No. A14-_____

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.

JoNell Evans, Stacia Ireland, Marina Gomberg, Elenor Heyborne,
Matthew Barraza and Karl Fritz Shultz,

Respondents.

Emergency Application to Stay Preliminary Injunction 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**

GENE C. SCHAERR*
JOHN J. BURSCH
Special Assistant Attorneys General
PARKER DOUGLAS
Utah Federal Solicitor & Chief of Staff
STANFORD E. PURSER
Assistant Attorney General
350 South State Street, #230
Salt Lake City, UT 84114-0856
801-366-0100 (phone)
gschaerr@utah.gov

Counsel for Governor Gary R. Herbert and Attorney General Sean D. Reyes

July 16, 2014

*Counsel of Record

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To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Applicants Gary R. Herbert, Governor of Utah, and Sean D. Reyes, Attorney General of Utah, respectfully apply for an emergency stay pending appeal of a preliminary injunction entered by the United States District Court for the District of Utah. That court ordered Applicants to immediately and permanently recognize hundreds of same-sex marriages pursuant to that court's previous injunction forbidding Utah from enforcing its marriage laws, even though this Court has already stayed the latter injunction pending appeal. Both the district court and a divided Tenth Circuit have denied Applicants' requests for a full stay pending appeal, although the Tenth Circuit has granted a temporary stay that will expire at 10:00 a.m. EDT on Monday, July 21, 2014. App. A at 30; App. B & C.

INTRODUCTION

This Application addresses a de facto circumvention of this Court's recent grant of a stay pending appeal (App. D) of the decision and injunction in *Kitchen* v. *Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), a circumvention that has burdensome regulatory implications and irreparable consequences for the state of Utah. The issue in *Kitchen* is the validity of Utah's constitutional provision and statutes defining marriage as between one man and one woman. The district court in *Kitchen* struck down Utah's laws and denied Utah's request for a stay. Although this Court ultimately issued a stay, several hundred same-sex couples—including the Plaintiffs in this case—obtained marriage licenses during the short period before this Court's stay issued.[1]

A divided Tenth Circuit has affirmed the district court's *Kitchen* decision, *see Herbert* v. *Kitchen*, ___ F.3d ___, 2014 WL 2868044 (10th Cir. June 25, 2014), and Utah is preparing its

[1] For convenience, the marriages and licenses issued during that period under authority of the district court's injunction are hereafter referred to as "interim marriages."

petition for certiorari in that case. That petition will give this Court an opportunity to determine whether the Fourteenth Amendment prohibits the people of a state from defining marriage as between one man and one woman. That decision will also likely dictate the outcome in this case: If Utah's laws are struck down, Utah will recognize Plaintiffs' interim marriages; if Utah's laws are upheld, Utah will do everything possible to comply with them.

Either way, the district court in this case erred in holding that Plaintiffs are entitled to an injunction *now* that directs Utah to recognize Plaintiffs' interim marriages *regardless* of this Court's ultimate decision in *Kitchen*. The district court reached that remarkable result by holding that Utah's democratically enacted marriage laws became "a legal nullity" the moment the non-final *Kitchen* decision was entered, and therefore that Plaintiffs acquired "vested rights" in their interim marriages once the appropriate Utah officials issued marriage licenses in compliance with the unstayed *Kitchen* order. App. A at 22. But no federal court has ever held that a plaintiff can acquire vested rights as a result of an unstayed, non-final district court order, because such a rule creates an end-run around the normal appellate process and largely innoculates the unstayed, non-final decision from effective appellate review.

This case thus presents an extremely important question of both federalism and federal procedure, a question that is closely related to, but distinct from, the question this Court will soon be asked to address in *Kitchen*. That question is whether a federal district court is authorized to create private rights that vest against a state by issuing a non-final order commanding state officials to perform a ministerial act (in this case, granting a marriage license) and then refusing to stay that order pending appeal. Utah submits the answer to that question is "no:" Absent a final decision by an appellate court of last resort declaring Utah's marriage laws unconstitutional, the democratically produced decisions of Utah's citizens should not be overturned based on the discretion of a single federal district judge unchecked by subsequent

appellate review. As Judge Kelly emphasized in dissenting from the Tenth Circuit's denial of a stay, "The rule contended for by the Plaintiffs—that a federal district court may change the law regardless of appellate review and the State is stuck with the result in perpetuity—simply cannot be the law." *See* App. C, Kelly, J., dissenting at 3. As explained in detail below, that indeed is *not* the law—as determined by this Court's precedent and other binding legal authority.

In short, a stay pending appeal is warranted given the close connection between this case and *Kitchen*, the likelihood this Court will grant certiorari and ultimately reverse the district court's unprecedented holding in this case, and the irreparable harm caused to Utah and its citizens by enjoining it (again) from enforcing their democratically enacted laws.

STATEMENT

Plaintiffs' suit challenges the applicability of Utah's constitutional and statutory provisions defining marriage as between one man and one woman. Article I, § 29 of the Utah Constitution, adopted under the name "Amendment 3" by 66% of Utah voters in the 2004 statewide election, provides that "[m]arriage consists only of the legal union between a man and a woman" and that "[n]o other domestic union, however denominated, may be recognized as a marriage . . . ." Utah Const. art. I, § 29. The Utah Code likewise proclaims that "[i]t is the policy of this state to recognize as marriage only the legal union of a man and a woman . . . ." Utah Code § 30-1-4.1(1)(a).

A. Plaintiffs enter interim marriages based on a non-final federal district court injunction that was appealed and that this Court has stayed.

Plaintiffs filed their complaint just a few weeks after the federal district court in Utah decided that Utah's definition of marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Kitchen*, 961 F. Supp. 2d at 1181, *et seq*. According to the district court, marrying someone of the same sex is a fundamental right, and Utah's longstanding

marriage definition impinges upon that right without sufficient justification. *Id*. The court implemented its decision by immediately enjoining the State from enforcing its marriage definition, and refused to issue a stay. Applicants filed a notice of appeal the same day and unsuccessfully sought a stay from the Tenth Circuit.

Without a stay pending appeal, the district court's decision created a rush to marry. And over the ensuing days, hundreds of same-sex couples, including the Plaintiffs, obtained marriage licenses during the Utah's pending appeal and continuing efforts to obtain a stay from this Court. On January 6, 2014, this Court restored order to the appellate process and stayed the district court's injunction pending resolution of the appeal by the Tenth Circuit. App. D. At a minimum, the stay implicitly recognized that: (1) Utah's marriage laws should have remained in force during the appeal; (2) Utah and its citizens should be allowed the benefit and certainty of appellate review on such a critical issue; and (3) this Court, and not a federal district court, has the final say on these matters.

The *Kitchen* appeal remains pending: The Tenth Circuit recently ruled against Utah 2-1, and Utah is now preparing its petition for certiorari. As a result, this Court will soon have the final, dispositive word on the important issue of who gets to decide how to define marriage: the people of a state participating in the democratic process, or the federal courts.

B. Plaintiffs file suit to validate their interim marriages regardless of the ongoing *Kitchen* appeal.

Once this Court entered its stay, Applicants again had a state constitutional and statutory duty to enforce and defend Utah's laws. The State was thus obligated to not recognize Plaintiffs' interim marriages unless and until the *Kitchen* decision is upheld by a final appellate decision.

Yet Plaintiffs did not wait for the Tenth Circuit's or this Court's decision about the constitutionality of Utah's marriage definition and, by implication, the validity of their interim

marriages. Instead, they filed the suit below for a judicial declaration that their marriages are valid and vested regardless of the *Kitchen* appeal, and that Utah must permanently recognize every interim marriage entered in Utah before the *Kitchen* injunction was stayed. Plaintiffs did so despite settled law indicating that, if the *Kitchen* decision is reversed, it will be "without any validity, force or effect, and ought never to have existed." *Butler* v. *Eaton*, 141 U.S. 240, 244 (1891).

C. Parallel proceedings are occurring in Utah State courts.

While the Plaintiffs' federal case was pending, a number of same-sex couples (including one of the Plaintiff couples here) filed petitions for step-parent adoptions in Utah state district court. Under Utah law, the State is not a party in these actions and customarily not notified of such proceedings, 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, showing that, because of the stay issued by this Court, Utah law remained and prevented the State from recognizing same-sex marriages or granting state benefits based on their interim marriages.

Nonetheless several state district courts issued conflicting opinions, and the Utah Department of Health, Office of Vital Statistics received four orders from State district court judges requiring the Department to issue amended birth certificates identifying the same-sex couple as parents of the child on the certificate. On April 7, 8, and 10, 2014, the Department petitioned the Utah Supreme Court for emergency relief in those cases and followed with petitions for extraordinary relief. The petitions asked the Utah Supreme Court to decide whether the Department is required to comply with an order issued that requires the Department to violate Utah law forbidding the State from recognizing the interim marriages and licenses issued during the short time the federal district court's order was unstayed.

The Utah Supreme Court has thus been asked to address whether, under *Utah* law, the interim marriages entered before the stay are valid and vested regardless of the outcome of the *Kitchen* appeal. Yet those questions are predicated on the existence of a federal substantive right, as it was only the district court's and Tenth Circuit's decisions to deny a stay in *Kitchen* that allowed any interim marriage in Utah to occur in the first instance. Those questions also depend on the legal status of a non-final federal district court decision, and the legal effect of a federal court order staying such a decision, as a matter of federal law.

On May 16, 2014, the Utah Supreme Court ordered that all State court proceedings related to the petitions for extraordinary relief—including two show-cause orders as to why the Attorney General and Department of Health should not be held in contempt for failure to comply with the adoption orders—are stayed. As of this date the petitions have been briefed, but the Utah Supreme Court has neither called for additional briefing nor set a date for argument. *See generally Department of Health* v. *Stone*, No. 20140272; *DOH* v. *Stone*, No. 20140292, *DOH* v. *Dever*, No. 20140281, and *DOH* v. *Hruby-Mills*, Case No. 20140280.

D. The district court declares the interim marriages forever valid and orders Utah to permanently recognize them.

Despite the pending *Kitchen* appeal and stay, and despite the fact that Utah's highest court has before it the validity of Plaintiffs' interim marriages under Utah law, the federal district court below, in a preliminary injunction, ordered Utah to recognize Plaintiffs' interim marriages now. In finding that the Plaintiffs had a sufficient likelihood of success on the merits, the district court reached the remarkable conclusion that: "Whether or not *Kitchen* is ultimately upheld, … Utah's marriage bans were a legal nullity until the Supreme Court issued the Stay Order on January 6, 2014." App. A at 22. The only authority the district court cited was *Howat* v. *Kansas*, 258 U.S. 181 (1922), which addressed the quite different question of whether a duly

entered federal-court injunction "must be obeyed . . . however erroneous the action of the court may be." *Id*. at 189–90. This Court's affirmative answer to that question does not imply that a democratically enacted state law becomes "a legal nullity" the moment it is declared unconstitutional by a non-final district court decision.

Based on its "nullity" premise, the district court concluded that, again as a matter of federal law, Plaintiffs had a vested "substantive due process" right to have their interim marriages recognized by the State, i.e., that "[o]nce Plaintiffs solemnized a legally valid marriage . . . , Plaintiffs obtained all the substantive due process and liberty protections of any other marriage." App. A at 24. The district court went on to conclude that, because the *Kitchen* decision was the operative law at the time those interim marriages occurred, as a matter of federal law this Court's stay order was the legal equivalent of Utah reenacting—retroactively—the laws that the district court had held unconstitutional. *See id*. at 25 ("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."). Because in the district court's view, the State's only legitimate interest was "in applying the controlling law at the time"—that is, Utah law as "modified" by the district court's *Kitchen* order—the State had "failed" to demonstrate a sufficient state interest "in divesting Plaintiffs of their already vested marriage rights." *Id*.

In short, the district court held that a lone federal district court judge is authorized to create private rights that vest against a state by issuing a non-final order commanding state officials to perform a ministerial act (in this case, issuing a marriage license) and then refusing to stay that order pending appeal. The court cited no direct authority for the proposition that a federal district judge possesses such a sweeping and novel power.

Instead, the district court attempted to ground its conclusion in this Court's decision in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013). *Id*. at 24. But it did so in a self-contradictory manner. On the one hand, on the threshold question of whether Plaintiffs assert a protected due process interest, the court disclaimed the relevance of the *Kitchen* appeal—which squarely raises whether *Windsor* requires Utah to permit same-sex marriage. App. A at 12. On the other hand, the district held that *Windsor* actually grants the Plaintiff couples a constitutionally protected liberty interest in their interim marriages, App. A at 12–14, 24—even though *Windsor* was expressly "limited" to marriages approved by democratically enacted state laws. 133 S. Ct. at 2696.

The district court thus found that Plaintiffs were likely to succeed on the merits and preliminarily enjoined the Applicants from applying Utah's marriage laws "to the same-sex marriages that were entered pursuant to Utah marriage licenses issued and solemnized between December 20, 2013, and January 6, 2014. . . .," App. A. at 35. The district court then ordered Applicants to "immediately recognize" those marriages, affording Plaintiffs "all the protections, benefits, and responsibilities given to all marriages under Utah law." *Id*. To reiterate, this ruling was in the context of Utah laws that prohibit Applicants from engaging in those very actions—laws that remain valid and effective as a result of this Court's stay in *Kitchen* and the Tenth Circuit's subsequent stay of its own *Kitchen* decision pending review in this Court.

Applicants then asked for a stay pending appeal, which both the district court and the Tenth Circuit ultimately denied (without meaningful analysis), except for a temporary stay that will expire on Monday, July 21, at 8 a.m. MDT, or 10 a.m. EDT. App. C.

Judge Kelly dissented from the Tenth Circuit's denial of a stay. He began by noting the absurdity of the district court's "vesting" analysis by pointing out that Plaintiffs' "right to marry" was created, not by Utah law, but "by a district court decree in *Kitchen*," which "remains stayed"

and "is non-final." App. C, Kelly, J., dissenting at 2 (citing among other cases *Axel Johnson Inc*. v. *Arthur Andersen & Co*., 6 F.3d 78, 84 (2d Cir. 1993)). Judge Kelly also dismantled the district court's "retroactivity" analysis by pointing out that Utah's marriage laws predate the district court's stayed injunction in *Kitchen*. *Id*. And he emphasized that "[t]he rule contended for by the Plaintiffs" and adopted by the district court—"that a federal district court may change the law regardless of appellate review and the State is stuck with the result in perpetuity—simply cannot be the law. It would not only create chaos, but also undermine due process and fairness." *Id*. at 3.

Analyzing the issue of irreparable injury and the balance of equities, Judge Kelly further concluded:

> In denying a stay pending appeal, this court is running roughshod over state laws which are currently in force. It is disingenuous to contend that the State will suffer no harm if the matter is not stayed; undoing what is about to be done will be labyrinthine and has the very real possibility to moot important issues that deserve serious consideration.

Id.

JURISDICTION

Applicants seek a stay pending appeal of a U.S. District Court's preliminary injunction, dated May 19, 2014, on federal claims that were properly preserved in the courts below. The district court temporarily stayed its preliminary injunction until June 9, 2014. App. A. The Tenth Circuit issued a temporary stay on June 5, 2014, pending resolution of the Applicants' requested stay pending appeal. App. B. But on July 11, 2014, the Tenth Circuit denied a stay pending appeal. App. C. The final judgment of the Tenth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a stay pending appeal under 28 U.S.C. § 2101(f). *See, e.g*., *San Diegans for the Mt. Soledad Nat'l War Memorial* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in

chambers); *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers) (affirming that there is "no question" the Court has jurisdiction to "grant a stay of the District Court's judgment pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay"). In addition, the Court has authority to issue stays and injunctions in aid of its own jurisdiction under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 23.

REASONS FOR GRANTING THE STAY

The standards for granting a stay pending review are "well settled." *Deauer* v. *United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). Preliminarily, this Court's rules require a showing that "the relief is not available from any other court or judge," Sup. Ct. R. 23.3—a criterion established here by the fact that both the district court and a divided Tenth Circuit have refused to grant a stay pending appeal of the district court's preliminary injunction order.[2] A stay is then appropriate if there is at least: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). Moreover, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id*. (citing *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)); *accord, e.g*., *Conkright* v. *Frommert*, 556 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers); *Barnes* v. *E-Systems, Inc*. *Group Hosp*. *Med*. *& Surgical Ins*. *Plan*, 501 U.S. 1301, 1302, 1305 (1991) (Scalia, J., in

[2] The Tenth Circuit's rules do not permit an application for stay addressed to the *en banc* court. *See* 10th Cir. R. 35.7 ("The en banc court does not consider procedural and interim matters such as stay orders, injunctions pending appeal ….").

chambers). In short, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans*, 548 U.S. at 1302 (granting stay pending appeal and quoting *INS* v. *Legalization Assistance Project of Los Angeles Cnty Fed'n of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)). Each of these considerations points decisively to a stay.

I. If the Court of Appeals affirms, there is at least a reasonable probability that certiorari will be granted and at least a fair prospect of reversal.

The linchpin of the district court's decision was its conclusion that, as a matter of federal law, from the moment the district court in *Kitchen* issued its order invalidating Utah's marriage laws, those laws "were a legal nullity until the Supreme Court issued the Stay Order on January 6, 2014." App. A at 22. It was on that basis that the district court held that the court-ordered issuance of marriage licenses gave Plaintiffs "vested rights" in their new-found marital status. And it was on that basis that the court ruled that the reinstatement of Utah's laws by this Court's stay order was akin to a *reenactment* of a previously repealed state law, and hence that Utah's subsequent refusal to recognize Plaintiffs' marriages violated federal due-process retroactivity principles. In short, the district court held as a matter of federal law that a single federal district court can create rights that vest against a state—or any government—simply by issuing a non-final order commanding government officials to perform a ministerial act (in this case, granting a marriage license) and then refusing to stay that order pending appeal. That is the issue Utah intends to present for this Court's review in this case if the Tenth Circuit affirms the decision below. And, as Judge Kelly noted in his dissent from the Tenth Circuit's decision denying a stay, the idea that "a federal district court may change the law regardless of appellate review and

the State [or any other government] is stuck with the result in perpetuity—simply cannot be the law." App. C, Kelly, J., dissenting at 3.

Utah believes it is highly likely—and certainly likely enough to warrant a stay—that at least four Justices will vote to grant certiorari if the district court's decision is affirmed, and that at least five Justices will agree with Judge Kelly that the district court's sweeping legal conclusions "simply cannot be"—and emphatically are not—"the law." Indeed, the district court's misunderstanding of the legal status of a law subject to a non-final decision of unconstitutionality is so fundamentally erroneous, and arises in a context of such importance to all of the states and to this Court, that a summary reversal could well be in order.

1. This Court has repeatedly demonstrated an appropriate determination to be the "last word" on the validity, under the federal constitution, of state and federal actions regarding same-sex marriage. *Windsor* and *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013), are obvious examples. And by granting a stay in *Kitchen,* this Court indicated its determination to have the final say on the constitutionality of *Utah's* marriage laws—even while indicating that there is at least a "fair prospect" that this Court will reverse the divided Tenth Circuit decision affirming that order. *See, e.g., Hollingsworth,* 558 U.S. at 190 (per curiam) (noting that a "fair prospect" of reversal is a necessary prerequisite to granting a stay). Consistent with the State's determination to defend its marriage laws, Utah's counsel are currently drafting a petition for certiorari in *Kitchen,* and will file that petition in due course.

If allowed to stand, the district court's decision in *this* case will severely limit this Court's ability to grant complete relief if it reverses the *Kitchen* decision. If the district court's decision in this case stands, this Court will only be able to ensure that the democratically expressed will of Utah's people is respected in the future; it will not be able to ensure that the people's will is respected as to the interim marriages that occurred before this Court stepped in and stayed the

Kitchen injunction. That prospect heightens the likelihood that at least four Justices will vote to grant review in this case if the Tenth Circuit affirms that decision below.

That likelihood is further heightened by the fact that virtually the same scenario that led to this Court's stay in *Kitchen*—in which same-sex marriages have been performed in the wake of lower-court decisions invalidating State marriage laws—has already arisen in several other state's cases, and will likely arise in additional cases all over the nation.[3] Accordingly, by the time this case reaches this Court, there is a reasonable prospect that a circuit split will have arisen on the very issue presented here, and in the context of nationwide litigation over the constitutionality of state marriage laws.

2. The district court's decision—and especially its holding that vested rights can arise from an unstayed, non-final district court order commanding ministerial action, conflicts with several lines of precedent from this Court. By itself, that conflict satisfies both substantive elements of this Court's stay analysis, to-wit; a sufficient likelihood that certiorari will be granted *and* that the decision below will ultimately be reversed.

First, a judgment reversed by a higher court is "without any validity, force or effect, and ought never to have existed." *Butler* v. *Eaton*, 141 U.S. 240, 244 (1891). In other words, a reversal returns the parties to the status quo ante. And an order that may be declared to be "without any validity, force or effect," and may ultimately be treated as though it "ought never to have existed," cannot be deemed to create vested rights.

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[3] *See, e.g.*, Ryan Parker, *Colorado attorney general seeks to end "legal chaos" over gay marriage*, Los Angeles Times (July 14, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-colorado-supreme-same-sex-20140714-story.html; Greg Botelho, *Court: Same-sex couples can't marry in Michigan as appeal continues,* CNN (March 26, 2014), http://www.cnn.com/2014/03/25/justice/michigan-gay-marriage/; John Newsome, *Same-sex marriages put on hold in Indiana by federal appeals*, CNN (July 1, 2014), http://www.cnn.com/2014/06/27/us/same-sex-marriage-indiana/; Kevin Conlon and Greg Botelho, *Court halts Arkansas same-sex marriages*, CNN (May 16, 2014), http://www.cnn.com/2014/05/16/justice/same-sex-marriage.

The district court's decision conflicts with the Fourth Circuit's decision in *Plyler* v. *Moore*, 100 F.3d 365, 374 (4th Cir. 1996). The Fourth Circuit's decision noted that "the 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)). But this vested-rights doctrine applies "only when a *final* judgment has been rendered." *Id*. (emphasis added). The district court's vesting analysis is thus contrary not only to this Court's decision in *Butler*, but also to circuit decisions like *Plyler* that apply the principles articulated there.

Second, the district court's decision conflicts with this Court's decisions on the legal effect of a stay, which takes the parties back to the status quo ante, to "the state of affairs before the … [stayed] order was entered." *Nken* v. *Holder*, 556 U.S. 418, 429 (2009). The effect of this Court's stay in *Kitchen* was to immediately take the State and the plaintiffs back to the legal status that existed before the district court's *Kitchen* order—regardless of the county clerks' issuance of the marriage licenses. Under the district court's analysis, this Court's *Kitchen* stay didn't return the parties to the legal status quo ante; instead, it left Plaintiffs with a "vested right" to the status that was conferred on them by the district court's *Kitchen* order, and in violation of State law. That analysis conflicts with *Nken*.

Third, the district court's "retroactivity" analysis conflicts with this Court's precedents on both the effect of a stay and the legal status of a non-final order. The key error in the district court's analysis is the premise (stated at p. 22) that, as a result of the district court's earlier order in *Kitchen*, "Utah's marriage bans were a legal nullity until the Supreme Court issued the Stay Order on January 6, 2014." As previously noted, it is from that premise that the district court concluded that the effect of this Court's stay order was legally equivalent to reenacting the laws that the district court had previously declared invalid, and therefore that the reinstatement of

Utah's marriage laws as a result of this Court's subsequent stay was subject to a retroactivity analysis.

But this "nullity" premise is not only inconsistent with the presumption of correctness that attaches to all duly enacted federal and State laws. *See, e.g., Doe* v. *State*, 538 U.S. 84, 110 (2003) (Kennedy, J, concurring.) ("What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one, and on that basis alone I concur in the Court's judgment."). It is also flatly contrary to both *Nken* and *Butler*: If a stay's legal effect is to return the parties to the legal status quo ante, as *Nken* says of a stay and *Butler* says of a reversal, then Utah's laws cannot be treated as though they were repealed by the district court's *Kitchen* order and then reenacted when this Court issued the stay. A world in which a law was repealed but later reenacted is obviously very different from a world in which the law was never repealed at all.[4]

Fourth, the district court's retroactivity analysis is contrary to this Court's rules regarding changes in the law that occur before a judgment becomes final. Chief Justice Marshall first

[4] That is also why the district court was incorrect to rely upon the California Supreme Court's decision in *Strauss* v. *Horton*, 207 P.3d 48 (Cal. 2009). Unlike California's Proposition 8, which was enacted in reaction to a decision from the California Supreme Court, and *after* the resulting same-sex marriages had occurred, the Utah statutes at issue here were enacted *before* the marriages at issue in this case, which were conducted only as a result of the district court's *Kitchen* order. Thus, unlike *Strauss* and Prop. 8, the provisions at issue here were not passed in reaction to any Utah law or judicial decision permitting same-sex marriage—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 there were no exisiting same-sex marriages to which the enactments would retroactively apply.

But in any event, the possibility of retroactive application is implicit in those provisions. Both Amendment 3 and the related Utah statute 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-ebster.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 the "clear and unavoidable implication that the statute operates on events already past," *Evans & Sutherland*, 953 P.2d at 437, as well as events that might occur subsequently to passage.

announced the principle that a person is not entitled to assert legal rights until the rights are affirmed in a final, non-reviewable order in *The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801). In that case, the Court was reviewing a judgment entered pursuant to a prior law, which changed during the appeal process. And the Court held that, "if subsequent to the judgment and *before* the decision of the appellate court, a law intervenes and positively changes the rule which governs, the [new] law must be obeyed …." *Id*. This Court, and numerous circuit courts, have continued to follow this rule. *See e.g., Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986); ("No person has a vested interest in any rule of law [and] this is true after suit has been filed and continues to be true until a *final*, unreviewable judgment is obtained.") (citations omitted); *Tonya K*. v. *Bd*. *of Educ*. *of the City of Chicago,* 847 F.2d 1243, 1247 (7th Cir.1988) ("In civil litigation, however, no person has an absolute entitlement to the benefit of legal principles that prevailed at the time the case began, or even at the time of the bulk of the litigation."). Thus, even if the district court were correct in holding that Utah's marriage laws became a "legal nullity" when the *Kitchen* order was first entered, the very fact that that order was non-final is critical: It means that any rights that might otherwise vest once that order becomes final are still subject to legal changes—such as this Court's stay—that may occur before the order becomes final. Accordingly, on that basis too, the district court's "vesting" and "retroactivity" conclusions are incorrect.

In dissenting from the Tenth Circuit's denial of a stay, Judge Kelly made a similar point, and then went on to explain the perverse effects of the district court's retroactivity analysis:

> … Plaintiffs' right to marry was created by a district court decree in *Kitchen* and that decree remains stayed. The judgment is non-final. *See McCullough* v. *Virginia*, 172 U.S. 102, 123–24 (1898); *Axel Johnson Inc*. v. *Arthur Andersen & Co*., 6 F.3d 78, 84 (2d Cir. 1993); *Johnson* v. *Cigna*, 14 F.3d 486, 490–91 (10th Cir. 1993). Insofar as retroactivity, the Utah provisions barring same-gender marriage and its recognition predate the district court's stayed injunction in *Kitchen*. The rule contended for by the Plaintiffs—that a federal district court may

> change the law regardless of appellate review and the State is stuck with the result in perpetuity—simply cannot be the law. It would not only create chaos, but also undermine due process and fairness.

App. C, Kelley, J., dissenting, at 2–3. Judge Kelly was surely correct that the district court's retroactivity and vesting analyses would "create chaos" and be unfair to the States: If affirmed by the Tenth Circuit, the court's holding would give district courts added incentives *not* to grant stays when they declare state or federal laws invalid. It would thus deprive public officials (and the governments they represent) of their own due-process rights to effective appellate review. And it would put State (and federal) officials in the untenable position of having to disobey district court injunctions in order to prevent those challenging a law from acquiring vested rights before the appellate process is exhausted—thereby heightening the potential for chaos.

In short, the district court's holding that the district court's unstayed, non-final decision in *Kitchen* could give the Plaintiffs here vested rights once county officials complied with that unstayed order conflicts in principle with this Court's decisions in *Nken*, *Butler*, and *The Schooner Peggy*. Judge Kelly was correct that the idea that "a federal district court may change the law regardless of appellate review and the State [or any other government] is stuck with the result in perpetuity—simply cannot be the law." App. C, Kelly J., dissenting at 3. As shown above, it clearly is not the law, and that is why at least a majority of this Court will likely reverse the decision below if the Tenth Circuit affirms it.

3. Not surprisingly, given the district court's stark departures from this Court's settled precedents, a Tenth Circuit affirmance will also create conflicts with decisions in other circuits. As noted above, it will create a circuit split with the Fourth Circuit's decision in *Plyler*. In addition, as suggested by Judge Kelly's dissent, such a decision will create a split with the Second Circuit's vested-rights analysis in *Axel Johnson Inc*. v. *Arthur Anderson & Co*., 6 F.3d 78, 84 (2d Cir. 1993). That decision rejected the district court's legal premise in this case that a

state law can have no application to a pending dispute once a non-final district court decision issues with respect to that dispute:

> The 'vested rights' doctrine has a due process component grounded upon a recognition 'that rights fixed by judgment are, in essence, a form of property over which legislatures have no greater power than any other [property].' . . . However . . . . a case remains 'pending, and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse.

Id. at 84 (citations omitted). The Second Circuit's holding that a case "remains pending … so long as an appeal is pending or the time for filing an appeal has yet to lapse" obviously contradicts the district court's premise here that a law becomes "a nullity" the moment it is held invalid in a non-final decision. Instead, the legal status of such a law "remains pending"—and is therefore *not* a nullity—until all appeals are exhausted.

The district court tried to distinguish *Axel* on the ground that the plaintiff there was relying solely on a district court judgment as the basis for its vested-rights argument, whereas the Plaintiffs here rely upon the subsequent issuance of their marriage licenses. But that distinction ignores the reality that: (a) the issuance of marriage licenses was a ministerial act required by the *Kitchen* decision, not some intervening or supervening cause of the Plaintiffs' marital status; and (b) the Plaintiffs were on notice—and may well have known—that the State intended to appeal the *Kitchen* decision. If the district court here had faithfully followed the analysis in *Axel*, therefore, it could not have concluded that Utah's marriage laws became legal nullities the moment the district court issued its order in *Kitchen*, and could not have concluded on that basis that the Plaintiffs here acquired vested rights the moment they obtained marriage licenses pursuant to that non-final order.

Judge Kelly was right to suggest that a Tenth Circuit decision affirming the district court's decision conflicts with *Axel*. Such a decision will also conflict with a number of other circuit decisions that, in various contexts, have rejected the district court's conclusion that a state

(or federal) law becomes a legal nullity the moment it is held invalid by a non-final district court decision. *E.g*. *Plyler* v. *Moore,* 100 F.3d at 374 (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 . . . .").

Indeed, if the district court's decision is affirmed by the Tenth Circuit, that decision is reasonably likely to be in direct conflict with a likely decision from the Utah Supreme Court arising in the same context. As a result of similar claims asserted by similarly situated same-sex couples, the Utah Supreme Court currently has before it the issue whether people in Plaintiffs' position have a vested right to their same-sex marriages under Utah law. *See Department of Health* v. *Stone*, No. 20140272; *DOH* v. *Stone*, No. 20140292, *DOH* v. *Dever*, No. 20140281, and *DOH* v. *Hruby-Mills*, Case No. 20140280. But to decide that issue, that court will first have to address the central *federal* question decided by the district court in this case—i.e., whether a duly enacted law becomes a legal nullity the moment it is declared invalid by non-final federal district court ruling. And, for reasons discussed above, it seems unlikely that the Utah Supreme Court would agree with the district court on that central point.

4. The district court's decision also conflicts in principle with this Court's decision in *Windsor*—especially this Court's express and repeated recognition of the State's primacy in defining and regulating marriage. The majority's decision to invalidate Section 3 of DOMA—which implemented a *federal* policy of refusing to recognize *state* laws defining marriage to include same-sex unions—was based in significant part on the States' historic control over the marriage institution. *Windsor*, 133 S. Ct. at 2692 ("The State's power in defining the marital relation is of central relevance in this case . . . ."). The majority emphasized that, "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the

authority and realm of the separate States." *Id*. at 2689–90. Citing this Court's earlier statement in *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942), that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders," the *Windsor* majority noted that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Windsor*, 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298) (alteration in original).

The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id*. (quoting *Ohio ex rel*. *Popovici* v. *Agler*, 280 U.S. 379, 383–84 (1930)). And the majority concluded that DOMA's refusal to respect a *State's* authority to define marriage as it sees fit represented a significant—and in the majority's view, unwarranted—"federal intrusion on state power." *Id*. at 2692. The federal government had no basis, the Court concluded, to deprive same-sex couples of a marriage status made valid and recognized by *State* law. *Id*. at 2695–96.

Here, by contrast, Utah law has never allowed, recognized or otherwise validated same-sex marriage. As Judge Kelly pointed out, the only reason Plaintiffs were able to marry during a short window was because the *Kitchen* district court failed to stay its injunction pending appeal. It is therefore absurd to equate—as the district court did here—the state-endorsed same-sex marriages at issue in *Windsor* with the same-sex marriages that were temporarily and erroneously *imposed* on Utah by a federal district court that remains subject to further review.

Moreover, although none of the Justices in the *Windsor* majority expressly tipped their hands on the precise question presented in *Kitchen* (and at the core of the present case), three of

the dissenting Justices clearly indicated a belief that the States can constitutionally retain the traditional definition of marriage. *See Windsor*, 133 S. Ct. at 2707–08 (Scalia, J., dissenting, joined in relevant part by Thomas, J.); *id*. at 2715–16 (Alito, J., joined in relevant part by Thomas, J.). And Chief Justice Roberts pointedly emphasized that "while '[t]he State's power in defining the marital relation is of central relevance' to the majority's decision to strike down DOMA here, … that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." *Id*. at 2697 (Roberts, C.J., dissenting) (quoting majority opinion). By themselves, the views expressed by these four Justices—without any contrary expression from the Court's other Members—create a strong prospect that this Court will reverse the Tenth Circuit's recent *Kitchen* decision and vacate the injunction in that case.

That decision will also bear directly on the district court's decision in this case. Indeed, the district court's *Windsor* analysis wrongly presumes the very issue in dispute: the state-law validity of Plaintiffs' marriages based on a non-final district court finding of a substantive right to same-sex marriage. By contrast, in *Windsor* this Court held that the federal government had no business rejecting same-sex marriages that were indisputably valid under the laws of New York. *Windsor*, 133 S. Ct. at 2695–96 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. . . . It imposes a disability on the class by refusing to acknowledge a status the State finds dignified and proper."). *Windsor* simply cannot be read as supporting the *Kitchen* court's decision to impose same-sex marriage *against* the democratically expressed desires of Utah's people, especially considering the *Windsor* majority's express limitation of its "opinion and its holding . . . to those

lawful marriages" that had been solemnized *in accordance* with the democratically expressed desires of the people of New York. *Id*. at 2696.

The district court's misreading of *Windsor* in this case is yet another reason that four Justices are sufficiently likely to vote for plenary review, and that the entire Court is sufficiently likely to overturn the district court's reading of that decision.

5. Finally, if affirmed by the Tenth Circuit, the district court's decision would effectively put many federal district court injunctions beyond effective appellate review. By simply refusing to stay its injunction, which any court could do any time, no matter the stakes, the *Kitchen* court paved the way for hundreds of same-sex marriages to occur contrary to Utah law, until this Court correctly stepped in and stayed the *Kitchen* ruling. But the district court's decision here effectively makes the intervening marriages appeal-proof, creating permanent, unchangeable, fully vested marriages, regardless of what this Court may have to say about the merits of the *Kitchen* decision. In other words, the district court's unreviewed judicial choice wins, and the State's democratic choice loses, even if the district court's opinion is ultimately reversed on appeal. That result not only represents a remarkable departure from this Nation's normal practice of judicial review, it dramatically alters the balance of power between federal district courts and the States—and indeed, between federal district courts and *all* elected bodies and public officials.

Such a result "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power[.]" Sup. Ct. R. 12(a). As Judge Kelly observed, to deny a stay of the district court's decision here is to "run[] roughshod over state laws which are currently in force." App. C at 3.

For any or all of these reasons, if the Tenth Circuit affirms the district court decision here, there is at least a reasonable probability that this Court would grant a writ of certiorari, and that it would ultimately reverse.

II. Absent a stay, there is a likelihood—indeed, a certainty—of irreparable harm to the State.

As this Court necessarily concluded in granting a stay in *Kitchen*, and as Judge Kelly reiterated, the preliminary injunction here 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*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Tex*. *Surgical Health Servs*. v. *Abbott*, 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. As Judge Kelly noted: "It is disingenuous to contend that the State will suffer no harm if the matter is not stayed; undoing what is about to be done will be labyrinthine and has the very real possibility to moot important issues that deserve serious consideration." App. C, Kelly, J., dissenting at 3.

1. As Judge Kelly suggested, ordering Utah to permanently recognize Plaintiffs' marriages has grave practical consequences. Hundreds of same-sex couples may ultimately seek to have their marriage "recognized" by the State of Utah. That recognition may arise in any number of ways—from the grant of same-sex adoptions to the provision of health care benefits,

and many others. If a stay is not granted, a large number of the 1300 couples who married before this Court's *Kitchen* stay will likely 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*, 79 F.3d 1014, 1023–24 (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, 676 (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, 1309–10 (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"). As Judge Kelly put it, "[d]eclining a stay here may well moot the novel issues involved, as well as those pending in the state courts. The State and its citizens, and respect for the law, are better served by obtaining complete, final judicial resolution of these issues." App. C, Kelly, J., dissenting, at 3.

2. Absent a stay, the State and its people will also suffer severe harm to their sovereign dignity. As the *Windsor* majority put it, "'[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). Indeed, *Windsor* emphasized that "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents

and citizens." *Id*. (emphasis added).

Here, every single interim marriage performed as a result of the district court's *Kitchen* injunction directly challenges the sovereignty of Utah and its people. Each such marriage undermines 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 principles of federalism, which affirm 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 here breaches that principle 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 Utahans 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* v. *United States*., 131 S. Ct. 2355, 2364 (2011) ("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 hundreds of thousands of Utahans to choose for themselves what marriage will mean in their

community. *See, e.g., Schuette*, 134 S. Ct. at 1636–37 ("Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times . . ."). The irreparable injury to Utah and its people could not be more clear.

III. 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. Plaintiffs' alleged harms do not outweigh the array of harms the State will suffer without a stay. First, Plaintiffs cannot claim irreparable harm from violation of their constitutional rights. While violation of an *established* constitutional right certainly inflicts irreparable harm, that doctrine does not apply where, as here, Plaintiffs seek to establish a novel constitutional right through litigation—and based upon a non-final decision. Because neither constitutional text nor any final decision by a court of last resort yet requires recognition of their same-sex marriage under the present circumstances, Plaintiffs suffer no constitutional injury from awaiting a final judicial determination of their claims before receiving the marriage recognition they seek. *See Rostker*, 448 U.S. at 1310 (reasoning that the act of compelling Respondents to register for the draft while their constitutional challenge is finally determined does not "outweigh[ ] the gravity of the harm" to the government "should the stay requested be refused").

In the meantime, as Judge Kelly noted, a stay does not harm Plaintiffs because it "would not decide or ultimately dispose of their claims." App. C, Kelly, J. dissenting, at 3. 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 § 30-1-4.1(2).

Nor, moreover, can Plaintiffs change the state of the law by obtaining marriage licenses on the yet-untested authority of the *Kitchen* court's judgment, much less that court's erroneous stay decision. Constitutional rights do not spring into existence by mass social activity triggered by the unreviewed decision of a single district court judge. Our constitutional tradition relies instead on the certainty and regularity of formal constitutional amendment, or judicial decision-making by appellate courts, which would be subverted by deriving a novel constitutional right to same-sex marriage from the number of people who assert it or the number of days its exercise goes unchecked.

Issuing a stay would also serve Utah's interest in enforcing its laws and the public's interest in 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 restored by this Court's 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, Applicants and Plaintiffs will know the status of the interim marriages. Until then, requiring Applicants to recognize Plaintiffs' marriages and provide marital benefits is premature and unwarranted.

Finally, as Judge Kelly noted, although "the Plaintiffs have important interests at stake, … Plaintiffs are free to live their lives as they will. A stay would simply maintain the status quo until this case—and the broader issue to ultimately be resolved in *Kitchen*—comes to a resolution via the normal legal process, including that currently unfolding in the Utah [and federal] courts." App. C, Kelly, J., dissenting at 3. To illustrate: If this Court does not issue a stay, this Court may still ultimately conclude that the district court erred and the preliminary

injunction must be reversed. And if *Kitchen* is also reversed, Plaintiffs' marriages will 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, Applicants, 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.

For all these reasons, the balance of equities favors a stay.

CONCLUSION

The Applicants respectfully request that the Circuit Justice issue the requested stay of the district court's order and preliminary injunction pending appeal. If the Circuit Justice is either disinclined to grant the requested relief or simply wishes to have the input of the full Court on this Application, Applicants respectfully request that it be referred to the full Court, as in *Kitchen*.

Respectfully submitted,

/s/ Gene Schaerr

GENE C. SCHAERR*
JOHN J. BURSCH
Special Assistant Attorneys General
PARKER DOUGLAS
Utah Federal Solicitor & Chief of Staff
STANFORD E. PURSER
Assistant Attorney General
160 East 300 South
Salt Lake City, UT 84114-0856
801-366-0100 (phone)
gschaerr@utah.gov

Counsel for Governor Gary R. Herbert and Attorney General Sean D. Reyes

*Counsel of Record

July 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on the 16th of July, 2014, a true, correct and complete copy of the foregoing Application for Stay Pending Appeal and accompanying exhibits was filed with the United States Supreme Court and served on the following via electronic mail and United States Mail:

Erik Strindberg
STRINDBERG & SCHOLNICK LLC
PLAZA 721
675 E 2100 S STE 350
SALT LAKE CITY, UT 84106
(801)359-4169
Email: erik@utahjobjustice.com

Joshua A. Block
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION (NY)
125 BROAD ST 18TH FL
NEW YORK, NY 10004
(212)549-2593
Email: jblock@aclu.org

John M. Mejia
ACLU OF UTAH
355 N 300 W STE 1
SALT LAKE CITY, UT 84103
(801)521-9862 x.108
Email: jmejia@acluutah.org

Kathryn K. Harstad
STRINDBERG & SCHOLNICK LLC
PLAZA 721
675 E 2100 S STE 350
SALT LAKE CITY, UT 84106
(801)359-4169
Email: kass@utahjobjustice.com

Lauren I. Scholnick
STRINDBERG & SCHOLNICK LLC
PLAZA 721
675 E 2100 S STE 350
SALT LAKE CITY, UT 84106
(801)359-4169
Email: lauren@utahjobjustice.com

Leah M. Farrell
ACLU OF UTAH
355 N 300 W STE 1
SALT LAKE CITY, UT 84103
(801)521-9862
Email: lfarrell@acluutah.org

Rachel E. Otto
STRINDBERG & SCHOLNICK LLC
PLAZA 721
675 E 2100 S STE 350
SALT LAKE CITY, UT 84106
(801)359-4169

/s/ Gene Schaerr

APPENDIX

APPENDIX A-

MEMORANDUM DECISION AND ORDER (DISTRICT COURT) CASE NO. 2:14-cv-00055-DAK MAY 19, 2014

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]

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[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

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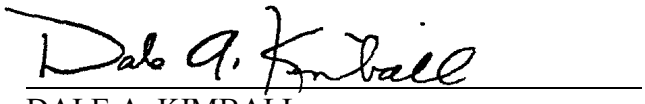
unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Id.* (citations omitted). Because these cases are not parallel actions, the court has no discretion to abstain and must exercise its obligation to hear and decide the case presented to it.

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

APPENDIX B-

ORDER GRANTING TEMPORARY STAY
(TENTH CIRCUIT)
CASE NO. 14-4060
JUNE 5, 2014

FILED
United States Court of Appeals
Tenth Circuit

June 5, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JONELL EVANS; STACIA IRELAND; MARINA GOMBERG; ELENOR HEYBORNE; MATTHEW BARRAZA; DONALD JOHNSON; CARL FRITZ SHULTZ,

Plaintiffs-Appellees,

v.

STATE OF UTAH; GARY HERBERT, in his official capacity as Governor of Utah; SEAN REYES, in his official capacity as Attorney General of Utah,

Defendants-Appellants.

No. 14-4060
(D.C. No. 2:14-CV-00055-DAK)
(D. Utah)

ORDER

The Defendants-Appellants have filed an appeal from the district court's May 19 Memorandum Decision and Order granting injunctive relief. Today they filed a motion for stay pending resolution of their appeal. We grant a temporary stay of the district court's order and direct the Plaintiffs-Appellees to respond to the stay motion no later than 11:59 P.M. MDT on Thursday, June 12, 2014. The temporary stay will be in effect until further order of this court.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

APPENDIX C-

ORDER DENYING MOTION TO STAY PENDING APPEAL (TENTH CIRCUIT) CASE NO. 14-4060 JULY 11, 2014

FILED
United States Court of Appeals
Tenth Circuit

July 11, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JONELL EVANS; STACIA IRELAND; MARINA GOMBERG; ELENOR HEYBORNE; MATTHEW BARRAZA; TONY MILNER, DONALD JOHNSON; CARL FRITZ SHULTZ,

Plaintiffs-Appellees,

v.

STATE OF UTAH; GARY HERBERT, in his official capacity as Governor of Utah; SEAN REYES, in his official capacity as Attorney General of Utah,

Defendants-Appellants.

No. 14-4060
(D.C. No. 2:14-CV-00055-DAK)
(D. Utah)

ORDER

Before **KELLY**, **LUCERO**, and **HOLMES**, Circuit Judges.

The State of Utah defendants have appealed from the district court's grant of a preliminary injunction that requires them to recognize marriages that were licensed and solemnized in Utah during the window of time between when the federal district court struck down Utah's same-sex marriage ban and when the Supreme Court issued a stay of the district court's order. They filed a motion asking this court to stay the district court's injunctive ruling, pending this court's decision on appeal. We granted a temporary stay on June 5, 2014, to consider the stay motion, response, and reply.

To receive a stay pending appeal, a movant must address four things: (1) the likelihood of success on the merits of their appeal; (2) whether they will suffer irreparable harm absent a stay; (3) the absence of harm to the opposing parties; and (4) whether a stay is in the public interest. 10th Cir. R. 8.1; *FTC v. Mainstream Mktg. Servs., Inc.,* 345 F.3d 850, 852 (10th Cir. 2003). In this case, there is harm on both sides of the stay question, which means there is no relaxation of the likelihood-of-success-on-appeal standard. *See Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). And to succeed on the merits of their appeal, appellants will be required to show that the district court abused its discretion in granting a preliminary injunction. *See id.*

We conclude that appellants have not made showings sufficient to warrant a stay pending appeal. We will, however, leave the temporary stay in place until 8:00 a.m., MDT, on Monday, July 21, 2014, to allow appellants time to seek relief from the United States Supreme Court. The motion for stay pending appeal is denied, but the temporary stay currently in place will remain in effect until Monday, July 21, 2014, at 8:00 a.m., MDT.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

No. 14-4060, Jonell Evans et al. v. State of Utah, et al.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur with this court's decision to leave the temporary stay in place so that the State Defendants ("State") may seek a stay from the Supreme Court. I dissent from this court's decision to now deny a stay pending appeal. The district court stayed its preliminary injunction order for 21 days to allow the State to seek a stay from this court. Evans v. Utah, No. 2:14CV55DAK, 2014 WL 2048343, at *20 (D. Utah May 19, 2014). We then issued a temporary stay on June 5 until further order of our court not only to allow briefing, but also because the court had yet to issue an opinion in two pending same-gender marriage cases.

Though the briefing has been completed, the only new federal development in this case is that a divided panel issued an opinion in Kitchen v. Herbert, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), and stayed its ruling. Whatever one's view of the merits, the district court's preliminary injunction in this case (as both the district court and this court apparently recognized) should be stayed to allow for an orderly resolution of this controversy and one based upon the rule of law. Denying a stay pending appeal in this case complements the chaos begun by the district court in Kitchen when it faulted the State for not anticipating its ruling and seeking a preemptive stay. See Plaintiffs-Appellees' Opposition to State Defendants-Appellants' Emergency Motions for Stay Pending Appeal and Temporary Stay Pending Resolution of Motion to Stay Ex. B at 6, Kitchen, No. 13-4178, 2014 WL 2868044. Ultimately, the Supreme Court granted a stay, but not before the State was compelled to issue marriage licenses to hundreds of same-

gender couples from December 23, 2013 to January 6, 2014. See Herbert v. Kitchen, 134 S. Ct. 893 (2014).

To obtain a stay, the State must establish (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. 10th Cir. R. 8.1; F.T.C. v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 852 (10th Cir. 2003) (per curiam). Where the three "harm" factors tip in favor of the moving party, the "probability of success" requirement is somewhat relaxed. Mainstream Mktg., 345 F.3d at 852. "Under 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. at 852-53 (quoting Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246-47 (10th Cir. 2001)). In my view, the State has made the required showing.

As to the merits, the district court concluded that the Plaintiffs have a vested interest in their state-law marriages regardless of the outcome of Kitchen. It concluded that invalidation of such marriages would constitute an invalid retroactive application of Utah's contrary provisions concerning same-gender marriage. As the State reminds us, however, Plaintiffs' right to marry was created by a district court decree in Kitchen and that decree remains stayed. The judgment is non-final. See McCullough v. Virginia, 172 U.S. 102, 123–24 (1898); Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78, 84 (2d

Cir. 1993); Johnson v. Cigna, 14 F.3d 486, 490–91 (10th Cir. 1993). Insofar as retroactivity, the Utah provisions barring same-gender marriage and its recognition predate the district court's stayed injunction in Kitchen. The rule contended for by the Plaintiffs—that a federal district court may change the law regardless of appellate review and the State is stuck with the result in perpetuity—simply cannot be the law. It would not only create chaos, but also undermine due process and fairness. As such, the State has shown a likelihood of success on the merits, or at least raised substantial questions "deserving of more deliberate investigation." Mainstream Mktg., 345 F.3d at 853.

The State will be irreparably harmed without a stay. In denying a stay pending appeal, this court is running roughshod over state laws which are currently in force. It is disingenuous to contend that the State will suffer no harm if the matter is not stayed; undoing what is about to be done will be labyrinthine and has the very real possibility to moot important issues that deserve serious consideration.

Moreover, granting a stay would not harm Plaintiffs because a stay would not ultimately decide or dispose of their claims. Though the Plaintiffs have important interests at stake, those interests may still be vindicated while appellate review occurs, and Plaintiffs are free to live their lives as they will. A stay would simply maintain the status quo until this case—and the broader issue to ultimately be resolved in Kitchen—comes to a resolution via the normal legal process, including that currently unfolding in the Utah courts.

Finally, there is a great risk of harm to the public interest absent a stay. As the

State points out, "final, complete review of the legal issues" will benefit all the people of Utah. State Defendants-Appellants' Reply in Support of Motions for Stay Pending Appeal at 5. Declining a stay here may well moot the novel issues involved, as well as those pending in the state courts. The State and its citizens, and respect for the law, are better served by obtaining complete, final judicial resolution of these issues.

APPENDIX D-

UNITED STATES SUPREME COURT STAY
Kitchen v. *Herbert*
CASE NO. 13A687
JANUARY 6, 2014

134 S.Ct. 893
Supreme Court of the United States

Gary R. HERBERT, Governor of Utah, et al., applicants,
v.
Derek KITCHEN, et al.

No. 13A687. | Jan. 6, 2014.

Case below, —— F.Supp.2d ——.

Opinion

Application for stay presented to Justice SOTOMAYOR and by her referred to the Court granted. Permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13–cv–217, on December 20, 2013, stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.

Parallel Citations

82 USLW 3382, 14 Cal. Daily Op. Serv. 114

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