regulation of domestic relations' is 'an area that has long been regarded as a *virtually exclusive* province of the States.'" 133 S.Ct. at 2691 (quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975)) (emphasis added). The district court's decision breaches the principle of federalism by exerting federal control over the definition of marriage—a matter within Utah's "virtually exclusive province." *Id.*

A federal intrusion of this magnitude not only injures the State's sovereignty; it also infringes the right of Utahns to government by consent within our federal system. For, as Justice Kennedy has explained:

> The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

United States v. *Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment); see also *Bond*, 131 S.Ct. at 2364 ("When government acts in excess of its lawful powers" under our system of federalism, the "liberty [of the individual] is at stake.").

Here, the district court's extraordinary decision to overturn Utah's marriage laws—and

its refusal even to stay its order pending further review—places in jeopardy the democratic right of millions of Utahns to choose for themselves what marriage will mean in their community.

2. Overturning Utah's marriage laws also has grave practical consequences. Hundreds of marriage licenses have been issued already, with many more couples expected to apply for licenses in the coming days. Assuming the Tenth Circuit and/or this Court ultimately holds Utah's Marriage Amendment to be valid, as the State strongly maintains it should, the State inevitably will confront the thorny problem of whether and how to unwind the marital status of same-sex unions performed before reversal of the district court's decision. Considerable administrative and financial costs will be incurred to resolve that problem, and the State's burden will only increase as the number of marriage licenses issued to same-sex couples continues to grow. See *Legalization Assistance Project*, 510 U.S. at 1305-06 (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant the requested stay). Only a stay can prevent or at least mitigate that indefensible result.

The State's responsibility for the welfare of *all* its citizens makes it relevant, as well, that Respondents and any other same-sex couples who choose to marry during the period before the Tenth Circuit and this Court resolve this dispute on the merits will likely be irreparably harmed without a stay. They and their children will likely suffer dignitary and financial losses from the invalidation of their marriages if appellate review affirms the validity of Utah's marriage laws. The State thus seeks a stay, in part, to avoid needless injuries to same-sex couples and their families that would follow if the marriage licenses that they obtain as a result of the district court's injunction are ultimately found invalid—simply because the district court refused (as did the Tenth Circuit) to stay that injunction pending appellate resolution of the central legal issue in this case.

Cavalierly brushing aside the State's substantial concerns, the district court found that the

State would not suffer irreparable injury absent a stay, and the Tenth Circuit proffered no analysis of the State's allegations of injury at all. In part, the district court reasoned that enjoining a state law did not impose an irreparable injury in this case because that principle was invoked only by courts disposed to rule on the merits *in favor* of the party seeking a stay, and because the district court knew of no practice within the Tenth Circuit of automatically granting a stay when a state law is held invalid. See App. C at 4-5. But the district court misread this Court's decisions invoking *New Motor Vehicle Board*, none of which limited the significance of enjoining a state law to cases where that law was believed to be valid.

Both lower courts, moreover, evidently misapprehended the import of the district court's injunction: It cannot be seriously contested that the State will suffer irreparable harm from the district court's nullification of Utah's *constitutional* definition of marriage absent a stay, given that such harm repeatedly has been found when a federal court enjoins the enforcement of ordinary statutes. See *New Motor Vehicle Bd.*, 434 U.S. at 1345 (relocation of auto dealerships); *Maryland*, 133 S.Ct. at 5 (collection of DNA samples from arrestees); *Planned Parenthood*, 134 S.Ct. at 507 (Breyer, J., dissenting from denial of application to vacate the stay) (restrictions on physicians' eligibility to perform abortions).

IV. The balance of equities favors a stay.

Although the case for a stay is not "close," here too, "the relative harms to the applicant and to the respondent" strongly tilt the balance of equities in favor of a stay. *Hollingsworth*, 558 U.S. at 190.

As previously explained, the State and its citizens will suffer irreparable injury from halting the enforcement of Utah's definition of marriage: Every marriage performed uniting persons of the same sex is an affront to the sovereignty of the State and to the democratically expressed will of the people of Utah; the State may incur ever-increasing administrative and