IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

PLAINTIFF-APPELLEES' OPPOSITION TO MOTIONS FOR STAY PENDING APPEAL AND TEMPORARY STAY PENDING RESOLUTION OF MOTION TO STAY

OPPOSITION TO REQUEST FOR EXTENDING TEMPORARY STAY

Plaintiffs request that the temporary extension of the district court's stay be dissolved and the motion for stay pending appeal be ruled on immediately. The district court went to great lengths to provide Defendants sufficient time to seek a stay from this Court before the preliminary injunction went into effect by granting a 21-day stay of its order, "notwithstanding the many factors weighing against a stay" pending appeal. *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 30. Yet rather than filing the instant motion by a date that would have allowed for sufficient briefing and deliberation, Defendants took advantage of the courtesy extended by the district court by waiting until Thursday, June 5, 2014, to file its stay request. This left only two business days remaining before the district court's injunction was to go into effect on Monday, June 9, 2014. This Court should not reward Defendants' decision to sit on their hands for over two weeks and then seek a last-minute extension of the stay based on time constraints that their own delay created.

BACKGROUND AND PROCEDURAL HISTORY

As Judge Kimball recognized in his opinion:

> [T]his 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.

Memorandum Decision & Order dated 5/19/2014, docket number 45, at 12. Plaintiffs are four same-sex couples legally married in Utah between December 20, 2013, and January 6, 2014, the period from the day the U.S. District Court for the District of Utah in *Kitchen v. Herbert*, No. 2:13–cv–217, enjoined Utah from prohibiting same-sex couples to marry or refusing to recognize such marriages until the day that injunction was stayed pending appeal. The Governor and Attorney General have both publicly recognized that those marriages were legally valid under Utah law at the time they were entered into. *Memorandum Decision & Order* dated 5/19/2014, docket number 45, at 4-5. But after the *Kitchen* injunction was stayed pending appeal, Defendants unilaterally announced that they were placing recognition of those marriages "on hold." *Id.* at 4.

Plaintiffs filed their initial complaint on January 21, 2014, in the Third Judicial District Court for the State of Utah, asserting claims under both the Utah and United States constitutions. *Notice of Removal* dated 1/21/2014, docket number 1, at 5. In their complaint and subsequent motion for preliminary injunction, Plaintiffs asserted that Defendants had misconstrued Utah's marriage amendment to apply retroactively to marriages that were legal at the time they were entered into. Plaintiffs further contended that such a retroactive application conflicted with the longstanding practice of Utah--and every other state-- to interpret any change in marriage eligibility laws to apply only prospectively to marriages not yet entered into. Plaintiffs alleged that Defendants' interpretation of Utah's marriage bans violates the vested rights of married same-sex couples under Utah law and unconstitutionally infringes upon their fundamental rights in

marriage, child-rearing, and family integrity protected by the Utah and United States constitutions.

On January 28, 2014, Defendants removed the case to the United States District Court for the District of Utah, where the case was assigned to the Honorable Dale Kimball. *Notice of Removal* dated 1/21/2014, docket number 1. On February 4, 2014, Plaintiffs moved for a preliminary injunction on all their claims. *Plaintiffs' Motion for Preliminary Injunction* dated 2/4/2014, docket number 8. In the interests of comity, Plaintiffs concurrently moved for certification of the state-law claims to the Utah Supreme Court to provide that court an opportunity to provide a definitive interpretation of Utah law. *Plaintiffs' Motion for Certification* dated 2/4/2014, docket number 10. In response to Plaintiffs' suggestion that state-law questions be certified to the Utah Supreme Court, Defendants argued that certification was unnecessary and asserted 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. *Defendants Mem. in Opp'n to Plaintiffs' Motion for Certification*, dated 2/21/2014, docket number 21. The district court heard oral arguments on Plaintiffs' motions on March 12, 2013. *Minute Entry* dated 3/12/2014, docket number 28.

While this case was pending in the district court, many same-sex couples – including one of the Plaintiff couples in this case – continued to pursue the process of step-parent adoption in state court so that both parents could form a legal relationship with their children. The Attorney General's office submitted briefs to those state courts opposing the step-parent adoptions. *Plaintiffs' Factual Supplement* filed 5/13/2014,

docket number 42 at 2. In the weeks after the federal district court heard oral arguments on the pending motions in this case, at least four state district judges rejected the Attorney General's arguments and granted step-parent adoption petitions for same-sex couples who married between December 20, 2013 and January 6, 2014, including one of the same-sex couples who are plaintiffs in this case. *Plaintiffs' Factual Supplement* filed 5/13/2014, docket number 42 at 2; *Defendants' Motion to Certify*, dated 4/16/2014, docket number 34, at 4. As part of the orders granting those step-parent adoptions, those state courts also ordered the State to issue amended birth certificates reflecting the adoptive step-parents' legal relationship to their children. *Plaintiffs' Factual Supplement* filed 5/13/2014, docket number 42, at 2; *Defendants' Motion to Certify* dated 4/16/2014, docket number 34 at 4; *Ex. A to Defendants' Motion to Certify* dated 4/16/2014, docket number 34-1.

The State of Utah refused to comply with those state court orders, and the Attorney General's office filed at least four petitions for extraordinary relief with the Utah Supreme Court. *Plaintiffs' Factual Supplement* filed 5/13/2014, docket number 42, at 2; *Defendants' Motion to Certify* dated 4/16/2014, docket number 34 at 4. The Utah Supreme Court did not act on the petitions for several weeks and before it did, a state court judge issued an order to show cause threatening to hold Defendants in contempt for their continued defiance of the order of his court. *Plaintiffs' Motion to File Second Supplement* dated 5/17/2014, docket number 43, at 3. Shortly after this order to show cause issued, the Utah Supreme Court granted a limited stay of the portion of four state court orders to issue amended birth certificates "until the Court can address the petitions

for extraordinary relief." *Ex. A to Plaintiffs' Motion to file Second Supplement* dated 5/17/2014, docket number 43-1. While this was going on, the Defendants – in a reversal of their previous opposition to certification – also filed a motion for Judge Kimball to certify state-law questions to the Utah Supreme Court on April 16, 2014. *Defendants' Motion to Certify* dated 4/16/2014, docket number 34.

On May 19, 2014, Judge Kimball denied both parties' motions to certify questions to the Utah Supreme Court and granted Plaintiffs' motion for preliminary injunction. *Memorandum Decision & Order* dated 5/19/2014, docket number 45. Judge Kimball concluded that certification of state law questions was unnecessary because Plaintiffs' reading of Utah law clearly prevailed, and, in any event, the injunction rested on Plaintiffs' federal claims. The district court also rejected Defendants' request for a stay pending appeal but granted "a limited 21–day stay during which it may pursue an emergency motion to stay with the Tenth Circuit." *Id.* at 30. As a result of the limited 21-day stay, the district court's injunction was scheduled to go into effect on Monday, June 9, 2014.

Defendants filed the instant motion for stay pending appeal on Thursday, June 4, 2014. The next day, June 5, 2014, this Court entered an order granting "a temporary stay of the district court's order" and directing the Plaintiffs to respond to the motion for stay by June 12, 2014. *Order filed by Clerk* dated 6/05/14, Court of Appeals Docket # 14-4060.

ARGUMENT

The district court correctly concluded that Defendants' unconstitutional attempt to strip recognition from legally valid marriages imposes severe and irreparable harm on Plaintiffs and other same-sex couples. Defendants should not be allowed to continue perpetuating that harm through a stay pending appeal.

The Supreme Court has warned that "a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review" and "[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders." *Id.* (internal quotation marks and citations omitted). Accordingly, a stay pending appeal "is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Id.* at 437 (Kennedy, J., concurring).

The four factors considered by this Court when determining whether to grant a stay are:

> "(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 the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

KSTU, LLC v. Aereo, Inc., No. 14-4020, 2014 WL 1687749, at *1 (10th Cir. Mar. 7, 2014 (quoting *Nken*, 556 U.S. at 434). "The first two factors 'are the most critical.'" *Id.* (quoting *Nken*, 556 U.S. at 434). "When considering success on the merits and

irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Nken*, 556 U.S. at 438 (Kennedy, J., concurring). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

In the context of granting a preliminary injunction, this Court has observed that when plaintiffs allege violations of their constitutional rights, a finding of likelihood of success on the merits will often be the determining factor because the deprivation of constitutional rights constitutes irreparable harm, the government suffers no cognizable harm when it is prevented from acting unconstitutionally, and it is always in the public interest to vindicate constitutional rights. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (plurality). Conversely, if the government is unable to show that it is likely to prevail in sustaining the constitutionality of its actions, then it will generally be unable to show that the remaining factors weigh in favor of allowing it to continue engaging in unconstitutional conduct. *Memorandum Decision & Order* dated 5/19/2014, docket number 45.

Defendants have not carried the burden necessary to secure a stay pending appeal. To the contrary, all relevant factors point strongly in favor of Plaintiffs' motion for preliminary injunction and against the stay Defendants seek.

I. The Supreme Court's Stay in *Kitchen* Does Not Signal that All Injunctions Involving Marriage for Same-Sex Couples Must Automatically Be Stayed Pending Appeal.

The Supreme Court has not adopted a policy of automatically staying every decision touching upon the subject of marriage for same-sex couples. Indeed, just a few

days ago the Supreme Court denied a motion to stay enforcement of a district court's order that struck down Oregon's marriage bans pending appeal from a denial of a motion to intervene. *See Nat'l Org. for Marriage v. Geiger*, No. 13A1173 (U.S.), order dated June 4, 2014.

Defendants argue that because the Supreme Court stayed *Kitchen* pending appeal, Judge Kimball's order to recognize the marriages of same-sex couples that have already taken place must be stayed as well. Stay Motion at 15-16. But, as discussed below, the legal questions, irreparable harms, and balance of hardships in this case are different than in *Kitchen*. The Supreme Court may ultimately decide whether Utah must allow additional same-sex couples to marry. But regardless of the outcome in *Kitchen*, Utah cannot strip recognition from the marriages that have already occurred.

II. Defendants Have Not Made a Strong Showing of Likelihood of Success on the Merits.

The district court held that by stripping recognition from over 1,000 marriages that were legal under the laws of Utah at the time they were entered into, Defendants violated two independent liberty interests under the Fourteenth Amendment. *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 13. First, the district court held that Defendants violated Plaintiffs' liberty interests in their fundamental right to marriage and family integrity that spring directly from the Fourteenth Amendment itself. *Id.* at 13-14. Second, the district court held that Defendants violated state-created liberty interests in their vested rights as married couples. *Id.* at 14-26. To meet the threshold

requirements for securing a stay pending appeal, Defendants must make a strong showing that they are likely to overturn *both* of those holdings.

A. Defendants Are Not Likely to Overturn the District Court's Ruling Based on Rights Springing Directly from the Fourteenth Amendment.

As detailed in the district court's opinion, Defendants' effort to strip recognition from Utah marriages that were validly entered into at the time those marriages took place violates fundamental rights and liberty interests at the core of the Fourteenth Amendment. "There 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.'" *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012) (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.*; *accord Lehr v. Robertson*, 463 U.S. 248, 258 (1983) ("[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."). There is, accordingly, "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).

There is no such thing as an "interim marriage." Whether or not the Fourteenth Amendment requires states to allow same-sex couples to marry in the first instance, same-sex couples who have legally married are protected by the same fundamental rights

and liberty interests as any other legally married couple. As with any other married couple, divesting those "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 Judge Kimball explained:

> 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. 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." Similarly, the "principal effect" of the State's actions "is to identify a subset of state-sanctioned marriages and make them unequal."

Memorandum Decision & Order dated 5/19/2014, docket number 45 at 13 (citations omitted).

Defendants fail to identify any precedent supporting their radical proposition that a state may retroactively void or strip recognition from couples legally married under that state's law at the time the marriages were solemnized. Indeed, such an attempt to nullify existing legal marriages would contravene the longstanding and consistent practice by Utah and other states of protecting marriages from retroactive invalidation by subsequent legal changes.[1] Accordingly, Defendants are not likely to succeed on the merits of their claims and cannot make the threshold showing necessary for a stay pending appeal.

[1] *See Tufts v. Tufts*, 8 Utah 142, 30 P. 309, 310 (Utah 1892) (marriages legally entered into create vested rights whose validity are not affected by change in underlying marriage statutes); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (constitutional amendment declaring that only marriage between a man and a woman "is valid or recognized" cannot be applied retroactively to strip recognition from marriages of same-sex couples that had already taken place); *Cook v. Cook*, 104 P.3d 857 (Ariz. Ct. App. 2005) (statute declaring that marriages between cousins from other jurisdictions are no longer recognized in

Arizona could not be applied to marriages that were already recognized in Arizona before the statute was passed); *In re Ragan's Estate*, 62 N.W.2d 121 (Neb. 1954) (statute prohibiting common law marriages could not be applied retroactively to nullify existing marriages); *Cavanaugh v. Valentine*, 41 N.Y.S.2d 896 (N.Y. Sup. Ct. 1943) (same); *Atkinson v. Atkinson*, 203 N.Y.S. 49 (N.Y. App. Div. 1924) ("It cannot be held that the Legislature intended that a marriage performed in accordance with the law existing at the time of performance can be declared void because of a subsequent change in the statute."); *Wells v. Allen*, 177 P. 180 (Cal. Ct. App. 1918) (giving legal effect to a common law marriage "which was a valid marriage in this state at the time these parties assumed that relation"); *Succession of Yoist*, 61 So. 384 (La. 1913) (anti-miscegenation statute declaring that "Marriages between white persons and persons of color are . . . null and void" does not apply retroactively to interracial marriages already in existence); and *Callahan v. Callahan*, 15 S.E. 727 (S.C. 1892) ("If the act of 1865 should be given such retroactive effect in this case, it would result in nullifying the marriage of Green and Martha, which was a contract entered into by two persons having full power, as the law then stood, to make it a valid contract . . . . The relation of husband and wife, in law, subsisted between Green and Martha . . . vested rights spring therefrom, which could not be taken away by the subsequent legislation.").

B. Defendants Are Not Likely to Overturn the District Court's Ruling Based on Liberty Interests Created By State Law

As Judge Kimball also explained in his opinion, Utah law has for over a century recognized that once couples enter into a legally valid marriage, they have vested rights in that marriage that cannot be taken away by subsequent changes in the law. *Tufts v. Tufts*, 8 Utah 142, 30 P. 309, 310 (Utah 1892); *see also supra*, note 1 (collecting cases). Utah law also applies a strong presumption against interpreting statutory enactments and constitutional amendments in a manner that would retroactively impair vested rights. *See Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108; *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663, 674 (Utah 2002). In accordance with those settled principles of interpretation, the district court properly concluded that Plaintiffs had vested rights in their marriages under Utah law and Utah's marriage amendment does not apply retroactively to impair those vested rights.[2]

[2] Defendants argue that Utah's statutory and constitutional marriage bans have a clear and unavoidable retroactive application because they the use the word "recognize." But in *Waddoups*, the Utah Supreme Court analyzed a statute declaring that the tort of negligent credentialing "is not recognized as a cause of action" and concluded that the statute lacked the clear and unmistakable intent necessary to be applied retroactively to causes of action that accrued before the statute was passed. Even though the cause of action was no longer "recognized," plaintiffs could continue to sue and recover damages after the statute was passed as long as the underlying conduct occurred prior to passage. Most significantly, all of Utah's marriage bans use the present tense, and the Utah Supreme Court in *Waddoups* explained that "[i]t 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." *Id.* at ¶ 7. The Utah Supreme Court's decision in *Waddoups* is consistent with the California Supreme Court's ruling in *Strauss* 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.

In arguing that Plaintiffs cannot have vested rights in their marriages because the *Kitchen* decision was a non-final judgment with a pending appeal, Defendants erroneously rely on *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996), and *Gavin v. Branstad*, 122 F.3d 1081(8th Cir. 1997). Stay Motion at 10. Those cases had nothing to do with pending appeals. They addressed a totally different question, whether a continuing prospective injunction arising from a consent decree in prison-reform litigation could be considered "final" for purposes of *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995). Indeed, those cases involved ongoing consent decrees where no appeals had been pending for many years. Moreover, the prisoners in *Plyler* and *Gavin* contended that they had vested rights in the continuation of the consent decrees. Here, Plaintiffs are not claiming they have a vested right in the continuation of the *Kitchen* injunction; rather, they are claiming they have vested rights in their legal marriages that have already taken place.

Defendants are not likely to persuade the Court to adopt their theory that the marriages entered into while the *Kitchen* injunction was in effect cannot produce vested rights because they will be declared void ab initio if *Kitchen* is overturned on appeal. Defendants' contention -- that all actions taken by third parties while an injunction is in effect should be declared void ab initio if the injunction is later overturned -- conflicts with the basic rule 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). District court injunctions would be rendered meaningless if, despite the lack of a stay, all actions

taken in accordance with a district court injunction could be declared void ab initio years later once the injunction is overturned.[3]

Moreover, at least four Utah state courts have rejected Defendants' legal arguments concerning the effect of Utah's marriage amendment and granted step-parent adoptions to couples who legally married while the *Kitchen* injunction was in effect. Indeed, Defendants have failed to identify "any case in the Utah state courts that have been favorable to the State's position." *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 33. Defendants cannot meet their heavy burden of showing that they are likely to prevail on appeal and that the federal district court and every Utah state court to rule on the merits of the issue erred.

III. Defendants Cannot Show They Will Be Irreparably Injured Without a Stay Pending Appeal.

A. The District Court's Preliminary Injunction Does Not Violate Principles of Comity to Utah State Courts.

Defendants assert that if Judge Kimball's injunction is not stayed, it "may interfere with the Utah Supreme Court's state law determinations pending before it." Stay Motion at 17. But, having removed this case to federal court and urged the court to rule on

[3] Defendants are simply wrong in asserting that the legal effect of reversing a lower court injunction is that the injunction "never existed." Stay Motion at 14. The source they cite for that proposition states that an injunction that is reversed "*ought* never to have existed." *Butler v. Eaton,* 141 U.S. 240, 244 (1891) (emphasis added). While it is in effect, an injunction may have binding and permanent consequences that cannot be undone even if it subsequently overturned. *See 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. *See Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967).

Plaintiffs' federal claims without certifying state-law questions, Defendants cannot now turn around and argue that, under principles of comity, the district court (and by extension this Court on appeal) should have deferred to state court proceedings and refrained from issuing an injunction. As Judge Kimball observed, "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." *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 44 n.5.

Indeed, Defendants' arguments in support of a stay pending appeal directly contradict the arguments they made to the district court in opposing Plaintiffs' motion for certification. Defendants told the court that "[t]he purposes of certification—the respect for comity, the efficient use of legal and judicial resources, and the expeditious resolution of outcome determinative issues—are not present in this case." *Defendants' Mem. in Opp'n to Plaintiffs' Motion for Certification*, dated 2/21/2014, docket number 21, at 12. According to Defendants, certification "would not help the Court in its consideration of the federal issues presented in this case," *id.* at 2, because "[i]f Plaintiffs seek a determination of the effect of a 'vested right' on their federal due process claims, that question is one for the federal court, not the Utah Supreme Court," *id.* at 11. In light of their previous litigation strategy and representations to the court, the district court correctly concluded that Defendants' later attempts to invoke principles of comity and

deference to state courts was a delay tactic. *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 33.[4]

In any event, in light of Judge Kimball's resolution of the federal constitutional claims, Defendants' arguments to the Utah Supreme Court regarding state law are moot. Whether or not the Utah Supreme Court would hold that Utah law authorizes Defendants to strip recognition from legally married same-sex couples, the Defendants must still recognize those marriages based on their obligations under the Fourteenth Amendment.

B. Defendants Cannot Show Any Other Cognizable Harm

There is no irreparable harm in this case comparable to the alleged irreparable harm that apparently prompted the Supreme Court to grant a stay pending appeal in *Kitchen*. The question before the Supreme Court in *Kitchen* was whether Utah should have to continue issuing *additional* marriage licenses beyond those that were already issued. There is no similar claim of irreparable harm here because "[t]he State's marriage bans are currently in place and can stop any additional marriages from occurring." *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 27-28. "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." *Id.* at 27.

The only harms Defendants put forth are the theoretical "administrative difficulties" that would result if the State provided recognition to Plaintiffs' marriages

[4] Moreover, it is uncertain that the Utah Supreme Court will even reach the merits of the state-law issues because there are significant procedural questions regarding Defendants' standing to collaterally attack a final adoption order.

and those marriages were somehow later voided as a result of the *Kitchen* litigation. But, as discussed above, Defendants are mistaken, as the ultimate outcome in *Kitchen* does not have any effect on the validity of Plaintiffs' marriages. Because Defendants are wrong about the applicable law, the purported harms they will suffer from an injunction are simply illusory.

IV. Defendants Cannot Show the Balance of Harms Tips Decidedly In Their Favor.

The balance of harms strongly tips in favor of Plaintiffs and against Defendants' request for a stay pending appeal. Granting such a stay would impose enormous hardship on Plaintiffs and other same-sex couples by holding them in an indefinite period of limbo. These couples have an urgent need for those marriages to be recognized *now* as they face the same life events and financial decisions in 2014 and 2015 that other families will encounter over the course of next two years or more. *Cf. Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 484 (C.D. Cal.2012) (finding that when plaintiffs' insurance policies had been placed in "legal limbo . . . [t]he resulting uncertainty, stress, and inability to plan are sufficient to constitute irreparable harm"). As Judge Kimball explained, "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." *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 26. The indignity and uncertainty caused by Defendants' actions are

impossible to quantify in a dollar amount, and damages would be inadequate to remedy them.

In contrast, the harms suffered by Defendants are nonexistent because the government suffers no cognizable harm – much less irreparable harm -- when it is prohibited from acting unconstitutionally. *See Hobby Lobby Stores, Inc v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (plurality). Similarly, "[a]lthough the State has an interest in applying state law, that interest is only in applying the controlling law at the time." *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 25. *See also Strauss*, 207 P.3d at 122 (retroactively application of ban on marriage for same-sex couples was "not essential to serve the state's current interest . . .in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples" because "that interest is honored by applying the measure prospectively").

V. Defendants Cannot Show that a Stay Would Be in the Public Interest

The district court rightly concluded that granting a stay pending appeal would be contrary to the public interest. "[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). Moreover, "the public is well served by having certainty about the status of Plaintiffs' marriages. That certainty not only benefits Plaintiffs and their 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." *Memorandum Decision & Order* dated 5/19/2014, docket number 45 at 28.

Defendants assert that a stay pending appeal is necessary to prevent administrative problems that would result in the event *Kitchen* is overturned and Plaintiffs' marriages are rendered void ab initio. But Plaintiffs' marriage must continue to be recognized regardless of the ultimate outcome in *Kitchen*. To the extent that any legal uncertainty currently exists, it is the product of Defendants' decision to retroactively apply Utah's marriage amendment in an unprecedented way and to file a series of petitions for extraordinary relief to avoid complying with federal and state court orders that reject their incorrect and unconstitutional interpretation. Granting a stay pending appeal will only prolong the legal limbo that Defendants have created. It is in the interest of all parties and the public at large to end that legal limbo as quickly as possible.

CONCLUSION

For the foregoing reasons, Defendants' motions for stay pending appeal and the temporary stay pending resolution of motion should be denied.

Respectfully Submitted,

/s/ Erik Strindberg

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Dated: June 6, 2014

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing Opposition:

(1) all required privacy redactions have been made per 10th Circ. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Mac AntiVirus, updated 6/6/2014, and according to the program are free of viruses.

June 6, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th of June, 2014, a true, correct and complete copy of the foregoing Opposition was filed with the Court and served on the following via the Court's ECF system:

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In addition, I hereby certify that on June 6, 2014, I mailed or served the foregoing Opposition by first-class mail, postage prepaid, to the following:

Mr. Parker Douglas
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P.O. Box 140856
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s/ Leah Farrell

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