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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JONELL EVANS, STACIA IRELAND, MARINA GOMBERG, ELENOR HEYBORNE, MATTHEW BARRAZA, TONY MILNER, DONALD JOHNSON, and **KARL FRITZ SCHULTZ,** Plaintiffs, vs. **STATE OF UTAH, GOVERNOR GARY HERBERT**, in his official capacity; and **ATTORNEY SEAN REYES**, in his official capacity, Defendants.	**CONSOLIDATED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR CERTIFICATION TO THE UTAH SUPREME COURT** Case No. 2:14-cv-55DAK

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Plaintiffs JoNell Evans, Stacia Ireland, Marina Gomberg, Elenor Heyborne, Matthew Barraza, Tony Milner, Donald Johnson, and Karl Fritz Schultz (collectively referred to as the "Plaintiffs") by and through their undersigned attorneys, hereby submit this Reply Memorandum in Support of their Motion for Preliminary Injunction and Motion for Certification:

INTRODUCTION

Plaintiffs, and more than 1,000 other same-sex couples, legally married under the laws of Utah. Defendants want to nullify those marriages and strip them of all legal recognition. Yet, they have failed to identify a single instance in Utah history, or anywhere else, in which such an unprecedented step has occurred. Instead, Defendants try to confuse the issue by acting as though Plaintiffs in this case are the same as the plaintiffs in the *Kitchen* litigation and pretending that it is "settled" Utah law that Utah's marriage recognition bans should be applied retroactively to "hold" state recognition of Plaintiffs' marriages now that the injunction barring their continued application has been stayed.

These attempts at misdirection fail. Plaintiffs in this case are not parties in *Kitchen*. Rather, they legally married under the laws of Utah pursuant to valid Utah marriage licenses. The *Kitchen* appeal will determine whether Utah has to issue any more marriage licenses to same-sex couples or recognize any new marriages. That litigation, however, has no effect on whether Defendants can – under Utah law or the federal Constitution – strip recognition from legal Utah marriages that have already taken place. No matter the outcome in *Kitchen*, Plaintiffs' marriages are valid and confer vested rights. Certifying questions of state law to the

Utah Supreme Court does not mean that there is any genuine doubt about the outcome but rather would allow this Court to fulfill its comity obligations to Utah and give the parties the benefit of a definitive statement on Utah law from a Utah court.

I. PLAINTIFFS' MOTION FOR CERTIFICATION OF STATE LAW QUESTIONS IN THE INTEREST OF COMITY DOES NOT DIMINISH PLAINTIFFS' SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THEIR STATE AND FEDERAL CLAIMS.

This case presents two questions of law: (1) under Utah law can Utah's marriage recognition bans be retroactively applied to Plaintiffs' legal marriages and to the marriages of other same-sex couples legally married in Utah while the *Kitchen* injunction was in effect, and (2) does applying the marriage recognition bans to Plaintiffs' marriages violate the substantive due process guarantees of the Fourteenth Amendment of the United States Constitution?

Plaintiffs' certification request of the first question of law does not diminish their substantial likelihood of success. *Cf.* *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1228 (10th Cir. 2009) (affirming preliminary injunction under the heightened standard used for mandatory injunctions even though the Kansas Supreme Court had not yet "addressed the specific question" at issue). As Plaintiffs established in their moving briefs, Utah law confers vested rights on valid marriages and prohibits retroactively applying constitutional amendments or statutes to impair vested rights, except in narrow circumstances not present here. Further, Defendants' arguments in opposition are incorrect as a matter of Utah law and have little chance of success, as discussed further below. Accordingly, Plaintiffs have established a strong likelihood of success on the merits on their state law claims; whether the answers to the questions come from this Court

(should it elect not to certify the questions) or from the Utah Supreme Court (should this Court certify, and that court accept the questions).

Nonetheless, Plaintiffs recognize that the precise questions here have not yet been answered by the Utah Supreme Court. As a legal matter, only the highest state court can provide an answer to such state law questions that controls in future cases; a federal court sitting in diversity merely "predicts" how the state supreme court would decide unanswered state law issues. *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665-66 (10th Cir. 2007). Under settled principles of federalism and comity, when constitutional claims are at stake the Utah Supreme Court should have the opportunity to provide a definitive construction of Utah state law. *See Kan. Judicial Rev. v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008).

Such definitive interpretation is in the best interest not only of the parties, but also of the other 1,000+ same-sex couples, legally married, and of the general public. There are many cases being adjudicated in Utah courts that require a definitive pronouncement of Utah's highest court. *See* Same-sex couples say state is interfering with adoptions, Salt Lake Tribune, Feb. 28, 2014. As Defendants stated in their stay application to the United States Supreme Court, the states have primary authority to "regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" Application to Stay Judgment Pending Appeal ("Stay App."), p. 9, attached as Exhibit A (quoting *U.S. v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (internal quotation marks omitted)). It is highly ironic that after criticizing the district court in *Kitchen* for allegedly paying insufficient attention to Utah's interest in determining its own marriage laws, Defendants removed this case from state

court and now ask this federal court to prevent the Utah Supreme Court from providing a definitive ruling on the issue.

It is for these reasons that Plaintiffs believe certification of the state-law questions is appropriate.

II. DEFENDANTS' ARGUMENT THAT PLAINTIFFS COULD NOT OBTAIN VESTED RIGHTS BECAUSE THE *KITCHEN* INJUNCTION WAS NOT "FINAL" IS WITHOUT MERIT.

Defendants argue that Plaintiffs could not have obtained vested rights because their "rights to their marriages . . . sprang from a non-final district court judgment, which has been stayed and is now on appeal." Defendants' Memorandum in Opposition to Plaintiffs' Motion and Memorandum in Support of Preliminary Injunction ("Def. PI Opp."), p. 11. According to Defendants, if the *Kitchen* decision is reversed everything that occurred while the *Kitchen* injunction was in effect can be retroactively declared a "mistake of law." This argument reflects a fundamental misunderstanding of civil procedure and the "mistake of law" doctrine.

As the Attorney General has already conceded, while the district court's injunction was in effect, Utah's marriage bans were a legal nullity and "marriages between persons of the same sex were recognized in the state of Utah . . . ." Compl. Ex. E.; *see also* Def. PI Opp., p. 7 (acknowledging that "[t]he *Kitchen* decision" was "controlling law"); *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring) ("A broad injunction against all enforcement of a statute paralyzes the State's enforcement machinery: the statute is rendered a nullity."); *Speet v. Schuette*,726 F.3d 867, 871 (6th Cir. 2013) ("A facial challenge to a law's constitutionality is an effort 'to invalidate the law in each of its applications, to take the law off the books completely."

(quoting *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir.2009) (en banc)); *Ex parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

Because they were legally married, Plaintiffs in this case are nothing like the couple in *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah Ct. App. 1991), contrary to Defendants' assertions. Def. PI Opp., pp. 8-9. There, the purported marriage was invalid because the wife had not completed her previous divorce at the time the marriage ceremony took place. The *Van Der Stappen* couple was therefore never legally married, regardless of their subjective belief. In contrast, as Defendants have conceded in their public statements, Plaintiffs were legally married under Utah laws in effect when their marriages took place. The Attorney General has even issued formal legal guidance stating that "marriages between persons of the same sex were recognized in the state of Utah between the dates of December 20, 2013 until the stay on January 6, 2014" and "[b]ased on our analysis of Utah law, the marriages were recognized at the time the ceremony was completed." Compl. Ex. E. Similarly, Utah State Tax Commission has decided that same-sex couples are legally married for purposes of filing their 2013 taxes because "[a]s of December 31, 2013, the Supreme Court had not yet issued its stay of the District Court's injunction." Compl. Ex. F. Defendants cannot now claim that those lawful marriages are now somehow invalid or void.

Defendants' argument that Plaintiffs could not obtain vested rights in their lawful marriages until the appeals in *Kitchen* were exhausted is incorrect.[1] It is black-letter law that "the vitality of that judgment is undiminished by pendency of the appeal." *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978); *accord Hovey v. McDonald*, 109 U.S. 150, 161(1883) ("[A]n appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effects."); *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006) ("The general rule is that the judgment of a district court becomes effective and

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[1] Defendants attempt to bolster their argument that Plaintiffs have no vested rights in their marriages by relying on a body of case law holding that litigants have no vested rights in non-final court judgments involving continuing consent decrees. *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996); *Gavin v. Branstad*, 122 F.3d 1081(8th Cir. 1997). Although those cases use the terms "vested rights" and "final judgments," they use those words in a specialized sense and in the context of a specific legal doctrine that has no bearing on the issues in this case. *Plyler* and *Gavin* turned on whether to apply *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211(1995), holding that Congress may not pass new legislation directing courts to reopen final judgments. The plaintiffs in *Plyler* and *Gavin* argued that under *Plaut*, the Prison Litigation Reform Act ("PLRA") could not be a basis to require district courts to terminate ongoing prison consent decrees. The *Plyler* and *Gavin* courts rejected those claims and held ongoing consent decrees are not final judgments for purposes of the protections of *Plaut*.

Defendants' reliance on these cases to argue that Plaintiffs have no vested rights pending the *Kitchen* appeals is simply wrong. 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 could be considered "final" under *Plaut*. Indeed, those cases involved ongoing consent decrees where no appeals had been pending for many years. *See Plyler*, 100 F.3d at 369 (consent decree entered in 1985 – eleven years before PLRA); *Gavin v. Branstad*, 122 F.3d at 1084 (consent decree entered in 1984 – twelve years before PLRA). 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.

enforceable as soon as it is entered; there is no suspended effect pending appeal unless a stay is entered.").

To be sure, now that the *Kitchen* injunction has been stayed the marriage bans are once again part of Utah law. But the Supreme Court's order staying *Kitchen* says nothing about the legal status of marriages that have already taken place.[2] Defendants do not cite any precedent to support their contention that the stay retroactively places the marriage bans back into effect for the period December 20, 2013, to January 6, 2014, *nunc pro tunc*. They simply assert that the stay has such an effect. Whether or not it is ultimately upheld, the district court's injunction was controlling law – and Utah's marriage bans were a legal nullity – until the stay was issued on January 6, 2014. *See* *Howat v. State of Kansas*, 258 U.S. 181, 189-90 (1922) ("An injunction duly issuing out of a court . . . must be obeyed . . . however erroneous the action of the court may be . . . ."); *Hovey*, 109 U.S. at 161-62 (holding that even though it appeared that the lower court

[2] If it had wanted to, the Supreme Court could have halted the injunction sooner by issuing a temporary stay while it considered the merits of Defendant's stay request. Indeed, on December 31, 2013, the same day that Justice Sotomayor called for a response to Defendant's stay application, *see* Docket for *Herbert v. Kitchen*, No. 13A687, Justice Sotomayor also issued a temporary interim stay in *Little Sisters for the Poor v. Sebelius*, No. 13A691, 82 U.S.L.W. 3382 (Dec. 31, 2013), while the Court considered the stay application in that case. Justice Sotomayor's decision to issue an interim stay in *Little Sisters* but not in *Kitchen* indicates that the Court was well aware that Judge Shelby's injunction would remain in force and same-sex couples could continue to marry while Supreme Court considered the stay application.

should have granted a stay, the lower court's injunction was still binding during the relevant time period).

Indeed, a person who disobeys a district court injunction that has not been stayed may be punished with contempt even if the underlying injunction is subsequently reversed. *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 295 (1947). The Attorney General's office recognized this principle, warning county clerks that failure to issue marriage licenses to same-sex couples while the injunction was in effect would be contempt of court. Compl. ¶ 20. Whatever ultimately happens in the *Kitchen* litigation, Plaintiffs and 1,000+ other same-sex couples were issued marriage licenses and were legally married while the *Kitchen* injunction was in force. They are therefore—and will remain—legally married.

Defendants' arguments to the contrary are based on the false premise that if the *Kitchen* judgment is ultimately overturned, then any action taken while the *Kitchen* injunction was in effect will necessarily be invalidated. That is not how the law works. The payment of money damages may be easily reversed through restitution if a district court's judgment is subsequently overturned, s*ee Soc'y of Lloyd's v. Bennett*, 182 Fed. Appx. 840, 841 n.1 (10th Cir. 2006) (unpublished), but many injunctions have legal effects that will be "irrevocably carried out" and cannot be unwound if the injunction is subsequently overturned on appeal. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981). Indeed, many courts of appeals, including the Tenth Circuit, apply heightened standards to certain types of injunctions precisely because those injunctions "once complied with, cannot be undone." *Prairie Band of Potawatomi Indians v.*

Pierce, 253 F.3d 1234, 1247 (10th Cir. 2001) (quoting *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 35 (2d Cir. 1995)).

Despite these irreversible consequences, "in the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree." *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 754 (11th Cir. 2009) (citations omitted). In particular, a court cannot unwind the effects of an injunction that has not been stayed if doing so adversely affects the interest of third parties who have taken action based on that injunction. *See, e.g.*, *In re Bel Air Assocs., Ltd.*, 706 F.2d 301, 304 -05 (10th Cir. 1983) ("[A] party appealing from an order which authorizes the sale of property of a debtor should obtain a stay of the order. Otherwise the property may be sold to a 'good faith purchaser,' removing the property from the jurisdiction of the courts and rendering moot the appeal from the order authorizing the sale." (footnote omitted)); *Matter of King Resources Co.*, 651 F.2d 1326, 1331 -32 (10th Cir. 1980) ("[I]nasmuch as the confirmation order was not stayed pending appeal, we could not compel third parties who have subsequently made good faith purchases of stock in the reorganized company to return their stock."); *see also In re Stephens*, 704 F.3d 1279, 1282-83 (10th Cir. 2013) (explaining that under doctrine of "equitable mootness," even if court has the power to grant effective relief by reversing lower court confirmation of bankruptcy reorganization, it will decline to do so if reversal would unduly affect the rights of innocent third parties). As a result, even when a judgment is reversed, a "party appealing [an] order will not be heard to affect the rights of a third party who, pursuant to the order, acquired, in good faith, an [interest in] property." *San Francisco Residence Club*, 583 F.3d at 754-55 (internal quotation marks and brackets omitted). Moreover, "[m]ere knowledge

that an aggrieved party has appealed [court's] order does not deprive a third party of the protection afforded a good faith purchaser." *Am. Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245, 248 n.1 (5th Cir. 1980).

In light of these settled principles, Defendants' argument that Plaintiffs assumed the risk that their marriages would be invalidated is incorrect. First, it is not the *Kitchen* injunction that Plaintiffs rely on as the source of their vested rights, but their valid Utah marriages. Moreover, even if the validity of their marriages hinged on the validity of the *Kitchen* injunction (which it does not), when one acquires vested rights by acting in accordance with an injunction that has not been stayed, "[m]ere knowledge that an aggrieved party has appealed [court's] order does not deprive a third party of [] protection . . . ." *Am. Grain*, 630 F.2d at 248 n.1. Indeed, because courts have consistently refused to retroactively strip recognition from marriages that have already taken place, *see* Motion for and Memorandum in Support of Preliminary Injunction ("P. PI Supp."), pp. 18-19, it would be entirely reasonable to expect that such an unprecedented – and unconstitutional – step would not be taken in this case.

Moreover, even if the status of the *Kitchen* injunction were a relevant inquiry, the equities favor Plaintiffs. By the time the Supreme Court issued its stay decision on January 6, 2014, Defendants' stay requests had already been repeatedly rejected by the district court and the Tenth Circuit, the Governor had already ordered state officials to obey the district court's injunction, and the Attorney General's Office had publicly declared that county clerks who did not issue licenses could be held in contempt of the court and the law. Additionally, after the Tenth Circuit denied their stay request for the third time, Defendants did not file an application for a stay with the Supreme Court for a full week. The equities might be different in a hypothetical situation

where people took advantage of a computer glitch that inadvertently prevented the injunction from being stayed for a couple of hours. But that is not this case. Plaintiffs, and other same-sex couples who married between December 20, 2013, and January 6, 2014, did so while a valid permanent injunction issued by the district court striking down the marriages bans was firmly in place, and both the district court and the Tenth Circuit made deliberate – and well-publicized – decisions *not* to stay the injunction pending appeal. In fact, in response to Defendants' first "on the record" request for a stay, the district court not only refused to grant the stay, but clarified that the permanent injunction was intended to prohibit the operation of all Utah statutes banning marriage between same-sex couples, even those not specified. Like any other third party that acts when a district court injunction that has not been stayed, Plaintiffs and other same-sex couples acquired vested rights that cannot be taken away even if the injunction is ultimately overturned.

III. THE UTAH SUPREME COURT WOULD NOT INTERPRET THE MARRIAGE RECOGNITION BANS TO RENDER PLAINTIFFS' MARRIAGES VOID AB INITIO.

In addition to arguing that Plaintiffs cannot have vested rights while the *Kitchen* decision is being appealed, Defendants argue that Plaintiffs cannot show a substantial likelihood of success because "the ultimate legal status of their marriages has yet to be determined" and will not be determined until the *Kitchen* decision is resolved. Def. PI Opp., pp. 5-6. This argument is based on the mistaken assumption that if Utah's marriage bans are upheld in *Kitchen* those bans will render Plaintiffs marriages "void ab initio." Def. PI Opp., p. 8. That assumption is wrong because, as explained in Plaintiffs' opening brief, the marriage bans do not apply to marriages that were legally valid under Utah law at the time they took place.

Defendants assert that because the marriage ban statutes use the words "declared void" instead of "voidable" this allows for a retroactive application of the marriage ban to legal marriages. But the Utah Supreme Court requires a far more explicit statement in order to overcome the strong presumption against retroactivity. *See* *Waddoups v. Noorda*, -- P.3d --, 2013 UT 64 (Nov. 1, 2013); *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663 (Utah 2002). The ban on recognition of marriages between cousins in *Cook v. Cook*, 104 P.3d 857 (Ariz. Ct. App. 2005), also used the word "void" instead of "voidable" but the court in that case held that was not sufficient to overcome the presumption against retroactivity and the statute therefore did not apply to pre-existing marriages that had already been recognized.

Put another way, if Utah had voluntarily repealed its marriage bans on December 20, 2013, but then reenacted the bans on January 6, 2014, there can be little question that the Utah Supreme Court would – like the California Supreme Court in *Strauss* –interpret the marriage bans so that they did not apply retroactively to marriages that had taken place in the interim, and the fact that the marriage recognition bans use the term "void" instead of "voidable" would not be sufficient to overcome Utah's strong presumptions against retroactivity. Indeed, Defendants concede that "[t]he rule against retroactively would apply if Defendants were refusing to recognize same-sex marriages that were entered into in Utah, recognized in Utah, and valid in Utah before section 30-1-2(5) and Amendment 3 became effective." Def. PI Opp., n.4.

Defendants nevertheless attempt to distinguish *Strauss* on the basis that it was a final decision issue by the California Supreme Court, while Utah's marriage bans were enjoined as unconstitutional by a federal court and the injunction was subsequently stayed. Def. PI Opp., pp. 11-12. Defendants do not cite any case for the proposition that the presumption against

retroactivity does not apply when the law changes as a result of a federal court injunction. They simply make a bare assertion that the normal rules concerning retroactive interpretations would not apply. For purposes of protecting against retroactive applications of state law it makes no difference *why* the governing law changed. For those couples married between December 20, 2013, and January 6, 2014, the harm caused by stripping recognition from their legally valid marriages is exactly the same regardless of whether the law changes by repeal and reenactment or by a court injunction and a subsequent stay. If Defendants want to argue that Utah's normal rule against retroactive applications does not apply, they bear the burden of coming forward with some authority for that proposition.

Plaintiffs are not arguing that "one constitutional amendment can[] 'violate'' a different part of the constitution." Defendants' Memorandum in Opposition to Plaintiffs Motion to Certify Questions of Utah State Law to the Utah Supreme Court ("Def. Cert. Opp."), p. 8. Rather, the marriage amendment can be harmonized with the due process provision if it is read to apply only prospectively to marriages that were not legally valid at the time they were entered into. As the California Supreme Court explained in *Strauss* when it sought to harmonize Proposition 8 with the state constitution's due process protections:

> [T]he general legal guideline that requires courts to interpret potentially conflicting constitutional provisions in a manner that harmonizes the provisions, to the extent possible, further supports the conclusion that Proposition 8 properly must be interpreted to apply only prospectively.

Strauss v.Horton, 207 P.3d 48, 122 (Cal. 2009). Indeed, Utah has a long tradition of interpreting constitutional amendments in a non-retroactive manner precisely to avoid creating unnecessary

tension between new amendments and due process protections. *Shupe v. Wasatch Elec. Co.*, 546 P.2d 896, 898 (Utah 1976).

The legislature that drafted Utah's statutory and constitutional recognition bans knew that its enactments would be construed with a presumption against any application that affected vested rights or otherwise conflicted with due process protections. If the legislature intended to override those background principles, it knew how to do so explicitly. *Waddoups*, 2013 UT 64, ¶ 7 nn.15-16 (collecting examples). It would frustrate rather than effectuate legislative intent to suddenly disregard Utah's longstanding principles of construction and interpret Utah's marriage bans in a manner that violates Utah's strong presumption against retroactivity and brings the marriage bans into conflict with Utah's constitutional protections against impairing vested rights.

IV. APPLYING THE MARRIAGE BANS TO PLAINTIFFS AND OTHER COUPLES WHO WERE ALREADY RECOGNIZED AS LEGALLY MARRIED WOULD VIOLATE THE FOURTEENTH AMENDMENT.

If the marriage recognition bans are retroactively applied to strip Plaintiffs' marriages of recognition, it would violate the Fourteenth Amendment's substantive due process protections. Defendants fail to address Plaintiffs' substantive due process claim and instead only cite cases involving *procedural* due process. The gravamen of Plaintiffs' Complaint is that they have constitutionally protected vested rights in their marriages, including the fundamental right to marry, the fundamental right to family integrity, and the fundamental right to the custody and care of their children, which cannot be stripped away regardless of what procedures Defendants use. *See* P. PI Supp., pp. 30-31.

Setting aside the issue of whether Plaintiffs and other same-sex couples had a constitutional right to marry in the first instance, once they did marry their relationships received

all the substantive due process protections as any other marriages under the Fourteenth Amendment. For example, there is no fundamental right to marry a first cousin or someone under the age of 18. But that does not mean that a state that allows first cousins to marry or couples to marry at age 16 can retroactively nullify those marriages at will. Whether or not the U.S. District Court in *Kitchen* was correct in holding that the Fourteenth Amendment requires Utah to allow same-sex couples to marry, once a legal marriage occurs, the Constitution prohibits Defendants from taking away the vested rights connected to that relationship. *See* *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) (observing that "there is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude"); *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."); *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (divesting "married same-sex couples of the duties and responsibilities that are an essential part of married life" violates due process). Defendants have not even attempted to argue that they have a constitutionally adequate justification for overcoming these substantive due process protections of fundamental rights – let alone demonstrated a compelling enough justification that would survive heightened scrutiny. *See* *Zablocki*, 434 U.S. at 388.

V. PLAINTIFFS HAVE ESTABLISHED THE REMAINING REQUIREMENTS FOR A PRELIMINARY OR PERMANENT INJUNCTION.

When a plaintiff establishes a substantial likelihood of success with respect to his or her constitutional claims, the remaining requirements for obtaining a preliminary or permanent injunction are virtually always satisfied. This is because: (1) the violation of constitutional rights,

for even a limited time, constitutes irreparable harm; (2) the government suffers no cognizable harm when it is prohibited from acting unconstitutionally; and (3) it is always in the public interest to protect constitutional rights. *See* *Hobby Lobby Stores, Inc v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (plurality).

As explained in Plaintiffs' opening brief, Plaintiffs would be irreparably harmed without an injunction because (a) they would suffer an ongoing violation of their constitutional rights, (b) they and their children would suffer harm from Utah's denigration of their legally valid marriages as less worthy than other marriages, (c) and they would suffer emotional distress and financial uncertainty from having their legal status held in limbo for potentially years. Indeed, Defendants already conceded that Plaintiffs would suffer irreparable harm in their petition for a stay from the Supreme Court. Defendants now try to backtrack on that statement by claiming that only the absence of a stay in *Kitchen* would cause irreparable harm. But Defendants clearly and unequivocally stated that "same-sex couples may be irreparably harmed in their dignitary and financial interests if their marriage status is retroactively voided." Stay App., p. 22. Defendants may now contend (based on their misunderstanding of the law) that they are entitled to impose these irreparable harms on Plaintiffs and other legally married same-sex couples, but they cannot take back their concession that those harms are indeed irreparable.

Defendants also shockingly argue that stripping recognition from Plaintiffs marriages is not irreparable because the couples have the option of leaving their families, friends, jobs, and support networks and moving out of Utah. According to Defendants: "The fact that these Plaintiffs have all been living in Utah for years without enjoying the rights to marriage – even though they have the option of living in a state that would recognize their marriage—supports

the conclusion that the harm Plaintiffs suffer is not irreparable." Def. PI Opp., p. 13. Plaintiffs are not required to exile themselves from their home state to vindicate their constitutional rights. Moreover, even though Plaintiffs lived in Utah for years without the freedom to marry, the relevant constitutional rights have changed because Plaintiffs are now legally married under the laws of Utah. The question here is not whether Plaintiffs are irreparably harmed by denial of their freedom to marry but whether they are irreparably harmed by nullifying the legal marriages that they have already entered into.

Defendants make the same analytical mistake when they assert that the Supreme Court necessarily held that the balance of harms favored the state when it stayed the *Kitchen* injunction. 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. Defendants told the court that "[h]undreds of marriage licenses have been issued already, with many more expected in the coming days" and the State will continue to suffer harm "as the number of marriage licenses issued to same-sex couples continues to grow." Stay App., p. 21. Defendants thus asserted that a stay was necessary to preserve the status quo before "additional irreparable injury in inflicted on the State." *Id.* at 24. Unlike in *Kitchen*, Plaintiffs in this case are not asking the Court to force Utah to issue any new marriage licenses to same-sex couples. They are asking the Court to prevent Utah from retroactively stripping recognition of their legally valid marriages.

In addition to misconstruing the harms suffered by Plaintiffs, Defendants also argue that "if this Court ordered the State to grant the couples all the benefits of marriage, the State would be required to act as if its laws were no longer in effect." Def. PI Opp., pp. 14-15. But no one disputes that Utah's marriage recognition bans are currently in effect; instead Plaintiffs'

argument is that as a matter of Utah law, those marriage recognition bans simply do not apply to marriages that have already taken place. Similarly, Defendants say that "[i]f this Court grants Plaintiffs' injunction and they are provided benefits of marriage now, and then if *Kitchen* is later reversed, Plaintiffs' marriages will be void under Utah law," which would then create additional administrative problems for Defendants to fix. But, as discussed above, Defendants are mistaken and 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.

CONCLUSION

The Court should enter a preliminary injunction to prevent Defendants from stripping recognition from Plaintiffs legally valid marriages and should certify the state law questions to the Utah Supreme Court, respecting that court's role as the ultimate arbiter of Utah law on an issue that affects more than 1,000 same-sex married couples.

DATED this 4th day of March, 2014.

STRINDBERG & SCHOLNICK, LLC

/s/ Lauren I. Scholnick

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served upon the following via the CM/ECF electronic delivery system.

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