No. 13A687

In the Supreme Court of the United States

GARY R. HERBERT, GOVERNOR OF UTAH, ET AL.,
Applicants,

v.

DEREK KITCHEN, ET AL.,
Respondents.

On Application to Stay Judgment Pending Appeal Directed to the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit

MEMORANDUM IN OPPOSITION TO APPLICATION TO STAY JUDGMENT PENDING APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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

Respondents Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge (collectively, "Respondents"), by and through their counsel of record, MAGLEBY & GREENWOOD, P.C., hereby submit this memorandum in opposition to the Application to Stay Judgment Pending Appeal to the United States Circuit Court of Appeals for the Tenth Circuit (the "Application" or "Appl.") filed by Applicants Gary R. Herbert, in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah (collectively, "Applicants"), and respectfully request that the Application be denied.

INTRODUCTION

Applicants ask the Court to override a decision by the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit" or the "Court of Appeals") denying a stay in a case currently pending before that court. The case is an appeal of an order of the United States District Court for the District of Utah (the "District Court") finding that Utah's laws barring same-sex couples from marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Dec. 20, 2013, Memorandum Decision and Order, Dkt. 90, No. 2:13-cv-00217-RS in the District Court ("Dist. Ct. 12/20 Order"), Appl. at A-1. The relief Applicants seek was properly denied by both the District Court and the Court of Appeals, which ordered expedited consideration of the appeal. *See* Dec. 23, 2013, Order on Motion to Stay, Dkt. 105, No. 2:13-cv-00217-RS in the District Court ("Dist. Ct. 12/23 Order"), Appl. at C-1; Dec. 24, 2013, Order Denying

Emergency Motion for Stay and Temporary Motion for Stay, No. 13-4178 in the Tenth Circuit ("CA10 12/24 Order"), Appl. at D-1; Dec. 30, 2013, Order, No. 13-4178 in the Tenth Circuit ("CA10 12/30 Scheduling Order"), attached hereto as Ex. C to Appendix ("App."). The Chief Deputy Clerk for the Tenth Circuit initially asked the parties to propose a five-week briefing schedule. *See* Dec. 26, 2013, Email, attached hereto as Ex. A to App. Applicants, however, requested four weeks to file their opening brief, and the Tenth Circuit ordered an expedited briefing schedule that requires all briefing to be completed by February 25, 2014, mere weeks from now. *See* CA10 12/30 Scheduling Order.

For reasons discussed in the orders of the District Court and the Court of Appeals, and in this memorandum, this Court should also deny Applicants' request for a stay pending appeal. "[W]hen a district court judgment is reviewable by a court of appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears 'an especially heavy burden.'" *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (citing *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)). In addition, "[r]espect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). These considerations weigh heavily against Applicants' request for a stay here, where Applicants merely reassert the same contentions that were properly found to be insufficient to warrant a stay

below, and where the appeal has been expedited. Applicants cannot meet their burden of showing that the Court of Appeals was "demonstrably wrong in its application of accepted standards in deciding [whether] to issue the stay," and that Applicants "may be seriously and irreparably injured [without] the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

Accordingly, Respondents respectfully request that the Application be denied.

BACKGROUND

I. THE CASE BEFORE THE DISTRICT COURT

The Utah laws at issue in this lawsuit include two state statutes and an amendment to the Utah Constitution that bar same-sex couples from entering civil marriage, or any other legal union, and prohibit recognition of marriages or other legal unions entered into by same-sex couples in other states. *See* Utah Const. art. I, § 29 (effective 2005); Utah Code § 30-1-4.1 (effective 2004); Utah Code § 30-1-2 (effective 1977).

On March 25, 2013, Respondents brought the underlying action in the District Court to challenge Utah's prohibition on same-sex marriage under both the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. On October 11, 2013, Respondents and Applicants both filed motions for summary judgment in the District Court. On December 20, 2013, the District Court granted Respondents' motion for summary judgment, denied Applicants' motion for summary judgment, and entered final judgment in favor of Respondents. Dist. Ct. 12/20 Order; Dec. 20, 2013, Judgment in a Civil Case, Dkt. 92, No. 2:13-cv-00217-RS in the District Court ("Judgment"), Appl. at B-1.

II. THE DISTRICT COURT'S RULING

The District Court ruled on summary judgment that Utah's laws barring same-sex couples from civil marriage violate Respondents' rights to due process and equal protection of the laws under the Fourteenth Amendment. The District Court recognized that no precedent of this Court is directly controlling, and, therefore, relied on analogous rulings of this Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), as well as cases in which the Court has held that state marriage laws must comply with the guarantees of the Fourteenth Amendment.

The District Court determined that this Court has recognized the freedom to marry as a fundamental right that is based upon "an individual's rights to liberty, privacy, and association," Dist. Ct. 12/20 Order at 20, and "has held that the Fourteenth Amendment requires that individual rights take precedence over states' rights where these two interests are in conflict," *id.* at 13. Although holding that strict scrutiny was warranted, the District Court found that Applicants had not presented even a rational basis for denying Respondents' the right to marry, and that the challenged laws therefore violated their right to due process. *Id.* at 32.

The District Court also found that the challenged laws warrant heightened equal protection scrutiny because they discriminate against Respondents on the basis of their sex. *Id.* at 34-35. However, the District Court concluded that it need not analyze why Applicants were unable to meet that heightened burden because the laws failed even under rational basis review. *Id.* at 35. The District Court noted that "Plaintiffs dispute the State's argument that children do better when

raised by opposite-sex parents than by same-sex parents," but concluded that "the court need not engage in this debate" because "the state fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote." *Id.* at 45. In addition, the District Court found that the laws harmed the children of same-sex parents in Utah "for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." *Id.* at 46.

III. THE DISTRICT COURT'S DENIAL OF A STAY

Applicants did not request a stay in the event of an adverse ruling in their motion for summary judgment in the District Court. Dist. Ct. 12/23 Order at 1. Applicants filed a motion to stay late in the evening on Friday, December 20, 2013. The District Court ordered expedited briefing over the weekend and set a hearing for 9 a.m. that following Monday, December 23, 2013. *Id.* at 1-2. Before the District Court hearing, Applicants filed two "Emergency Motions for Temporary Stay" with the Court of Appeals, which were both denied. Dec. 22, 2013, Order at 1, 2, No. 13-4178 in the Tenth Circuit ("CA10 12/22 Order"). At the conclusion of the hearing, the District Court issued an oral ruling, denying Applicants' motion for a stay, which was memorialized in a written order later that day. *Id.*

The District Court denied Applicants' motion for a stay pending appeal because it found that none of the four factors supporting a stay had been shown by the Applicants. The District Court found that Applicants' reassertion of their summary judgment arguments was not sufficient to show a likelihood of success on Respondents' claims. *Id.* The District Court found that "[i]n contrast to the

speculative harm faced by the State, there is no dispute that same-sex couples face harm by not being allowed to marry," and that the delay caused by a stay would in particular cause irreparable harm to couples, including Respondents Karen Archer and Kate Call, "facing serious illness or other issues that do not allow them the luxury of waiting for such a delay." *Id.* at 5. The District Court also found that a stay would harm the public's interest in "protecting the constitutional rights of Utah's citizens." *Id.* at 6. Accordingly, the District Court denied a stay. *Id.*

IV. THE COURT OF APPEALS' DENIAL OF A STAY

On December 24, 2013, a two-judge panel of the Court of Appeals also denied Applicants' request for a stay pending the appeal of the District Court's decision. *See* CA10 12/24 Order at 2. The Court of Appeals considered four factors: "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest." *Id.* The Court of Appeals noted that, "[t]he first two factors are the most critical, and they require more than a mere possibility of success and irreparable harm, respectively." *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 434-35 (2009)). The Court of Appeals concluded that, "consider[ing] the district court's decision and the parties' arguments concerning the stay factors . . . a stay is not warranted," and denied Applicants' request for a stay. *Id.*

ARGUMENT

Applicants now ask this Court to issue a stay that was denied by both the District Court and the Court of Appeals. To obtain this relief, Applicants must show that the Court of Appeals was "demonstrably wrong in its application of

accepted standards in deciding [whether] to issue the stay." *Coleman,* 424 U.S. at 1304. They must also show that their rights "may be seriously and irreparably injured by the stay. . . ." *Id.* Finally, Applicants must show that this case "could and very likely would be reviewed here upon final disposition in the court of appeals. . . ." *Id.* Because Applicants seek "an overriding stay" in a case already pending before the Court of Appeals, they must meet "'an especially heavy burden.'" *Edwards*, 512 U.S. at 1302 (internal citations omitted). Applicants do not make any of these required showings, and their request for a stay should be denied.

I. APPLICANTS MISSTATE THEIR HEIGHTENED BURDEN WHEN SEEKING AN OVERRIDING STAY OF A CASE STILL PENDING IN THE COURT OF APPEALS

Throughout their Application, Applicants fail to acknowledge or apply the heightened burden they must meet when asking this Court to grant a stay in a case still pending before the Court of Appeals. Applicants primarily rely on cases involving "the usual stay application," which seek a stay while a petition for certiorari is pending before the Court.[1] *Heckler v. Lopez,* 463 U.S. 1328, 1330 (1983) (Rehnquist, C.J., in chambers). The standard in those cases does not apply to this Application. Applicants have a heavier burden because they ask "instead that [a Circuit Justice] grant a stay of the District Court's judgment pending appeal

[1] *See* Appl. at 7 (citing to *Deaver v. United States*, 483 U.S. 1301 (1987) (Rehnquist, C.J., in chambers) (seeking stay pending disposition of a petition for certiorari); *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (same); *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301 (1991) (Scalia, J., in chambers) (same)). Applicants also cite to irrelevant cases in which this Court determined whether to grant a stay in the first instance, pursuant to its direct review of decisions by three-judge courts under 28 U.S.C. § 1253. *See* Appl. at 7 (citing *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers) and *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers)). Finally, Applicants cite to *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam), but that case involved a request for a stay pending the filing and disposition of a petition for a writ of mandamus.

to the [Court of Appeals], when the [Court of Appeals] itself has refused to issue the stay." *Id.* "[A] stay application to a Circuit Justice on a matter before a court of appeals is rarely granted." *Id.* (internal citations omitted); *see also Heckler v. Lopez*, 464 U.S. 879, 884 (1983) (Stevens, J., dissenting in part) (noting that "in such a case the granting of a stay by a Circuit Justice should be extremely rare and great deference should be shown to the judgment of the Court of Appeals"). Only in cases that are "sufficiently unusual" will a Circuit Justice or this Court grant such relief. *Heckler*, 463 U.S. at 1330; *see also Fargo Women's Health Org. v. Schafer*, 133 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring).

Applicants do not acknowledge, much less attempt to meet, this heightened burden. Applicants instead side step their heightened burden by citing to, with virtually no discussion or analysis, three cases in which a Circuit Justice granted a stay of a case pending in the Court of Appeals. None of those cases supports Applicants' position; rather, in each case, the unusual circumstances that warranted a stay underscore the absence of any basis for granting a stay here.

Applicants cite to *Heckler*, *see* Appl. at 7, but in that case, there was "serious doubt," 463 U.S. at 1334, that the relief ordered by the district court was within "the remedial powers of a federal court" over a federal administrative agency, *id.* at 1336. *See also id.* at 1337 ("It bears repeating that if it seemed to me that nothing more were involved than the exercise of a District Court's traditional discretion in fashioning a remedy for an adjudicated harm or wrong, there would be no occasion

for me as Circuit Justice to grant a stay where both the Court of Appeals and the District Court had refused to grant one."). No such concern exists here.

Applicants also cite to *San Diegans for the Mt. Soledad National War Memorial v. Paulson*, 548 U.S. 1301, 1304 (2006) (Kennedy, J., in chambers), *see* Appl. at 7, but that case reiterated that "the Court, and individual Circuit Justices, should be most reluctant to disturb interim actions of the Court of Appeals in cases pending before it." A stay was granted in that case *only* because a recent act of Congress and pending state court litigation—both taking place *after* the Court of Appeals denied a stay—might have mooted the need for the district court's injunction. *Id.* at 1303-04. Nothing remotely like such "unusual" circumstances exists in this case. *Id.* at 1303.

Finally, Applicants cite to *INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor,* 510 U.S. 1301 (1993) (O'Connor, J., in chambers), which also involved unusual circumstances entirely absent here. Justice O'Connor, sitting as Circuit Justice, explained that the case was sufficiently "exceptional" to warrant a stay because it was likely the organizational plaintiffs in *Legalization Assistance Project* "had no standing to seek the order entered by the District Court" in the first instance based on a recent decision by the Court involving a similar challenge. *Id.* at 1302-03, 1305.[2] Here, there is no dispute Respondents have standing to challenge their exclusion from marriage and from

[2] As explained more fully below, Applicants' argument that *Legalization Assistance Project* stands for the proposition that mere "administrative burden" can constitute irreparable harm is meritless. *See* Appl. at 21. The harm at issue in that case was not simply administrative burden, "but an improper intrusion by a federal court into the workings of a coordinate branch of the Government." 510 U.S. at 1306.

being recognized as legally married under Utah's laws. Nor is there any basis for questioning the authority of a federal court to enjoin state laws that violate the Fourteenth Amendment.

Applicants have not cited to a single case in which the Court has granted a stay of a district court order pending appeal when the appellate court has already denied a stay under circumstances even remotely similar to the circumstances here because this case is not an "exceptional case" warranting a stay.

II. THE COURT OF APPEALS WAS NOT DEMONSTRABLY WRONG IN ITS APPLICATION OF ACCEPTED STANDARDS IN DENYING APPLICANTS' REQUEST FOR A STAY PENDING APPEAL

This Court may not override a Court of Appeals' order denying a stay unless that court was clearly and "'demonstrably wrong in its application of accepted standards. . . .'" *W. Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman*, 424 U.S. at 1404). Deference to the Court of Appeals' decision "is especially warranted when," as here, "that court is proceeding to adjudication on the merits with due expedition." *Gonzales*, 546 U.S. at 1308.

In the District Court, Respondents challenged Utah's marriage laws on multiple constitutional grounds, each of which, if successful, would be sufficient to require invalidation of those laws. To obtain a stay from the Court of Appeals, Applicants had to make a "strong showing" that they were likely to prevail on all Respondents' claims. *Nken*, 556 U.S. at 434. The Court of Appeals correctly found that Applicants failed to meet that established test, and Applicants have shown no basis for this Court to vacate that order and issue an overriding stay.

Windsor made clear it was deciding only whether the federal government may deny recognition to "persons who are joined in same-sex marriages made lawful by the State." 133 S. Ct. at 2695. Nevertheless, even though *Windsor* does not decide the ultimate issues in this case—whether Utah is constitutionally required to let same-sex couples marry or recognize their existing marriages—the reasoning and analysis in *Windsor* strongly support the reasoning of the District Court and the Court of Appeals in declining to issue a stay. In light of the reasoning in *Windsor*, Applicants cannot meet the threshold requirement of showing not merely that Respondents' claims *might* fail, but that each claim is *likely* to fail. *See Nken*, 556 U.S. at 434. There is no basis for finding that the Court of Appeals' application of that accepted standard was "demonstrably wrong."

A. Respondents Have Challenged Utah's Same-Sex Marriage Ban on Multiple Constitutional Grounds

Respondents claim Utah's marriage laws violate their rights to due process in multiple ways. *See* Compl., ¶¶ 45-47, Dkt. 2, No. 2:13-cv-00217-RS in the District Court. First, Respondents claim the marriage laws impermissibly deprive Respondents of the fundamental right to marry. *Id.* Second, Respondents claim that the laws violate their protected rights to privacy, liberty, and association by excluding them from marriage and, independently, by excluding them from any type of official recognition or protection of their relationships. *Id.* Third, Respondents claim that the laws impermissibly deprive same-sex couples who have legally married in other states of their fundamental right to remain married and of

their protected liberty, privacy, and associational interests in their existing marriages. *Id.*

Respondents also challenge Utah's exclusionary marriage laws on multiple equal protection grounds. *See* Compl., ¶¶ 52-61. First, they claim the marriage laws warrant heightened equal protection scrutiny because the laws exclude Respondents and other persons in committed same-sex relationships from the exercise of a fundamental right and cannot survive that level of scrutiny. *Id.* Second, they claim the laws warrant heightened equal protection scrutiny because they establish a sex-based classification and cannot survive that level of scrutiny. *Id.* Third, they claim the laws classify based on sexual orientation and that such laws warrant and cannot survive skeptical scrutiny under the established criteria for determining when classifications based on certain personal characteristics are likely to reflect prejudice or bias rather than legitimate goals. *Id.* Fourth, Respondents claim the marriage laws must be subject at least to, and cannot survive, "careful consideration" under the Equal Protection Clause because, like Section 3 of DOMA in *Windsor*, the marriage laws single out same-sex couples in an unusual manner in order to treat them unequally—including in this case, departing from Applicants' longstanding practice of recognizing valid marriages from other states, even when those marriages would be prohibited under Utah's own marriage laws. *Id.* Finally, Respondents claim the marriage laws violate their right to equal protection under any level of scrutiny because the laws harm same-sex couples and

their children without providing any benefits to others or to the state—that is, by not being rationally connected to any legitimate state interest. *Id.*

B. *Windsor* and Other Precedents Strongly Support Respondents' Due Process Claims

As Applicants note, "[t]his case squarely presents the question that this Court expressly left open last Term in *United States v. Windsor*," Appl. at 1, whether states may, consistent with the requirements of due process and equal protection, bar same-sex couples from civil marriage and refuse to recognize the marriages of those who legally marry in other states. Applicants suggest that *Windsor*'s emphasis on federalism shows that the Court is likely to uphold Utah's marriage ban as a valid exercise of state sovereignty. Ultimately, however, in striking down a federal law that discriminated against married same-sex couples, *Windsor* relied not on federalism, but on the Due Process Clause of the Fifth Amendment. 133 S. Ct. at 2696 (holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution"). Applicants also suggest that they are likely to succeed on appeal because all of "[t]the various opinions" in *Windsor* anticipate the filing of future challenges to state marriage bans. Appl. at 9. But under the standard Applicants must meet in this proceeding, that acknowledgement shows that the constitutional questions presented by this case are serious and that the Court of Appeals was not "demonstrably wrong" in concluding that Applicants could not make a strong showing that they are likely to prevail on appeal. *Cf. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J.,

concurring) (noting that "the difficulty of a question is inversely proportional to the likelihood that a given answer will be clearly erroneous").

In fact, the reasoning in *Windsor*—as well as older cases addressing the constitutionally protected right to marry—supports the District Court's conclusion that gay and lesbian persons must be included within the constitutionally protected right to marry. *Windsor* affirmed that state marriage laws are "subject to [constitutional] guarantees" and must "respect the constitutional rights of persons." 133 S. Ct. at 2691. In prior cases, this Court has held that the fundamental right to marry is based on an individual's underlying rights to privacy, liberty, and freedom of intimate association. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Without deciding whether state laws barring same-sex couples from marriage violate the right to marry, the Court has held that individuals in same-sex relationships have the same liberty and privacy interests in their intimate relationships as other people. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). *Windsor* affirmed that the Constitution protects "the moral and sexual choices" of same-sex couples and held that their relationships, including the relationships of legally married same-sex couples, have the same constitutional protections as others and are entitled to be treated by the government with "equal dignity." 133 S. Ct. at 2693-94. These precedents strongly support the District Court's determination that persons in same-sex relationships have fundamental interests in liberty, privacy, and

association that are infringed by state laws categorically barring them from the right to marry. Dist. Ct. 12/20 Order at 18-25.

Applicants argue that Respondents do not have a fundamental right to "same-sex marriage" because they cannot show that such a right is "'deeply rooted in the Nation's history and tradition.'" Appl. at 12 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). But when analyzing cases involving fundamental rights, this Court has not held that the contours of a fundamental right can be limited based on who seeks to exercise it or on historical patterns of discrimination. The position urged by Applicants—that Respondents seek not the same right to marry as others, but a new right to "same-sex marriage"—repeats the analytical error of *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court erroneously framed the issue in that case as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. As this Court explained when it reversed *Bowers* in *Lawrence*, that statement "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." 539 U.S. at 567. Similarly here, as the District Court concluded, there is no principled basis for framing the right at stake as a new right specific only to gay and lesbian persons. Dist. Ct. 12/20 Order at 28-29.[3] Applicants have not shown

[3] Other courts have also held that gay and lesbian persons have the same fundamental right to marry as heterosexual persons. *See*, *e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010) (recognizing fundamental right to marry under the federal Constitution), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *cf. Obergefell v. Wymyslo*, 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) ("Although it is unnecessary to reach the issue of whether the fundamental right to marry itself also endows Ohio same-sex couples married in other jurisdictions with a significant liberty interest in their marriages for substantive due process purposes, the Court notes that a substantial logical and jurisprudential basis exists for such a conclusion as well."); *cf. In re Marriage*

that the Court of Appeals was "demonstrably wrong" in its application of the accepted standards governing issuance of a stay.

Windsor's holding that legally married same-sex couples have a protected liberty interest in their marriages that is impermissibly infringed by the federal government's refusal to recognize their marriages also supports invalidation of Utah's refusal to recognize the lawful marriages of same-sex couples who married in other states. 133 S. Ct. at 2681 (holding that the "injury and indignity [inflicted by Section 3 of DOMA] is a deprivation of an essential part of the liberty protected by the Fifth Amendment"). Indeed, one federal district court has already applied *Windsor* to hold that Ohio's refusal to recognize surviving same-sex spouses on death certificates violates the requirement of due process. *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013). As that court recognized, the constitutional harm inflicted by the government's refusal to recognize an existing marital relationship is no less when it is a state, rather than the federal government, that denies recognition. *Id.* at *6-8.

C. *Windsor* and Other Precedents Strongly Support Respondents' Equal Protection Claims

Applicants do not address Respondents' claims that Utah's marriage ban warrants heightened equal protection scrutiny because it discriminates based on both sexual orientation and sex, and because laws that classify based on sexual orientation warrant heightened scrutiny. Those claims present serious questions,

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Cases, 183 P.3d 384, 427 (Cal. 2008) ("[T]he California Constitution properly must be interpreted to guarantee this basic civil right to [marry to] *all* individuals and couples, without regard to their sexual orientation.").

as *Windsor* expressly noted with respect to the level of scrutiny applied to laws that classify based on sexual orientation. 133 S. Ct. at 2683-84 (noting that lower courts are considering and debating whether heightened scrutiny should apply to such laws). Applicants' failure to address those claims is reason enough, alone, to deny their Application. Applicants cannot overcome the strong presumption that the Court of Appeals' determination was correct without showing they are likely to prevail on all of Respondents' claims.

As the Court of Appeals' ruling suggests, the reasoning in *Windsor* and other equal protection decisions strongly supports the conclusion that Respondents are likely to succeed on their claims that Utah's marriage ban violates their right to equal protection of the laws. *Windsor* held that laws enacted in order to deny equal treatment of married same-sex couples inflict injuries of constitutional dimensions. 133 S. Ct. at 2694 (ruling that Section 3 of the federal Defense of Marriage Act "demeans" same-sex couples, and "humiliates tens of thousands of children now being raised" by those couples). As the District Court correctly held, the Court's analysis of the profoundly stigmatizing impact of laws that single out same-sex couples for discrimination with respect to marriage applies equally to Utah's laws excluding same-sex couples from the ability to marry. Dist. Ct. 12/20 Order at 50. Those laws stigmatize and harm same-sex couples and their families, while providing no benefit to others. *Id.* That aspect of *Windsor*'s reasoning strongly supports the District Court's conclusions that the challenged laws violate the Equal

Protection Clause because they discriminate against same-sex couples and inflict serious constitutional harms on those couples and their children.

Windsor also held that "'[d]iscriminations of an unusual character,'" including against gay and lesbian individuals with respect to marriage, warrant "'careful consideration.'" 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633). The Court found that Section 3 of DOMA was enacted for an improper discriminatory purpose, even though it was supported by large majorities of Congress, in part, because it departed from the federal government's longstanding practice of deferring to state definitions of marriage in order to single out a particular subset of married couples for unequal treatment. 133 S. Ct. at 2693. The Court found that DOMA was enacted "to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law." *Id.* at 2693-94. In this case, the District Court carefully outlined how the challenged Utah laws (which like similar laws in many other states, were enacted expressly in order to exclude same-sex couples from marriage) are unusual. Dist. Ct. 12/20 Order at 39-40. The District Court ultimately declined to rely on this aspect of *Windsor*'s holding, concluding that the challenged laws failed even under conventional rational basis review. *Id.* at 41. Nonetheless, *Windsor* makes clear that state laws, like Utah's, enacted in quick succession to make sure that no same-sex couple could be married, also warrant close scrutiny.[4]

[4] Applicants place great weight on the District Court's "refusal to find that Utah's marriage laws (in contrast with DOMA) are based on animus." Appl. at 14. However, while the District Court ultimately refrained from expressly finding that Utah's marriage ban reflects animus toward gay and lesbian persons, the District Court's analysis strongly supports that conclusion. The District

This Court's precedents—as well as a growing number of decisions by state and federal courts—also support the conclusion that laws that discriminate based on sexual orientation, including laws barring same-sex couples from marriage, warrant heightened constitutional scrutiny. *Windsor* noted that lower courts across the country are considering whether "heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation." 133 S. Ct. at 2684-85. In addition, the Court let stand the Second Circuit's holding that heightened scrutiny applies to such laws. *Id.* at 2684 (noting that the Second Circuit "applied heightened scrutiny to classifications based on sexual orientation"). Applying the criteria used by the Court in prior cases to determine when certain classifications warrant heightened scrutiny, many courts have now concluded that laws that discriminate based on sexual orientation warrant careful review.[5] In light of these precedents and this Court's application of "careful consideration" in *Windsor*, Respondents are likely to succeed on their claim that Utah's discrimination against same-sex couples warrants, and cannot withstand, a heightened level of constitutional scrutiny.

Court found that "the avowed purpose and effect of Amendment 3 is to deny the benefits and responsibilities of marriage to same-sex couples, which is another way of saying that the law imposes inequality." Dist. Ct. 2/20 Order at 39. The District Court also found that, because Amendment 3 went further and "held that no domestic union could be given the same or substantially equivalent legal effect as marriage," its "wording suggests that the imposition of inequality was not merely the law's effect, but its goal." *Id.* Those findings are virtually indistinguishable, if at all, from the basis of *Windsor*'s conclusion that Section 3 of DOMA's "principal purpose [was] to impose inequality." 133 S. Ct. at 2694.

[5] *See*, *e.g.*, *Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *18 (N.M. Dec. 19, 2013); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008); *In re Marriage Cases,* 183 P.3d 384, 444 (Cal. 2008). *See also Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013) (holding that review of DOMA "require[s] a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage").

This Court's precedents also support Respondents' claim that the challenged laws warrant, and cannot survive, heightened scrutiny because they discriminate against Respondents based on their sex. Both the District Court in this case and the District Court in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), held that laws barring same-sex couples from marriage impermissibly discriminate based on sex. These laws classify Respondents based on their sex because the male Respondents would be able to marry their partners if their partners were female, and the female Respondents would be able to marry their partners if their partners were male. *See* Dist. Ct. 12/20 Order at 35; *Perry,* 704 F. Supp. 2d at 996; *see also In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (EDR Plan administrative decision). The Equal Protection Clause prohibits such "differential treatment for denial of opportunity" based on a person's gender in the absence of an "exceedingly persuasive" justification. *United States v. Virginia,* 518 U.S. 515, 532-33 (1996) (internal quotation marks omitted). Moreover, as *Perry* explained, "sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." 704 F. Supp. 2d at 996. For that reason, a law enacted to bar gay and lesbian couples from marriage "targets them specifically due to sex," in addition to "target[ing them] in a manner specific to their sexual orientation." *Id.*

In addition, like other types of sex discrimination, discrimination against same-sex couples is rooted in gender stereotypes, including the stereotype that a

man should only be attracted to, enter into an intimate relationship with, and marry a woman, and vice versa. The challenged Utah laws impermissibly reflect those gender-based expectations and penalize individuals who depart from "assumptions about the proper roles of men and women." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

While this is an issue on which courts have split, the reasoning supporting the conclusion that laws targeting same-sex couples impermissibly discriminate based on sex is well founded and consistent with this Court's precedents. Applicants cannot show that the Court of Appeals' was demonstrably wrong in concluding that Applicants failed to meet their burden of showing a likelihood of success. *Cf. Abbott*, 134 S. Ct. at 506 (noting that "the difficulty of a question is inversely proportional to the likelihood that a given answer will be clearly erroneous").

D. *Windsor* and Other Precedents, Including Decisions by Many State and Federal Courts, Strongly Support the District Court's Conclusion That the Challenged Laws Violate Equal Protection Even Under Rational Basis Review

Applicants cannot show that this Court is likely to reverse the District Court's ruling by citing to a hodgepodge of articles that purportedly show that same-sex parents are inferior to opposite-sex parents. In addition to being false,[6]

[6] Applicants' arguments about optimal childrearing, Appl. at 14-18, are not relevant to whether the District Court decision will be upheld on appeal, as the District Court observed. Dist. Ct. 12/20 at 45. However, Applicants' statement that "[a]mong the wealth of social science analysis supporting the traditional definition of marriage, a substantial body of research confirms that children generally fare best when reared by their two biological parents in a loving, low-conflict marriage," Appl. at 15, is not true. The scientific consensus of every national health care organization charged with the welfare of children and adolescents – including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American

Applicants' argument does not resolve the constitutional issues presented by this case. As the District Court carefully demonstrated, and as numerous other federal and state courts across the country have also found, there simply is no rational connection between barring same-sex couples from marriage and the promotion of "responsible procreation" or "optimal parenting" by opposite-sex couples. To the extent the benefits and protections of marriage encourage opposite-sex couples to marry before having children, those incentives existed long before Utah's discriminatory laws were enacted, and they would continue to exist if those laws were struck down. *Cf. Windsor v. United States,* 699 F.3d 169, 188 (2d Cir. 2012) ("DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before."); *see also*, *e.g.*, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 n.10 (1st Cir. 2012) (holding that the state's "responsible procreation" argument failed to "explain how denying benefits to same-sex couples will reinforce

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Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America – based on a significant and well-respected body of current research, is that children and adolescents raised by same-sex parents, with all things being equal, are as well-adjusted as children raised by opposite-sex parents. *See* Brief of American Psychological Association, et al. as *Amici Curiae* on the Merits in Support of Affirmance, *United States v. Windsor,* 133 S.Ct. 2675 (2013) (No. 12-307). The bulk of the research on which Applicants rely is outdated, and the current studies they cite by Mark D. Regnerus, Appl. at 15-17, have been wholly discredited by the scientific community, including the journal which published them. Tom Bartlett, *Controversial Gay-Parenting Study is Severely Flawed, Journal's Audit Finds*, Chron. Of Higher Educ., July 26, 2012, http://chronicle.com/blogs/percolator/controversial-gay-parenting-study-is-severely-flawed-journals-audit-finds/30255. Applicants' citation to the study by Kristin A. Moore, Appl. at 15, is equally misplaced because the authors added an introductory note to their study explicitly warning that no conclusions can be drawn from this research about the well-being of children raised by same-sex or adoptive parents. Kristin A. Moore, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It*, Child Trends (2002).

heterosexual marriage"); *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009) ("[T]he County fails to address the real issue in our required analysis of the objective: whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation?") (emphasis in original).

Respondents agree with Applicants that marriage provides enormous benefits for children. But excluding the children of same-sex couples from those benefits causes severe harm to those children, without providing any benefit to the children of opposite-sex parents. "If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children." Dist. Ct. 12/20 Order at 46. The asserted governmental interest in encouraging procreation and child-rearing to occur within a stable family context also applies to the children of same-sex couples. "These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." *Id.*

Applicants do not dispute that same-sex couples and their children are harmed by being excluded from marriage. *See* Appl. at 21 (stating that same-sex couples and their children "will likely suffer dignitary and financial losses from the invalidation of their marriages"). Nonetheless, they argue, illogically, that it is rational for the state to penalize those couples and their children by excluding them from protections in order to "hold[] up and encourag[e] man-woman unions as the *preferred* arrangement in which to raise children." *Id.* at 17 (emphasis in original). Applicants' argument is remarkably similar to the justifications offered in support

of now-repudiated laws that penalized so-called "illegitimate" children by depriving them of critical legal protections. This Court has repudiated such laws as "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." *Id.* Those principles apply to Applicants' argument that a state can penalize the children of same-sex couples in order to hold up "man-woman unions as the *preferred* arrangement" for raising children. Appl. at 17 (emphasis in original).

Furthermore, as the District Court also held, marriage in Utah as in other states is tied to a wide array of governmental programs and protections, many of which have nothing to do with child-rearing or procreation. Dist. Ct. 12/20 Order at 26-27. The fact that same-sex couples do not engage in unplanned procreation does not provide a rational basis for excluding married same-sex couples from all of the other protections provided to married couples under Utah law. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Here, as in *Romer*, "[t]he breadth of [Utah's discriminatory marriage laws] is so far removed from these particular justifications that [it is] impossible to credit them." *Id.* at 635.

E. *Baker v. Nelson* Provides No Support for Applicants' Position

Applicants invoke this Court's 1972 summary dismissal of the appeal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972),

contending that *Baker* warrants vacating the Court of Appeals' ruling because *Baker* requires, on the merits, that the District Court and the Court of Appeals reject Appellees' challenges to Utah's marriage laws. *Baker* is not controlling in this case for the reasons the District Court explained, as well as for the additional reasons set forth below. Appellants have not shown that *Baker* provides reason for this Court to conclude that the Court of Appeals was "demonstrably wrong" in its application of the standards governing issuance of a stay.

Summary dismissal by this Court for want of a substantial federal question is dispositive only on "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1979). *Baker* was decided in 1971, decades before the wave of unprecedented state statutes and constitutional amendments establishing categorical bans on marriage by same-sex couples. Like DOMA, these measures are "discriminations of an unusual character," *Windsor*, 133 S. Ct. at 2693 (internal citations omitted), in that they were expressly enacted to target same-sex couples. *Baker* did not involve: (1) an enactment specifically targeted to deny rights to same-sex couples; (2) a state constitutional amendment that took the issue of marriage for same-sex couples out of the realm of ordinary politics and made it virtually impossible for gay and lesbian people to use the ordinary legislative process to seek change; or (3) an enactment specifically prohibiting a state from recognizing the legal marriages of same-sex couples. *Baker* did not address and therefore does not resolve the "precise issues" presented by this case. *Mandel*, 432 U.S. at 176.

Baker addressed a general marriage statute that was not enacted for the purpose of *excluding* same-sex couples from marriage. The statute at issue in *Baker* did not refer to the gender of the intended spouses. The Minnesota Supreme Court rejected the plaintiffs' argument that "the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages," holding that the law "does not authorize marriage between persons of the same sex." *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971). That no substantial federal question was presented by such a statute does not answer whether a different kind of statute or constitutional amendment—intended to exclude same-sex couples—might be unconstitutional as a form of invidious discrimination. "'A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.'" *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 785 n. 5 (1983)).

Baker also did not address the validity of a state constitutional amendment enacted in order to remove the issue of whether same-sex couples have an equal right to marry from the normal political process. In *Romer*, the Court invalidated a state constitutional amendment that barred the enactment of any state or local laws prohibiting discrimination based on sexual orientation, concluding that "[i]t is not within our constitutional tradition to enact such measures." 517 U.S. at 633. That no substantial federal question was presented by the general marriage statute in *Baker* does not answer whether a measure like Amendment 3 might be

unconstitutional as a form of invidious discrimination that seeks to disadvantage and stigmatize gay and lesbian persons in the political process.

Further, at the time *Baker* was enacted, no state had yet enacted measures to bar any recognition of couples who legally married in other states. *Baker* did not even consider, much less determine, the validity of such a measure. As discussed above, a state's refusal to recognize the lawful marriages of same-sex couples who marry in other states raise constitutional questions distinct from those raised by marriage bans within a state. *See*, *e.g.*, *Obergefell*, 2013 WL 6726688, at *5 (holding that a state's refusal to recognize existing legal marriages raises distinct due process issues relating to questions of reliance, settled expectations, and the established principle that "*existing* marital, family, and intimate relationships are areas into which the government generally should not intrude without substantial justification") (emphasis in original).

III. THE APPLICANTS' RIGHTS WILL NOT BE SERIOUSLY AND IRREPARABLY INJURED BY DENIAL OF A STAY

Both the District Court and Court of Appeals concluded that Applicants did not show they would suffer any irreparable harm by complying with the injunction pending appeal. Dist. Ct. 12/23 Order at 4-5; CA10 12/24 Order at 2. To obtain a stay from this Court, Applicants must show the Court of Appeals' application of the standard was "demonstrably wrong," *Coleman*, 424 U.S. at 1304, or that new circumstances warranting relief have arisen. Instead of even attempting to meet that burden, Applicants merely reassert the same arguments that were properly rejected as inadequate by both the District Court and Court of Appeals. Applicants

claim that, if they prevail on appeal, they will be injured by the "administrative and financial costs" of determining "whether and how to unwind the marital status of same-sex unions performed before reversal of the district court's decision." Appl. at 21-22. In addition, they claim that an order preventing the enforcement of a state law is in itself an irreparable harm to the state's sovereignty. *Id.* at 19-21. Neither of these claims constitutes irreparable harm.

A. Applicants Cannot Show Irreparable Harm Based on Potential Questions Regarding the Validity of Same-Sex Couples' Marriages

Applicants assert that permitting same-sex couples to marry "has grave practical consequences," but the only specific harm they identify is the potential "administrative and financial costs" of addressing "whether and how to unwind the marital status of same-sex unions performed before reversal of the district court's decision." Appl. at 21. As an initial matter, it bears emphasis that the District Court's Order has been in effect since December 20, 2013. Hundreds of same-sex couples in Utah have already married. Marissa Lang, *Same-Sex Couples Shatter Marriage Records in Utah*, Salt Lake Trib., Dec. 26, 2013, http://www.sltrib.com/sltrib/news/57310957-78/sex-county-marriages-couples.html.csp?page=1. The Governor's Office has directed all state agencies to comply with the District Court's decision and, based upon an initial survey of relevant state officials, has stated that the impact of doing so will be minimal. *See* Ex. C to App. (email from Governor's Chief of Staff stating that based upon a survey of Cabinet members "many agencies will experience little or no impact" and

providing guidance for agencies that encounter any "conflicting laws"); *see also* Dist. Ct. 12/20 Order at 47-48 (finding that "the process of allowing same-sex marriage is straightforward and requires no change to state tax, divorce, or inheritance laws"). Complying with the injunction requires no change in the existing legal structure or administration of civil marriage, and the evidence before this Court shows that, like other states which have implemented similar rulings, Utah can readily and effectively comply with the District Court's order.

Moreover, Applicants' claim they will suffer irreparable harm if the marriage ban is upheld on appeal has no merit. As Applicants themselves acknowledge, it is by no means clear that such a ruling would require the State to seek or would result in the invalidation of the existing marriages. *See* Appl. at 21 (noting that if the marriage ban is upheld, Applicants would have to determine "whether" to seek invalidation). Further, federal and state courts regularly address complex issues regarding the validity of marriages in other contexts.[7] Should Applicants decide to challenge the validity of same-sex couples' marriages if Applicants prevail on appeal, they can do so through the normal judicial process and will suffer no irreparable harm. Under well-settled law, any "administrative" or "financial costs" that might arise from the Applicants seeking such determinations cannot constitute irreparable injury. *See Sampson v. Murray*, 415 U.S. 61 (1974) ("Mere injuries,

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[7] *See*, *e.g.*, *Burden v. Shinseki*, 727 F.3d 1161 (Fed. Cir. 2013) (determining the applicable standard to assess the validity of an alleged marriage in a claim for veterans' benefits); *Corwell v. Corwell*, 179 P.3d 821 (Utah Ct. App. 2008) (determining the effect of an annulment on a party's ability to seek a protective order under a statute that limited protection against cohabitant abuse to married and formerly married persons); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (determining the validity of marriages entered into by same-sex couples in California before the enactment of a state constitutional amendment barring such marriages).

however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").[8]

Applicants' argument that this Court should issue a stay because same-sex couples and their children may suffer "dignitary and financial losses from the invalidation of their marriages," *see* App. at 21, cuts entirely the other way. Applicants cannot simultaneously concede that being stripped of one's marital status causes profound, irreparable harm and urge the Court to inflict that very injury on the married Respondents and other married same-sex couples. As the District Court noted, "the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed." Dist. Ct. 12/20 Order at 50. That immediate, continuing, and severe harm far outweighs any speculative problems that might be caused by the possible invalidation of their marriages in the future.

B. Applicants Cannot Establish Irreparable Harm Based on the Mere Enjoining of a State Law

Applicants' argument that an order enjoining the enforcement of a state law always inflicts irreparable harm, regardless of the law's validity or invalidity, has no merit. The government does not suffer irreparable harm when an enjoined measure is unconstitutional. *See*, *e.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law."); *Indep. Living Ctr. of S. Cal. v. Maxwell-*

[8] Applicants' citation to *Legalization Assistance Project*, 510 U.S. at 1305-06, is inapt. That decision found that, because the plaintiffs in that case likely did not have standing, the district court likely did not have authority to intrude upon the internal workings of a federal administrative agency, particularly where doing so imposed a "considerable administrative burden." *Id.* It did not hold that, in an ordinary case, mere "administrative burden" constitutes irreparable harm.

Jolly, 572 F.3d 644, 658 (9th Cir. 2009) (rejecting argument that "merely by enjoining a state legislative act, [a court] create[s] a per se harm trumping all other harms").

Applicants' attempt to bootstrap irreparable harm based on their inability to enforce a measure that has been declared to be invalid by the District Court, and likely to be held invalid by the Court of Appeals, is unavailing. If Applicants' argument were correct, then any time a state sought to stay an order enjoining a law found to be unconstitutional by a lower court, the state would win. Applicants' argument would unduly tip the scale in favor of the government in any case challenging a government enactment, and against the constitutional rights of the citizenry. *Cf. Maxwell-Jolly*, 572 F.3d at 658 (noting that if harm to a state when a law is enjoined were "dispositive," "the rule requiring balance of competing claims of injury would be eviscerated") (internal citations and quotations omitted).

The cases to which Applicants' cite do not stand for the proposition that a state is injured whenever its laws are enjoined. Applicants cite to *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers), but that decision found that "a majority of the Court [would] likely reverse judgment of the District Court" and uphold the challenged state law. *Id.* at 1347. Here, the Court of Appeals reached the opposite conclusion. CA10 12/24 Order at 2. Moreover, unlike Applicants, who cannot point to any concrete way in which permitting same-sex couples to marry causes any irreparable, let alone actual, harm, the decision in *New Motor Vehicle Board* explained in detail how

enjoining the statute, which required car dealers to obtain approval before relocating, would cause irreparable harm to existing dealers and the public. 435 U.S. at 1351. Applicants' citation to *Maryland v. King*, 133 S. Ct. 1 (2012), also does not support their position. In that case, which involved a constitutional challenge to a state law authorizing the collection of DNA samples from individuals charged with but not yet convicted of certain crimes, the Court also determined the law was likely to be upheld and enjoining it pending appeal would cause "an ongoing and concrete harm to Maryland's law enforcement and public safety interests." *Id.* at 3. Here, Applicants have not shown that the Court of Appeals was "demonstrably wrong" in concluding that Applicants are not likely to succeed on appeal, nor have they demonstrated "ongoing and concrete harm" to any specific state interests. Finally, Applicants' citation to a concurring opinion in *Abbott*, 134 S. Ct. 506, is likewise unavailing. As with the other cited decisions, the opinion's finding of irreparable harm caused by enjoining a state law was predicated on the Court of Appeals' determination that "the State was likely to prevail on the merits of the constitutional question." *Id.* at 506.

Applicants' invocation of the states' "interest in controlling the definition of marriage within their borders," Appl. at 19, to show irreparable harm merely repeats their arguments on the merits of Respondents' constitutional claims; it does not show irreparable harm. In any event, however, it is well established that every state's marriage laws "must respect the constitutional rights of persons" and are "subject to constitutional guarantees." *Windsor*, 133 S. Ct. at 2691-92. While states

have primary authority over family law in our federal system, that does not insulate state marriage laws from the requirement of compliance with the commands of the Fourteenth Amendment, just as it does not insulate state laws regarding parentage or child custody from that requirement. *See*, *e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (invalidating state custody and visitation statute that impermissibly infringed upon parental rights); *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating state law that automatically denied custody to unmarried fathers).

The District Court's decision that Utah's marriage ban violates Respondents' constitutional rights to due process and equal protection no more constitutes irreparable injury to Applicants or "breaches the principle of federalism," *see* Appl. at 20, than other decisions invalidating state laws that impermissibly deprive individuals of equal protection of the laws or burden fundamental rights to liberty, privacy, and intimate association. As this Court has made clear, "federalism protects the liberty of the individual"; it is "not . . . a matter of rights belonging only to the State[]." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Applicants' emphasis on the sovereignty of the state and its people overlooks that Respondents and their families are also Utah citizens and cannot be made "stranger[s] to its laws." *Romer*, 517 U.S. at 635. Utah's citizenry, which includes Respondents and their families, is not harmed by a decision that requires the state to protect fundamental liberties equally for all its citizens.

Applicants' exclusive emphasis on state sovereignty also overlooks that, like Utah's laws, the rights protected by the Fourteenth Amendment were produced by a democratic process, and Respondents and others have a compelling interest in ensuring that those rights are respected. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (internal citations and quotations omitted)

In sum, Applicants' argument that a state is injured any time its laws are enjoined, regardless of their validity or invalidity, finds no support in this Court's precedents, and Applicants' reliance on that argument serves only to underscore their inability to show any way that permitting same-sex couples to marry causes any irreparable, let alone actual, harm. Neither Applicants nor the public have an interest in enforcing unconstitutional laws or relegating same-sex couples and their families to a perpetual state of financial, legal, and social vulnerability. Applicants cannot show that the Court of Appeals clearly erred in concluding that Applicants did not demonstrate irreparable harm in the absence of a stay.

IV. THE APPLICANTS HAVE NOT SHOWN THAT THIS CASE IS LIKELY TO BE REVIEWED IN THIS COURT UPON FINAL DISPOSITION IN THE COURT OF APPEALS

Even if Applicants could show both that the Court of Appeals was "demonstrably wrong" and that its "rights" will be "seriously and irreparably injured by the stay," they cannot show that this case is likely to be reviewed in this Court after the Tenth Circuit rules on the appeal. *W. Airlines*, 480 U.S. at 1305. Applicants' burden on this issue is high, because it is nearly impossible to demonstrate that this Court will be "likely" to review a decision and opinion that

have yet to be issued by a Court of Appeals. *See Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (noting that only in "exceptional" cases will a litigant be able to establish before decision by the Court of Appeals that this Court is likely to grant certiorari).

Applicants' argument that this Court is likely to review this case because the Court granted certiorari in *Perry*, 133 S. Ct. 2652, has no merit. *See* Appl. at 8. Respondents strongly concur with the Court of Appeals that Applicants have not shown they are likely to prevail on appeal. Nonetheless, because the Tenth Circuit has not yet issued an appellate decision on the merits in this case, it is not possible to predict with certainty how, or on what basis, the Court of Appeals might rule. Therefore, any discussion of the issue is premature.

Applicants suggest that this Court has a "general . . . policy" of granting certiorari when a federal court invalidates a state statute based on the federal constitution. *See* Appl. at 8 (citing *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) and *Roman v. Sincock*, 377 U.S. 695 (1964)). In fact, the Supreme Court Case Selections Act was amended in 1988, six years after *Karcher* and twenty four years after *Roman*, to achieve the opposite result. *See* 28 U.S.C. § 1254 (commentary) (noting rejection of "the premise of old subdivision (2) . . . that a federal court's invalidation of a state law was suspect and should therefore be guaranteed access to the highest court in the land for a final determination").

Moreover, the cases cited to by Applicants do not support their claim that such a policy exists. In *Karcher*, Justice Brennan found that certiorari would likely be granted, not because a state statute was at issue, but rather because there was confusion in the three-judge court below as to the legal test that should be applied to redistricting laws based on a prior Supreme Court decision and its progeny. 455 U.S. at 1299-1300. *Roman* is a decision on the merits and does not include any detail regarding the prior order granting a stay.

Moreover, recent decisions denying certiorari in cases where federal courts struck down state statutes on federal constitutional grounds belie the existence of any such alleged policy. *See, e.g.*, *Brewer v. Diaz*, 656 F.3d 1008 (9th Cir. 2013) (affirming preliminary injunction against Arizona statute as violative of the Equal Protection Clause), *cert. denied*, 133 S. Ct. 2884; *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2013) (affirming preliminary injunction against Alabama statute as preempted by federal law), *cert. denied*, 133. S. Ct. 2022. These decisions are consistent with Supreme Court Rule 10, which makes no mention of whether a case involves a federal court striking down a state law on federal constitutional grounds as a relevant consideration in granting certiorari.

Applicants also suggest that a grant of certiorari is likely because, they assert, a favorable decision for Respondents on appeal would create a circuit split due to the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). But the plaintiffs in *Bruning* brought different claims than those at issue here. In *Bruning*, the plaintiffs argued only that Nebraska law

constituted an unlawful bill of attainder and raised "an insurmountable political barrier to same-sex couples obtaining" the benefits of marriage; plaintiffs expressly did "not assert a right to marriage or same-sex unions." *Id.* at 865. Indeed, as the lower court made abundantly clear, the court was "not asked to decide whether a state has the right to define marriage in the context of same-sex and opposite-sex relationships." *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 985 n.1 (D. Neb. 2005); *see also id.* at 995 n.11 ("[T]he court need not decide whether and to what extent Nebraska can define or limit the state's statutory definition of marriage.").

The District Court's decision is the first post-*Windsor* federal court decision to strike down a state marriage ban. The constitutional issues presented by this case plainly are of great importance; however, currently there are more than twenty-five state and federal lawsuits, in at least fifteen states, challenging state laws barring marriage by same-sex couples on federal constitutional grounds.[9] The

[9] *Sevcik v. Sandoval*, No. 12-17668 (9th Cir., appeal filed Oct. 18, 2013), No. 2:12-CV-00578 (D. Nev., filed Apr. 10, 2012); *Jackson v. Abercrombie*, Nos. 12-16995, 12-16998 (9th Cir., appeal docketed Sept. 10, 2013), No. 1:11-CV-00734 (D. Haw., filed Dec. 7, 2011); *Freeman v. Parker*, No. 4:13-CV-03755 (S.D. Tex., filed Dec. 26, 2013); *Latta v. Otter*, No. 1:13-CV-00482 (D. Idaho, filed Nov. 8, 2013); *DeLeon v. Perry*, No. 5:13-CV-00982 (W.D. Tex., filed Oct. 28, 2013); *Tanco v. Haslam*, No. 3-13-1159 (M.D. Tenn., filed Oct. 21, 2013); *Geiger v. Kitzhaber*, No. 6:13-CV-01834 (D. Or, filed Oct. 15, 2013); *Palladino v. Corbett*, No. 2:13-CV-05641 (E.D. Pa., filed Sept. 26, 2013); *Bradacs v. Haley*, No. 3:13-CV-02351 (D.S.C., filed Aug. 28, 2013); *Harris v. McDonnell*, No. 5:13-CV-00077 (W.D. Va., filed Aug. 1, 2013); *Bourke v. Beshear*, No. 3:13-CV-00750 (W.D. Ky., filed July 26, 2013); *Obergefell v. Kasich*, No. 1:13-CV-00501 (S.D. Ohio, filed July 19, 2013); *Bostic v. McDonnell*, No. 2:13-CV-00395 (E.D. Va., filed July 18, 2013); *Jernigan v. Crane*, No. 4:13-CV-00410 (E.D. Ark., filed July 18, 2013); *Whitewood v. Wolf*, No. 1:13-CV-01861 (M.D. Pa., filed June 9, 2013); *Bishop v. United States*, No. 4:04-CV-00848 (N.D. Okla., filed Nov. 3, 2004); *Fisher-Borne v. Smith*, No. 12-CV-00589 (M.D.N.C., filed June 13, 2012); *DeBoer v. Snyder*, No. 12-CV-10285 (E.D. Mich., filed Jan. 23, 2012); *Bassett v. Snyder*, No. 2:12-CV-10038 (E.D. Mich., filed Jan. 5, 2012); *Wright v. Arkansas*, No. 60CV-13-2662 (Ark. Cir. Ct., filed July 1, 2013); *Brinkman v. Long*, No. 2013-CV-32572 (Colo. Dist. Ct., filed Oct. 30, 2013); *Ky. Equality Fed'n v. Beshear*, No. 13-CI-01074 (Ky. Cir. Ct., filed Sept. 10, 2013); *Commonwealth v. Clary*, No. 11-CR-3329 (Ky. Cir. Ct., motion for invocation of marital privilege filed June 6, 2013); *Donaldson & Guggenheim v. Montana*, No. BDV-2010-702 (Mont. Dist.

Courts of Appeals, including the Tenth Circuit, have not yet had a chance to address these issues. Therefore, while it is certainly possible that the Court "could" grant certiorari in this case, Applicants cannot show that it "very likely would" do so. *Coleman*, 424 U.S. at 1304.

V. GRANTING A STAY WOULD CAUSE UNDISPUTED, IRREPARABLE HARM TO SAME-SEX COUPLES AND THEIR CHILDREN

As *Windsor* affirmed, marriage is a status of "immense import." 133 S. Ct. at 2692. In addition to subjecting same-sex couples and their children to profound legal and economic vulnerability and harms, Utah's exclusionary marriage laws stigmatize the relationships of same-sex couples as inferior and unequal. In *Windsor*, the Court echoed principles set forth in *Loving*, 388 U.S. 1, forty-six years earlier, finding that discrimination against same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects. . . ." 133 S.Ct. at 2694 (citing *Lawrence*, 539 U.S. 558). The Court made clear that the discriminatory treatment "humiliates tens of thousands of children now being raised by same-sex couples" and that "the law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* "In contrast to the State's speculative concerns, the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed." Dist. Ct. 12/20 Order at 50.

Ct., filed July 22, 2010, amended complaint filed July 15, 2013); *In re Marriage of J.B. and H.B.*, No. 11-0024 (Tex., argued Nov. 5, 2013); *State v. Naylor*, No. 11-0114 (Tex., argued Nov. 5, 2013).

Cases across the country have already demonstrated that the inability to marry, or have an existing marriage recognized by the state, subjects gay and lesbian couples not only to catastrophic and permanent harm, but also to the intolerable threat of such harm. A district court in Illinois, for instance, granted a temporary restraining order to "medically critical plaintiffs" who, if not permitted to marry immediately, would "be deprived of significant federal rights and benefits." *Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577, at *3 (N.D. Ill. Dec. 10, 2013). The stay of the Northern District of California's ruling in *Perry* pending appeal cost California couple Stacey Schuett and Lesly Taboada-Hall the opportunity to legally marry before Lesly's death just six days before this Court issued its decision, leaving her partner's status a widow in legal limbo. *See* Mary Callahan, *Judge Grants Legal Recognition to Sebastopol Women's Marriage After Legal Battle*, The Press Democrat, September 18, 2013, http://www.pressdemocrat.com/article/20130918/articles/130919524.[10]

In this case, Appellees Karen Archer and Kate Call face a similar fate if a stay is issued pending resolution of this appeal. It is undisputed that Karen Call is suffering from a terminal illness that may very well prevent her from surviving the instant appeal. Dist. Ct. 12/20 Order at 5-6. Forcing same-sex couples and their

---

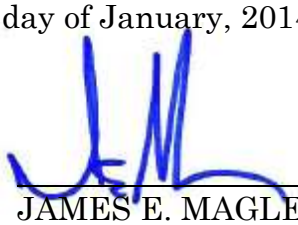
[10] *See also Obergefell v. Wymyslo*, Case No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (holding that incorrectly classifying plaintiffs as unmarried on a death certificate would result in severe and irreparable harm including denial of status as surviving spouse with its attendant benefits and inability to comply with decedent's final wishes); *Griego v. Oliver*, Case No. D-202-CV-2013-2757, Declaratory Judgment, Injunction, and Peremptory Writ of Mandamus, slip. op. at *4 (N.M. Dist. Ct. Sept. 3, 2013) (holding denial of right to marry constitutes irreparable harm after terminally ill plaintiff moved for temporary restraining order allowing her to marry her partner before dying); *Griego v. Oliver*, Case No. D-202-CV-2013-2757, Plaintiffs Roper and Neuman's Motion for Temporary Restraining Order (N.M. Dist. Ct. Aug. 21, 2013) (detailing irreparable harms same-sex couple with terminally ill partner would suffer if unable to legally marry in New Mexico).

families to wait and hope for the best during the pendency of this appeal imposes an intolerable and dehumanizing burden that no family should have to endure.[11]

CONCLUSION

For the foregoing reasons, the Application should be denied.

Respectfully submitted this 3rd day of January, 2014.



JAMES E. MAGLEBY

Counsel of Record for Respondents

[11] Applicants note that the Ninth Circuit in the California Proposition 8 litigation granted a stay pending appeal. Yet as soon as this Court issued its decision in *Windsor*, the Ninth Circuit immediately lifted its stay. *See Perry v. Brown*, 725 F.3d 968, 970 (9th Cir. 2013) ("The stay in the above matter is dissolved effective immediately."). In addition, courts that have considered this issue since *Windsor* have refused to stay their rulings or to stay lower court rulings allowing same-sex couples to marry pending appeal. *See, e.g.*, *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) (New Jersey Supreme Court order denying stay); *Griego v. Oliver*, Case No. D-202-CV-2013-2757, Declaratory Judgment, Injunction, and Peremptory Writ of Mandamus, slip. op. at *2-*3 (N.M. Dist. Ct. Sep. 3, 2013) (ordering county clerks in Bernalillo and Sandoval Counties to begin issuing marriages licenses to qualified same-sex couples based on court's determination that any exclusion of those couples from marriage was unconstitutional); *Gray v. Orr*, No. 1:13-CV-08449, 2013 WL 6355918 at *6 (N.D. Ill. Dec. 5, 2013) (granting injunction permitting a same-sex couple to marry before the effective date of recently enacted Illinois statute eliminating the state's ban on marriage by same-sex couples).

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Opposition to Application to Stay Judgment Pending Appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and accompanying Appendix, was sent via electronic mail and United States mail on January 3, 2014, to:

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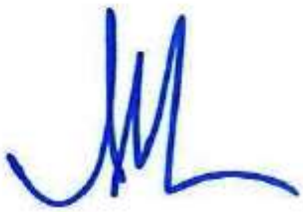


JAMES E. MAGLEBY

Counsel of Record for Respondents

Appendix

DECLARATION OF PEGGY A. TOMSIC
Counsel for Respondents

I, Peggy A. Tomsic, declare and state as follows:

1. I am an attorney with the Salt Lake City, Utah, law firm of Magleby & Greenwood P.C. I am a member in good standing of the Utah State Bar, and have been since my admission in 1982. I am counsel of record for Respondents in the underlying action in the United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit, and have an application pending before this United States Supreme Court. I make this Declaration on the basis of my personal knowledge.

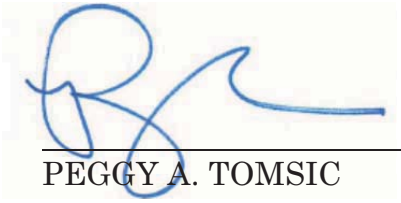
2. A true and accurate copy of the email from the Chief Deputy Clerk of the United States Court of Appeals for the Tenth Circuit, Doug Cressler, ("Chief Deputy Clerk"), to counsel for Applicants and for Respondents, dated December 26, 2013, and proposing a five week briefing schedule, is attached as Exhibit "A."

3. On December 27, 2013, I had a telephone conversation with Applicants' counsel, who requested that Applicants be given four weeks to prepare their opening brief. I agreed to that request. Attached as Exhibit "B" is a true and accurate copy of the briefing schedule ordered by the United States Court of Appeals for the Tenth Circuit on December 30, 2013, consistent with what the parties had proposed to the Chief Deputy Clerk.

4. A true and accurate copy of the Press Release from Derek Miller, Chief of Staff for the Governor of Utah, dated December 24, 2013, is attached as Exhibit "C."

I hereby declare under penalty of perjury based on my personal knowledge that the foregoing is true and accurate.

Dated this 3rd day of January, 2014.



PEGGY A. TOMSIC

Exhibit “A”

Peggy Tomsic

From: Doug_Cressler@ca10.uscourts.gov
Sent: Thursday, December 26, 2013 10:17 AM
To: James Magleby; Jennifer Fraser Parrish; Peggy Tomsic; phillott@utah.gov; spurser@utah.gov; rchamness@slco.org; dgoddard@slco.org
Cc: Betsy_Shumaker@ca10.uscourts.gov
Subject: 13-4178 Kitchen v. Herbert -- briefing schedule

Dear Counsel:

This message is sent as a follow-up to the order issued in connection with the Kitchen proceedings on December 24, 2013. This is a bad week to try to get any business done, but we would like you all to begin thinking about a proposed briefing schedule.

We ask that you please confer among yourselves and submit via reply email a joint proposed expedited schedule to which both sides can agree for the briefing. The proposed schedule should include firm due dates for each of the three briefs. Based on the schedule, we will confer with a panel of judges that will be drawn and hopefully, will be able to promptly come up with an oral argument date.

If you are looking for some guidance on the briefing schedule, we would suggest that the briefing be concluded no later than five weeks from today. If that is not possible, we will try to work with you on a different proposal.

Again, we recognize that this is a difficult week to pose this request, but we hope you could get back to us with via reply email with a proposal as soon as possible. If you have any questions or concerns, please give me a call at **Redacted** Thank you.

Doug Cressler
Chief Deputy Clerk
U.S. Court of Appeals for the Tenth Circuit

Exhibit “B”

FILED
United States Court of Appeals
Tenth Circuit

December 30, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually, et al.,

Plaintiffs - Appellees,

v.

GARY R. HERBERT, in his official capacity as Governor of Utah, et al.,

Defendants - Appellants,

and

SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County,

Defendant.

No. 13-4178
(D.C. No. 2:13-CV-00217-RJS)

ORDER

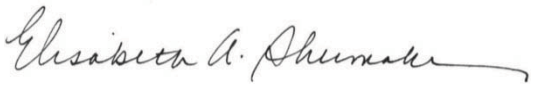
This matter is before the court to set an expedited briefing schedule. The schedule set here overrides the minute entry on the docket dated December 27, 2013.

The appellants' opening brief and appendix shall be filed on or before January 27, 2014. In this regard we strongly encourage the parties to confer on the materials to include in the appendix. *See generally* Fed. R. App. P. 30 and 10th Cir. R. 30.1.

The appellees' response brief shall be filed on or before February 18, 2014. Any reply brief shall be filed on or before February 25, 2014. Requests for extension of time

are very strongly discouraged, and will be considered only under extraordinary circumstances.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

Exhibit “C”

STATE OF UTAH

GARY R. HERBERT
GOVERNOR

OFFICE OF THE GOVERNOR
SALT LAKE CITY, UTAH
84114-2220

SPENCER J. COX
LIEUTENANT GOVERNOR

For Immediate Release
December 24, 2013

Contact: Nate McDonald
Public Information Officer
801.538.1509 desk
801.694.0294 cell
nmcdonald@utah.gov

Governor's Office gives direction to state agencies on same sex marriage issues

SALT LAKE CITY - (Dec. 24, 2013) The Governor's Office sent the following email to Cabinet Members today in regards to issues stemming from the recent federal court rulings on Amendment 3 to the Utah State Constitution:

> Dear Cabinet,
> Thanks to each of you for providing an analysis of the impacts to the operations in your respective agencies based on the recent federal district court ruling on same sex marriage. As indicated in your responses, many agencies will experience minimal or no impact.
>
> For those agencies that now face conflicting laws either in statute or administrative rule, you should consult with the Assistant Attorney Generals assigned to your agency on the best course to resolve those conflicts. You should also advise your analyst in GOMB of the plans for addressing the conflicting laws.
>
> 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.
>
> Thank you for your attention to this matter.
>
> Derek B. Miller
> Chief of Staff
> Governor's Office
> State of Utah

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