JONI J. JONES (7562)
KYLE J. KAISER (13924)
Assistant Utah Attorneys General
PARKER DOUGLAS (8924)
General Counsel and Chief of Staff
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Facsimile: (801) 366-0101
E-mail: jonijones@utah.gov
kkaiser@utah.gov
pdouglas@utah.gov

Attorneys for State Defendants

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JONELL EVANS, STACIA IRELAND, MARINA GOMBERG, ELLENOR HEYBORNE, MATTHEW BARRAZA, TONY MILNER, DONALD JOHNSON, and CARL FRITZ SHULTZ, Plaintiffs, v. STATE OF UTAH, GOVERNOR GARY HERBERT, in his official capacity; and ATTORNEY SEAN REYES, in his official capacity, Defendants.	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION TO CERTIFY QUESTIONS OF UTAH STATE LAW TO THE UTAH SUPREME COURT** Case No. 2:14-cv-00055-DAK Judge Dale A. Kimball

Defendants the State of Utah, Governor Gary Herbert, and Attorney General Sean Reyes, ("Defendants" or the "State" or the "State of Utah") by and through undersigned counsel submit the following Memorandum in Opposition to Plaintiffs' Motion to Certify Questions of Utah State Law to the Utah Supreme Court (doc. 10).

Plaintiffs move to certify two questions of state law to the Utah Supreme Court:

1. Under Utah law, do same-sex couples who were legally married between December 20, 2013, and January 6, 2014 have vested rights in their marriage which are protected under Article I, Section 7 of the Utah Constitution?
2. Once the State of Utah recognized the marriages of same-sex couples entered into between December 20, 2013 and January 6, 2014, could it apply Utah Code § 30-1-4.1 and Article I, Section 29 of the Utah Constitution to withdraw that recognition?

(Pls.' Mot. to Certify, doc. 10 at 2 (emphasis added).) The first question need not be certified because the answer is clearly apparent from state law. The second question is not appropriate for certification because it is illogically framed, and, even if rewritten with more logical specificity, would not help the Court in its consideration of the federal issues presented in this case.

FACTUAL BACKGROUND

Plaintiffs provide thirty-nine paragraphs of facts, spanning more than seven pages. These are essentially a duplication of their factual recitation in their Complaint and Motion for Temporary Injunction (docs. 1 & 8) so need not be reiterated here. The operative facts at the heart of the motion to certify are relatively few: Plaintiffs applied for, and received, marriage licenses after the district court's decision in *Kitchen v. Herbert*, ___ F. Supp. 2d ___, 2013 WL 6697874, at * 30 (D. Utah Dec. 20, 2013), which declared that Article I, section 29 of the Utah Constitution, known as "Amendment 3," and parts of Utah's marriage statute, Utah Code §§ 30-

1-2 and 30-1-4.1, were unconstitutional as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The district court's order also enjoined the State from enforcing Amendment 3 and those statutes to the extent they prohibit a person from marrying another person of the same sex. The State is appealing that ruling, and on January 6, 2014, the United States Supreme Court stayed the permanent injunction issued by the district court "pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit." Application Granted by the Ct., *Herbert v. Kitchen*, No. 13A-687, 134 S. Ct. 893, 2014 WL 30367 (orders Jan. 6, 2014). Plaintiffs received their marriage licenses after the enactment of the challenged amendments and statutory provisions—between the time the district court enjoined Utah from enforcing them and the time the Supreme Court issued its stay. *Id.* They seek "recognition" of their marriages from the State, and seek benefits flowing from marriage, regardless of whether the Tenth Circuit Court of Appeals or the United States Supreme Court affirms the district court's decision. (Pls.' Compl., doc. 1 at 2 ¶ 1.)

LEGAL ARGUMENT

Utah Rule of Appellate Procedure 41 provides that a court of the United States may request the Utah Supreme Court to answer a certified question where there is "a controlling issue of law in a proceeding pending before the certifying court" in which "there appears to be no controlling Utah law." Utah R. App. P. 41(c)(1)(B)–(C); *see also id.* 41(a) (permitting certification where the state of the law is "uncertain"). Certification protects "the interests of comity and federalism," *Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 564 F.3d 1192, 1198 (10th Cir. 2009), and "is appropriate when it will conserve time, energy, and resources of the parties as well as of the court itself." *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1005 (10th Cir. 2013). Certification is often appropriate when "the case concerns a matter of vital public

concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 335 F. Supp. 2d 1319, 1321 (D. Utah 2004) (Kimball, J.) (quoting *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001)).

However, certification is a carefully limited exception. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) ("Certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law."). A federal court should "'apply judgment and restraint before certifying,' and [should] 'not trouble [its] sister state courts every time an arguably unsettled question of state law comes across [its] desk[];" *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1235–36 (10th Cir. 2012) (quoting *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007)). This is because "it has from the first been deemed the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943). Otherwise, certification of a question in any case could never be denied in which there were any possible argument that there is uncertainty in the law, thwarting the procedure of removal and the role of the federal courts. *Copier ex rel. Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 838–39 (10th Cir. 1998) (affirming trial court's refusal and refusing to certify question of Utah tort law).

Certification is particularly unnecessary when a federal court is reviewing the plain text of an unambiguous statute or state constitutional provision, regardless of whether the state appellate court has had an opportunity to independently interpret the statute. *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (refusing to abstain on reviewing the constitutionality

of a state statute because the challenged statute was unambiguous and "the naked question, uncomplicated by an unresolved state law, is whether the Act on its face is unconstitutional"); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 469–71 (1987) (refusing to require federal abstention to allow a state appellate court to interpret an unambiguous statute). In other words, "certification may be appropriate if the statute's plain language does not indicate the answer," *Penguin Group (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 42 (2d Cir. 2010) (citations and quotations omitted), but if a statute is unambiguous or interpretation straightforward, certification is not warranted. *Grant v. Meyer*, 828 F.2d 1446, 1448 & n.5 (10th Cir. 1987) (refusing to abstain or certify a question to the Colorado Supreme Court because the statute being challenged was unambiguous).[1]

[1] *Accord Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 54 (2d Cir. 1992) (refusing to certify a number of the proposed questions of insurance law where "the plain language of the statute leaves no room for interpretation"); *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) (refusing to certify question of Texas state workers' compensation law because, under the plain language of the statute, "our decisional analysis is relatively straightforward"); *Am. Fidelity Bank & Trust Co. v. Heimann*, 683 F.2d 999, 1002 (6th Cir. 1982) (concluding no need to certify when "the task in this case is one of reading and interpreting statutory language as written"); *Fernando v. MortgageIT*, No. 2:11-CV-1352 JCM GWF, 2012 WL 1586015, at * 1 (D. Nev. May 4, 2012) (order not selected for publication) ("[A] court should decline to certify a question to the [state] Supreme Court when the statutory language is sufficiently clear for the court to apply."); *cf. United States v. Juvenile Male*, 560 U.S. 558, 561 (2010) (per curiam) (certifying a question to the Montana Supreme Court because there was "no controlling appellate decision, *constitutional provision, or statute on point*" (emphasis added) (citing Mont. R. App. P. 15(3)); *Union Planters Bank, N.A. v. New York*, 436 F.3d 1305, 1306 (11th Cir. 2006) (per curiam) (certifying questions to the Alabama Supreme Court because of a lack of governing authority and because "we do not find clear guidance in the statutes themselves").

I. Plaintiffs' First Question Should Not Be Certified Because the Answer to the Proposed Certified Question Is Clear from the Plain Text of the Utah Constitution.

Plaintiffs' first question asks whether the same-sex couples who received marriage licenses have vested rights "which are protected under Article I, Section 7 of the Utah Constitution." This question need not be certified because the answer is clear from the plain text of the Utah Constitution and its statutes.

Article I, Section 7 is Utah's Due Process Clause, which provides that "No person shall be deprived of life, liberty, or property, without due process of law." Utah Const. art. I, § 7. It was in the original constitution and has not been amended. JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 31 (1998). As with similar clauses, it prevents the deprivation of "vested rights," such as claims that have accrued, without due process. *See generally Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663 (Utah 2002).

Yet the Due Process Clause cannot be read in isolation. Article I, Section 29 of the Utah Constitution provides that "(1) Marriage consists of only the legal union between a man and a woman," and "(2) No other domestic union, however denominated, maybe be recognized as a marriage or given the same or substantially equivalent effect." Utah Const. art. I, § 29. Though a federal district court enjoined the enforcement of the provision as unconstitutional, that order has been stayed. The result of the stay is that the injunction is no longer in effect. *See Nken v. Holder*, 556 U.S. 418, 420 (2009); (*see also* Defs.' Mem. in Opp. to Pl.'s Mot. for Prelim. Inj.)

Plaintiffs are asking the State to "recognize," (*see* Pls.' Compl., doc. 1 at ¶ 145(a)–(b)) or at least "give[] the same or substantially equivalent effect" to their marriages as to opposite-sex couples awarded marriage licenses in this period. The Due Process Clause in the state constitution cannot be read to provide the vested rights Plaintiffs seek given the unambiguous

directive of the Amendment in Article I, Section 29.

It is hornbook law that a constitutional amendment must be read in context of the entirety of the constitution, and that amendments must be read in harmony with the constitution if possible, but that the amendment is the final word of the citizens of the state on an issue. *E.g.*, 16 C.J.S. *Constitutional Law* § 68. As stated by the Utah Supreme Court:

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

Wadsworth v. Santaquin City, 28 P.2d 161, 167 (Utah 1933) (citing 12 C.J. 708, et seq.) (further citations omitted). The Supreme Court of Florida similarly recognized the supremacy of a latter-enacted, more specific constitutional amendment:

> A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except in so far as the old order is in manifest repugnance to the new Constitution, but such a provision should be read in the light of the former law and existing system. Amendments, however, are usually adopted by the express purpose of making changes in the existing system. Hence, it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time. *In such a case the rule is firmly established that an amendment duly adopted is a part of the Constitution and is to be construed accordingly. It cannot be questioned on the ground that it conflicts with pre-existing provisions. If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people*.

Sylvester v. Tindall, 18 So. 2d 892, 900 (Fla. 1944) (quoting 11 AM. JUR. § 54, at 663) (emphasis added); *accord Jackson v. Dravo Corp.*, 603 F.2d 156, 157 (10th Cir. 1979) ("The general rule is that where an amendment to a constitution is in conflict or in anywise modifies a prior provision

of the constitution, the amendment controls."). Moreover, one constitutional amendment cannot "violate" a different part of the constitution. *Id.*; *see also E. Okla. Bldg. & Constru. Trades Council v. Pitts*, 82 P.3d 1008, 1012 (Okla. 2003) ("We fail to understand how an amendment to the Oklahoma Constitution could be found to violate that constitution."). The canon of judicial interpretation is well-settled in the constitutional analysis from appellate courts of other states. [2]

In this case, the plain language of the Utah State Constitution answers the question Plaintiffs would have certified. Plaintiffs ask this Court to "recognize" their marriages and propose to ask the Utah Supreme Court if such marriages are vested rights under Utah law. Yet Utah cannot "recognize" marriages between same-sex partners. Utah Const. art. I, § 29. The federal court decision enjoining the enforcement of Article I, section 29 has been stayed, and thus the law of the land at the present time is that Article I, section 29 is in place and binding.[3]

---

[2] *See, e.g.*, *State ex rel. Moreau v. Castillo*, 971 So. 2d 1081, 1083 *writ denied*, 964 So. 2d 349 (holding that specific provision of constitution denying felon from holding office superseded restoration of "full rights of citizenship" granted by separate provision of state constitution); *State ex rel. Lashly v. Becker*, 235 S.W. 1017, 1020 (Mo. 1921) (en banc) ("If the [later amendment], on any given subject, conflicts with portions of the [constitution] as it stood before the amendment, those portions must fall in obedience to the latter expressions found in the amendment."); *City of Albuquerque v. N.M. State Corp. Comm'n*, 93 N.M. 719, 721 (1979) (recognizing that when constitutional provisions conflict, the specific prevails over the general and the later prevails over the earlier, in determining whether a city or a corporation commission could set rates for transportation); *State ex rel. Lein v. Sathre*, 113 N.W.2d 679, 682–83 (N.D. 1962) (recognizing that a constitutional amendment changing the apportionment of state legislators "prevails over all preexisting inconsistent constitutional provisions"); *Oakley v. State*, 830 S.W.2d 107, 109–111 (Tex. Ct. Crim. App. 1992) (op. on pet. for discretionary review en banc) (holding that constitutional amendment permitting trial court to describe parole, meant to overturn a Texas court case, also overrode claim for violation of due process); *Commonwealth ex rel. Specter v. Vignola*, 285 A.2d 869, 871–72 (Pa. 1971) (holding that a specific constitutional amendment relating to the appointment of judges prevails over a general provision for the removal of civil officers).

[3] If the injunction was not stayed, and Article I, Section 29 were unenforceable pursuant to the *federal* constitution, it would not have been repealed. Thus, it is arguable that, regardless of the presence or absence of the injunction or the stay, Article I Section 29 informs the interpretation of the *state* constitutional rights granted in other portions of the Utah State Constitution.

See Nken, 556 U.S. at 420 (noting that the legal effect of a stay is to take the parties to "the state of affairs before the … order was entered"). Article I, Section 29 is the later-enacted amendment to the constitution, and is more specifically targeted at the recognition of same-sex marriages. It thus must control over any general rights to due process. *E.g.*, *Jackson*, 603 F.2d at 157; *Oakley*, 830 S.W.2d at 109–111.

Plaintiffs' citations to Utah Supreme Court cases describing the nature of vested rights in marriage licenses are of no relevance because Article I, Section 29 governs in this instance what process is due. (*See* Pls.' Mot. to Certify, doc. 10 at 4.) Cases about the protection of marriage under the Utah Constitution are non-starters when there is a more specific constitutional provision dealing with the constitutional protection of same-sex marriage. Article I, Section 29 prohibits the state from recognizing the marriages, and Utah statutory law declares them void. Utah Code § 30-1-2(5). Both are currently enforceable and unambiguous. Plaintiffs' case law is therefore irrelevant, and no further interpretation from the Utah Supreme Court is necessary.

Plaintiffs' reliance on *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) is also misplaced for a number of reasons. First, the same-sex couples who had been married in California had done so following the California Supreme Court's *final non-reviewable determination* that the California Constitution (as then-existing) required recognition of same-sex marriage. *Id.* at 122 ("These couples' reliance upon this court's *final decision* in the *Marriage Cases* was entirely legitimate. A retroactive application of the initiative would…undermin[e] the ability of citizens to plan their lives according to the law *as it has been determined by this state's highest court.*" (emphasis added)).

The couples in this case are seeking benefits flowing from recognition of marriages they have not yet received, and based on a district court's injunction, which has been stayed.

Significant for the analysis here, the marriages performed in California were performed before Proposition 8 was enacted. *See id.* at 59. All of the marriages at issue in this case were performed *after* Article 1, Section 29 was enacted. Moreover, the California Supreme Court determined that the intent of the voters in Proposition 8 was not to apply the statute retroactively, based on the language of the proposition as well as other factors. *Id.* at 121–22.

The language in Amendment 3 is clear and unambiguous, *see Grant*, 828 F.2d at 1448 n.5, and thus certifying the question to the Utah Supreme Court would waste, not save, the resources of the parties and of the Court. Plaintiffs' Motion to Certify the first question should be denied.

II. Plaintiffs' Second Question Should Not Be Certified Because the Proposed Question Is Vague and Will Not Assist This Court in Resolving the Dispute Before It.

Plaintiffs' second question, "Once the State of Utah recognized the marriage of same-sex couples entered into between December 20, 2013, and January 6, 2014, could it apply Utah Code § 30-1-4.1 and Article 1, Section 29 of the Utah Constitution to withdraw that recognition?" should similarly not be certified. It assumes facts that are not settled, it illogically assumes that Utah officials may act in contravention of standing Utah law, and it therefore does not assist the Court in deciding the underlying issues.

First, the question misstates facts. The State has not "withdrawn" any recognition. The State has put the provision of benefits to same sex-couples who acquired a marriage license during those eighteen days "on hold." (*See* Pl.'s Mot. for Prelim. Inj., doc. 8 at ¶ 8.) Its representatives have stated that any benefits that actually accrued during those eighteen days (such as a couple changing names on a driver's license, or a 'married' tax status) would be honored. (*Id.*) But because of the non-final nature of the *Kitchen* decision, and the contingency

inherent in an appeal, and because Article 1, Section 29 and Utah Code § 30-1-4.1 are currently the law of the land, future benefits cannot be provided or recognized without officials violating Utah statutes and constitutional provisions. In short, the question misstates the record and the law, and should not be certified.

The question is also illogically vague. It asks "could [Utah] apply" the statutes to "withdraw" recognition of marriage. It does not state a legal basis for the question, much less that it is a "controlling issue of law," nor does it frame the issue in a way that the Utah Supreme Court could answer. Utah R. App. P. 41(c).

Assuming Plaintiffs are seeking a determination of whether Utah's actions following the January 6, 2014 stay are consistent with Article I, Section 7 of the Utah Constitution, the question need not be certified for the reasons stated above. The answer is clear: By its plain language, Article I, Section 29 dictates the result.

If 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. "While the underlying interest is generally created by state law, 'federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.'" *Teigen v. Renfrow*, 511 F.3d 1072, 1079 (10th Cir. 2007) (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005)).

The *Kitchen* decision is on appeal, and is subject to reversal. "A judgment reversed by a high court is 'without any validity, force, or effect, and ought never to have existed.'" *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991) (quoting *Butler v. Eaton*, 141 U.S. 240, 244 (1891)). If a federal appellate court reverses the district court's decision in *Kitchen*, the district court decision "bec[omes] null and void in its entirety." *Id.* The rights upon which

Plaintiffs base their claim to benefits of a marriage license are contingent upon the *Kitchen* decision, which is determined by federal law. Therefore, certification is not proper because the question is for this Court, not the Utah Supreme Court, to decide.[4]

Plaintiffs' second question is non sequitur with respect to the federal due process questions presented to this Court. With respect to state law, the issues are clearly articulated in the plain language of the Utah Constitution and relevant statutes. Accordingly, the Court should refuse to certify the second question.

CONCLUSION

The 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. The answers to Plaintiffs' proposed questions either do not get to the heart of the matter this Court needs to resolve—whether the Due Process Clause of the United States Constitution protects an expectation in a non-final federal judgment—or they are clear from the plain language of Utah law. Defendants therefore respectfully request that the Court deny Plaintiffs' motion to certify in its entirety.

[4] Once again, Plaintiffs' citations to Utah case law regarding retroactivity and the citation to *Strauss* and *Cook v. Cook*, 104 P.3d 857, 865 (Ariz. Ct. App. 2005) (*see* Pls.' Mot. to Certify, doc. 10 at 5) are inapposite because Amendment 3 and Utah Code § 30-1-1.4 were enacted prior to Plaintiffs' receipt of their marriage licenses.

DATED this 21st day of February, 2014.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ Kyle J. Kaiser
JONI J. JONES
KYLE J. KAISER
Assistant Utah Attorneys General
PARKER DOUGLAS
General Counsel and Chief of Staff
Attorneys for Defendants