No. 14A65

IN THE SUPREME COURT OF THE UNITED STATES

JONELL EVANS, *ET AL.*,

Plaintiffs-Respondents

v.

STATE OF UTAH, *ET AL.*,

Defendants-Applicants.

On Application to Stay Preliminary Injunction Pending Appeal

RESPONDENTS' OPPOSITION TO APPLICATION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Erik Strindberg
Lauren I. Scholnick
Kathryn Harstad
STRINDBERG & SCHOLNICK, LLC
675 East 2100 South, Ste. 350
Salt Lake City, UT 84106
Telephone: (801) 359-4169
Facsimile: (801) 359-4313
erik@utahjobjustice.com
lauren@utahjobjustice.com
kass@utahjobjustice.com

Joshua A. Block
Counsel of Record
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, New York, 10004
Telephone: (212) 549-2593
Facsimile: (212) 549-2650
jblock@aclu.org

John Mejia
Leah Farrell
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION
355 N. 300 W.
Salt Lake City, Utah 84103
Telephone: 801.521.9862
Facsimile: 801.532.2850
aclu@acluutah.org

Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

No. 14A65

IN THE SUPREME COURT OF THE UNITED STATES

JONELL EVANS, *ET AL.*,

Plaintiffs-Respondents

v.

STATE OF UTAH, *ET AL.*,

Defendants-Applicants.

On Application to Stay Judgment Pending Appeal

RESPONDENTS' OPPOSITION TO STAY PENDING APPEAL

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

Plaintiffs-Respondents JoNell Evans, Stacia Ireland, Marina Gomberg, Elenor Heyborne, Matthew Barraza, Tony Milner, Donald Johnson, and Karl Fritz Schultz (collectively, the "Plaintiffs") respectfully oppose the Application to Stay Preliminary Injunction Pending Appeal filed by the State of Utah; Gary Herbert, in his official capacity as Governor of Utah; and Sean Reyes, in his official capacity as Attorney General of Utah (collectively, the "Defendants").

INTRODUCTION

As the district court recognized in its opinion:

> [T]his case is not about whether the due process clause should allow for same-sex marriage in Utah or whether the *Kitchen* [*v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013),] 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.

Stay App. A at 12. Between December 20, 2013, and January 6, 2014, over 1,000 same-sex couples received valid Utah marriages, solemnized their marriages, and were fully recognized by Utah as married couples in the eyes of the law. Defendants now seek to effectively divorce those couples against their wishes by placing their marriages "on hold." Defendants' unconstitutional attempt to nullify over 1,000 legally valid marriages has already imposed severe and irreparable harm, and Defendants should not be allowed to prolong that harm through a stay pending appeal.

Defendants' argument boils down to the assertion that the district court and Tenth Circuit erred in December 2013 when they denied the motions for a stay pending appeal in the *Kitchen* litigation, and that Utah should not, as a result of that error, be "stuck with" the marriages that were solemnized while the *Kitchen* injunction was still in effect. Stay App. C at 3 (Kelly, J., dissenting). But the entire premise of a stay pending appeal is that, in the absence of such a stay, obeying a district court injunction that is later reversed would impose harm that is "irreparable." It is an inevitable fact of civil litigation that sometimes lower courts erroneously refuse to stay an injunction pending appeal, and in those circumstances portions of the injunction may well have been "irrevocably carried out," and relied upon by third parties, with consequences that cannot be undone. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981); *see also Brownlow v. Schwartz*, 261 U.S. 216, 218 (1923) (dismissing appeal from injunction, which directed issuance of building permit, as moot where lower court's order was not stayed, permit was issued in compliance with the order, and building was constructed and sold to third party). In order protect the interest of third parties and the public at large, the "general rule of appellate procedure" is that parties who seek to have an injunction overturned are not entitled to relief that would prejudice the interests of third parties who relied on the lower court's order. *Am. Grain*

Ass'n v. Lee-Vac, Ltd., 630 F.2d 245, 247-48 (5th Cir. 1980); *see* Wright & Miller, *Federal Prac. & Proc.* § 3533.2.2 ("The impossibility of undoing the effects of compliance may arise from the desire to protect the interests of third parties as well as other obstacles."). Plaintiffs in this case and the thousand other same-sex couples who married are not parties to *Kitchen*. They are members of the public who acted in accordance with a binding federal decree, who followed the law as it currently existed, and who were fully recognized by Utah as married. Their marriages are entitled to at least the same protection as provided to ordinary commercial transactions. That is not "an end-run around the normal appellate process." Stay Mot. 2. It is how the normal appellate process works.

Contrary to Defendants' assertions, there is no such thing as an "interim marriage." In seeking to nullify marriages that were legal at the time they were solemnized, Defendants seek to do something that is unprecedented in our nation's history. The Fourteenth Amendment protects the "existing marital relationship," *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring), of all legally married couples whether or not the state was constitutionally obligated to permit those couples to marry in the first instance. Moreover, across centuries and across different politically charged contexts, every state – including Utah – has rigorously applied "clear statement" rules to avoid construing legal restrictions on marriage in a manner that would nullify marriages in that state that had already taken place. Properly construed, Utah's marriage bans simply do not apply to Plaintiffs' marriages. Defendants' arguments to the contrary have been rejected by every state and federal court to rule on the merits of the issue.

Defendants argue that granting a stay pending appeal would promote certainty, but the law is clear: Plaintiffs' marriages are valid and must be recognized regardless of whether *Kitchen* is ultimately affirmed or reversed. If any uncertainty exists, it is the product of

Defendants' unlawful attempt to put these marriages "on hold" and continued attempts to seek emergency stays to avoid complying with federal and state court orders rejecting their legal arguments. 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.

STATEMENT OF THE CASE

The *Kitchen* Injunction

On December 20, 2013, the U.S. District Court for the District of Utah issued a declaratory judgment that Utah's statutory and constitutional bans on allowing same-sex couples to marry are facially unconstitutional and a permanent injunction barring Utah's Governor and Attorney General (the "State Defendants") from enforcing those bans in any context. *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, No. 13-4178, -- F.3d --, 2014 WL 2868044 (10th Cir. June 25, 2014). The State Defendants did not request a stay pending appeal before the decision was issued, and the district court declined to enter a stay *sua sponte*. The State Defendants filed a motion for a stay pending appeal that afternoon, which was a Friday, and the district court denied the stay request on Monday, December 23, 2013. *See Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013).

After the district court refused to stay enforcement of the decision pending appeal, Governor Herbert's office sent an email to his cabinet on December 24, 2013, with the following directive: "Where no conflicting laws exist you should conduct business in compliance with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court." Stay App. A at 3. Also on December 24, 2013, a spokesperson for the

Utah Attorney General's Office publicly stated that county clerks who did not issue licenses could be held in contempt of court. *Id.*

Later that day the U.S. Court of Appeals for the Tenth Circuit denied the State Defendants' motion for a stay. *Id.* at 2-3. The State Defendants then waited until December 31, 2013, to file a request for a stay of the district court's order with this Court, which ultimately granted a stay on January 6, 2014. *See Herbert v. Kitchen*, 134 S. Ct. 893 (2014). Between December 20, 2013, and January 6, 2014, the State issued marriage licenses to over 1,300 same-sex couples. Stay App. A at 3. While it is not known how many of those couples solemnized their marriages before January 6, 2014, news outlets reported that over 1,000 same-sex couples solemnized their marriages before that date. *Id.*

After this Court stayed the *Kitchen* injunction, Governor Herbert and Attorney General Reyes announced that recognition of existing marriages of same-sex couples would be placed "on hold." But they did not – and do not – dispute that the marriages were legally valid at the time the couples entered into them. On January 9, 2014, Attorney General Reyes issued a letter to county attorneys and county clerks advising them 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." Stay App. A at 4 (internal quotation marks omitted). Attorney General Reyes further stated that the State of Utah would not challenge the validity of those marriages for the purposes of recognition by the federal government or other states. *Id.* at 5. Similarly, on January 15, 2014, the Utah State Tax Commission issued a notice stating that same-sex couples may file their state income taxes using a "joint return if they [were] married as

of the close of the tax year for 2013 because [a]s of December 31, 2013, the Supreme Court had not yet issued its stay of the District Court's injunction." *Id.* (internal quotation marks omitted).

Plaintiffs and Other Legally Married Same-Sex Couples

Plaintiffs are four same-sex couples who legally married in Utah between December 20, 2013, and January 6, 2014. They received valid Utah marriage licenses and solemnized their marriages, and thereby acquired all the same legal rights and responsibilities as any other married couple under Utah law. When they stood before their families and community and entered into lawful marriages, these couples acquired "a dignity and status of immense import." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). For same-sex couples like the Plaintiffs in this case, who have lived in Utah their entire adult lives, it is impossible to overstate the significance of finally being recognized as married couples in the eyes of their community and the law.

Many same-sex couples, like Plaintiffs Matthew Barraza and Tony Milner, are raising children together, but because Utah does not allow two unmarried people to both establish a legal parental relationship with their children, these couples have lived in a constant state of anxiety about what would happen to their children if the parent with the legal relationship were to die or become incapacitated. (*Plaintiffs' Mot. for Preliminary Injunction*, filed 2/4/14, at 10-13 (D. Ct. Dkt. No. 8).) Like many other couples, just a few days after marrying, Mr. Barraza and Mr. Milner initiated adoption proceedings that would finally provide their child with the security of having two legal parents. (*Id*.)

Other couples like JoNell Evans and Stacia Ireland have lived with the fear that if one of them were to become hospitalized, the other one would not be recognized by the hospital as a partner or family member. (*Id.* at 13-15.) In 2010, Ms. Ireland suffered a heart attack. (*Id.* at

14.) Before they left for the hospital, Ms. Evans scrambled to locate a copy of Ms. Ireland's power of attorney. (*Id.*) With documents in hand, the hospital staff tolerated Ms. Evans's insistence that she stay by Ms. Ireland's side during her treatment, but they did not interact with Ms. Evans or include her in discussions like they would with a spouse. As Ms. Evans describes it, "It felt like I wasn't even in the room." (*Id.*) After they married, that changed. On January 1, 2014, Ms. Evans again had to rush Ms. Ireland to the emergency room because Ms. Ireland was experiencing severe chest pains. (*Id.*) Ms. Ireland informed the hospital that she had married Ms. Evans and during their stay in the hospital Ms. Evans was afforded all the courtesies and rights given to the spouse of a patient. (*Id.*)

Procedural History

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 1/28/2014, at 5 (D. Ct. Dkt No. 1).) In their complaint and subsequent motion for preliminary injunction, Plaintiffs asserted that Defendants had misconstrued Utah's marriage bans to apply retroactively to their marriages, which were legal and valid at the time they were solemnized. 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 U.S. District Court for the District of Utah, where the case was assigned to a different district judge than the one who issued the underlying injunction in *Kitchen*. (*Id.*) On February 4, 2014, Plaintiffs moved for a preliminary injunction on all their claims. (*Plaintiffs' Mot. for Preliminary Injunction* dated 2/4/2014 (D. Ct. Dkt. No. 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 give a definitive interpretation of Utah law. (*Plaintiffs' Motion for Certification* dated 2/4/2014 (D. Ct. Dkt. No. 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 Opposition to Plaintiffs' Motion for Certification,* dated 2/21/2014 (D. Ct. Dkt. No. 21).) The district court heard oral arguments on Plaintiffs' motions on March 12, 2013. (*Minute Entry* dated 3/12/2014 (D. Ct. Dkt. No. 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, at 2 (D. Ct. Dkt. No. 42).) In the weeks after the federal district court heard oral arguments on the pending motions in this case, state district judges in at least four cases 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. (*Id.*; *Defendants'*

Motion to Certify, dated 4/16/2014, at 4 (D. Ct. Dkt. No. 34).) 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, at 2 (D. Ct. Dkt. No. 42); *Defendants' Motion to Certify* dated 4/16/2014, at 4 (D. Ct. Dkt. No. 34); *Ex. 1 to Defendants' Motion to Certify* dated 4/16/2014 (D. Ct. Dkt. No. 34-1).)

The State of Utah refused to comply with those state-court orders. Instead, 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, at 2 (D. Ct. Dkt. No. 42); *Defendants' Motion to Certify* dated 4/16/2014, at 4 (D. Ct. Dkt. No. 34).) After the Utah Supreme Court took no action for several weeks, 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, at 3 (D. Ct. Dkt. No. 43).) Shortly after this order to show cause issued, the Utah Supreme Court granted a limited stay of the portion of four state court orders "mandating or authorizing [Defendants] to issue 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 (D. Ct. Dkt. No. 43-1).) While this was going on, the Defendants – in a reversal of their previous opposition to certification – also filed a motion on April 16, 2014, for the federal district court to certify state law questions to the Utah Supreme Court. (*Defendants' Motion to Certify* dated 4/16/2014 (D. Ct. Dkt. No. 34)).[1]

[1] As of this date, the Utah Supreme Court has not set a briefing schedule or taken any additional action in those cases.

On May 19, 2014, the district court denied both parties' motions to certify questions to the Utah Supreme Court and granted Plaintiffs' motion for preliminary injunction. Stay App. A at 34.[2] The court 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.

On June 5, 2014, the Tenth Circuit extended the temporary stay while it considered the motion for stay pending appeal. Stay App. B. The motion was assigned to the same panel of judges considering the appeal from the underlying injunction in *Kitchen*. On June 25, 2014, a majority of the panel affirmed the lower court's decision in *Kitchen*, but stayed enforcement of that judgment pending this Court's disposition of an expected petition for *certiorari*. *See Kitchen v. Herbert*, No. 13-4178, -- F.3d --, 2014 WL 2868044 (10th Cir. June 25, 2014). On July 11, 2014, the same majority on the panel denied Defendants' request for a stay pending appeal in this case. Stay App. C. The court nevertheless extended the temporary stay for ten days, until July 21, 2014, at 8:00 a.m. M.D.T. to provide Utah time to seek a stay from this Court. *Id.*

[2] In response to Defendants' assertion that the court should refrain from acting until the Utah Supreme Court resolves petitions for extraordinary relief, the district court 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." Stay App. C at 33 n.5. Indeed, in their opposition to Plaintiffs' motion for certification Defendants had told the district 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 Opposition to Plaintiffs' Motion for Certification* dated 2/21/2014, at 12 (D. Ct. Dkt. No. 21).) 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).

Utah filed its stay request at the end of the day on July 16, 2014.

ARGUMENT

Defendants' request for an emergency stay should be denied. "In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (internal quotation marks omitted). This 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 "stay equities" considered by courts 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.

Id. at 434. The first two factors "are the most critical." *Id.* "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." *Id.* 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; *accord Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam) (applying *Nken* standard to requests for a stay by this Court).

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. There Is No Reasonable Probability that Four Justices Will Grant *Certiorari* to Address the Discrete Issues Raised in This Case.

This Court will soon be confronted with petitions for *certiorari* asking it to decide whether bans on allowing same-sex couples to marry violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. But as the district court and the Tenth Circuit recognized, this case is fundamentally different. Indeed, the Tenth Circuit panel that denied the motion for stay pending appeal in this case is the same panel that stayed its own decision striking down the underlying marriage bans in *Kitchen* until this Court acts on a petition for *certiorari* in that case. The plaintiffs in this case are not arguing that Utah's marriage bans are facially unconstitutional or that they have a fundamental right to enter into marriage in the first instance, and they are not seeking an order requiring Utah to permit any additional same-sex couples to marry. The plaintiffs here are already legally married, and the question is whether the Constitution protects that existing marital relationship.

None of the relevant considerations for granting *certiorari* is present in this case. *See* Sup. Ct. Rule 10. There is no conflict among the lower courts with respect to whether married couples have a protected liberty interest in their existing marital relationship, and, unlike *Kitchen* and other cases in which plaintiffs are seeking the freedom to marry, the narrow issue raised in this case applies to only a finite number of couples and does not present the sort of recurring

issue that must be "settled by this Court." Sup. Ct. Rule 10(c). Following this Court's grant of a stay pending appeal in *Kitchen*, the uniform practice of the Courts of Appeals to date has been to grant stays of district court or appellate court decisions that strike down such bans as unconstitutional. The only states where marriages took place before a federal court decision was stayed pending appeal are Utah, Michigan, Wisconsin, and Indiana. The validity of those finite number of marriages is of paramount importance to the couples who married, but – in the absence of any division in authority among the lower courts – these cases do not raise questions of national importance requiring this Court's intervention. *Cf. Multimedia Holdings Corp. v. Circuit Ct. of Fla., St. Johns Cnty*, 544 U.S. 1301, 1306 (2005) (Kennedy, J., in chambers) (finding no reasonable probability that *certiorari* will be granted because challenged orders were "isolated phenomena").

Moreover, to the extent that Defendants disagree with the district court's prediction regarding how Utah state courts would apply the state's strong presumption against retroactivity when the law changes as a result of a federal injunction, *see* Stay Mot. 15-16, that dispute regarding Utah law is not the proper subject of a petition for *certiorari* to this Court. There is no likelihood that four Justices of this Court would grant *certiorari* to decide the proper application of *Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108 (Utah 2013); *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663 (Utah 2002); and *Tufts v. Tufts*, 30 P. 309, 310 (Utah 1892), to the facts of this case.

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. Stay App. C at 13. First, the district court held that Defendants violated Plaintiffs' liberty interests protecting an existing

marital relationship 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. In order to meet the threshold requirements for securing a stay pending appeal, Defendants must show they are likely to overturn *both* of those holdings.

A. Actions Taken By Third Parties in Reliance on a District Court Injunction Are Not Rendered Void *Ab Initio* If the Injunction Is Reversed on Appeal.

It is black-letter law 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); *accord Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) ("[T]he vitality of th[e] judgment is undiminished by pendency of the appeal."). Some injunctions may be entered erroneously, but they still "must be obeyed . . . however erroneous the action of the court may be." *Howat v. State of Kansas*, 258 U.S. 181, 189-90 (1922); *see Hovey v. McDonald*, 109 U.S. 150, 161-62 (1883) (holding that even though it appeared that the lower court 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. *See Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967).

Against this black-letter law, Defendants' argument boils down to the assertion that the lower courts erred in December 2013 when they denied the motions for a stay pending appeal in the *Kitchen* litigation, and that Utah should not, as a result of that error, be "stuck with" the marriages that were solemnized while the injunction was still in effect. Stay App. C at 3 (Kelly, J., dissenting). But it is an inevitable fact of civil litigation that sometimes lower courts err in not

staying an injunction pending appeal. A belatedly entered stay will return the governing law to the "status quo" that existed before the injunction, Stay Mot. 14 (citing *Nken*, 556 U.S. at 429), but "[n]o court can make time stand still," much less travel back in time, *Nken*, 556 U.S. at 421 (internal quotation marks omitted). In such circumstances, before the stay is issued, portions of the injunction may well have been "irrevocably carried out" with consequences that cannot be undone. *Camenisch*, 451 U.S. at 398; *see also Nken*, 556 U.S. at 429 ("[T]he court's decision may in some cases come too late for the party seeking review."); *Brownlow*, 261 U.S. at 218 (dismissing appeal from injunction, which directed issuance of building permit, as moot where lower court's order was not stayed, permit was issued in compliance with order, and building was constructed and sold to third party). Indeed, the entire premise of a stay pending appeal is that, in the absence of such a stay, obeying a district court injunction that is later reversed would impose harm that is "irreparable." The corollary is that when a stay is denied – however erroneous that denial may be – some facts on the ground may be irrevocably, but lawfully, changed.[3]

In light of these well-settled principles, it is Defendants' position – not Plaintiffs' – that would "create chaos" and "undermine due process and fairness" by making it impossible for third parties and the general public to transact business based on a binding and enforceable lower court order. Stay App. C at 5 (Kelly, J., concurring in part and dissenting in part).) Under our legal system, we protect the interests of the parties and the rule of law by having procedures in

[3] Even when an injunction "*ought* never to have existed," *Butler v. Eaton*, 141 U.S. 240, 244 (1891) (emphasis added), actions taken while that injunction is in effect may have lasting consequences. Defendants tacitly concede this point when they assert that, unless this Court grants a stay, compliance with the district court's preliminary injunction may frustrate appellate review by rendering this case moot. Stay Mot. 34. Far from supporting their position, that argument is a concession that parties may be "stuck with the result" of an injunction that is carried out before it can be stayed pending appeal. Defendants' argument regarding "vested rights" and retroactivity are discussed, *infra* in Section II.C.

place to seek a stay pending appeal. But when a stay has not yet been granted "action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree." *Am. Grain*, 630 F.2d at 247. District court decisions would be rendered meaningless if, despite the lack of a stay, all business transacted with third parties in accordance with a district court injunction could be declared void *ab initio* years later if the injunction is overturned. Such a rule would place a *de facto* stay on every lower court judgment pending appeal because third parties and the public at large could not confidently conduct their affairs in accordance with the injunction until all appeals were exhausted.

That is not the law governing appellate procedure. To the contrary, to ensure that a lower court injunction is effective, and to protect the interest of third parties and the public at large, the "general rule of appellate procedure" is that parties who seek to have an injunction overturned are not entitled to relief that would prejudice the interests of third parties who relied on the lower court's decree. *Id.* at 247-48; *see* Wright & Miller, *Federal Prac. & Proc.* § 3533.2.2 ("The impossibility of undoing the effects of compliance may arise from the desire to protect the interests of third parties as well as other obstacles."). This principle arises in many different contexts, *see id.*, but manifests itself most prominently in bankruptcy proceedings, where it is codified as protection for "third-party purchasers" at 11 U.S.C. § 363(m). Under this rule and the related doctrine of equitable mootness, "[i]n the absence of a stay of a bankruptcy court's order affecting a debtor's property, a party appealing the order will not be heard to affect the rights of a third party who, pursuant to the order, acquired, in good faith, an option or lease on the property." *Am. Grain*, 630 F.2d at 248 (footnote omitted). "Unless the sale is stayed pending

appeal, the transaction survives even if it should not have been authorized in the first place." *Matter of UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).[4]

As explained below, the act of entering into marriage is a fundamental change in legal status, which is shielded by the Constitution from state interference. The fundamental rights protecting existing marital relationships are entitled to at least the same level of protection as ordinary commercial transactions. The plaintiffs in this case – and the thousand other couples who married while the *Kitchen* injunction was in effect – were not parties to the *Kitchen* litigation.[5] They were members of the public who acted in reliance on the binding federal decree. Indeed, by the time this Court issued its stay decision on January 6, 2014, Defendants' prior stay requests had 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 court. In the event that the *Kitchen* injunction is overturned, Utah will be under no obligation to allow any new couples to marry, but the constitutional protections that attach to existing marital relationships bar Utah from trying to nullify the legal marriages that have already occurred. That is not "an end-run around the normal appellate process." Stay Mot. 2. It is how the normal appellate process works.

[4] Moreover, third parties act in "good faith" when relying on a lower court decree even when they know that an appeal from that order is still pending. *Am. Grain*, 630 F.2d at 248 n.1; *accord Oakville Dev. Corp. v. FDIC.*, 986 F.2d 611 (1st Cir. 1993) ("Knowledge of a pending appeal, without more, does not deprive a purchaser of good faith status.").

[5] Defendants repeatedly – and incorrectly – assert that *Nken* stands for the proposition that a stay "return[s] the parties to the status quo ante." Stay Mot. 14. As noted in the text, a stay returns the governing law to the status quo before the injunction, but it does not transport the parties back in time. But even if Defendants' reading of *Nken* were correct, Plaintiffs in this case are not "parties" to *Kitchen*. They are members of the public entitled to the same protection as any other third party who acts in accordance with a judicial decree.

B. 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' attempt to strip recognition from Utah marriages that were valid under the law at the time they were solemnized violates fundamental rights and liberty interests at the core of the Fourteenth Amendment. It is well established that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983). The Constitution provides "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude." *Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring) (distinguishing between protections for existing marital relationships and barriers to entering into marriage in the first instance).

Whether or not the Fourteenth Amendment requires states to allow particular couples to marry in the first instance, couples that do legally marry are protected by the same fundamental rights and liberty interests as any other legally married couple. For example, some states allow couples to marry even if they are first cousins or if they are under 18, while other states do not. Although this Court has never held that states are constitutionally required to allow such marriages to take place, no one has ever suggested that first cousins and persons under 18 who lawfully marry do not enjoy the same constitutional protections as other married couples.

The marriages of Plaintiffs and other same-sex couples are no different. "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." Stay App. A at 13 (citations omitted). Mr. Barraza and Mr. Milner were finally able to both establish a legal relationship with their son. Ms. Evans was able to stand by Ms. Ireland's side at the hospital and be treated the same as any other spouse. By

attempting to place these marriages "on hold," Defendants seek to take that status away and divest these married same-sex couples of the same "duties and responsibilities that are an essential part of married life." *Windsor*, 133 S. Ct. at 2695; *see also* Stay App. A at 13.

Defendants fail to identify any precedent supporting their radical proposition that a state may strip recognition from couples who legally married under that state's law at the time the marriages were solemnized. To the contrary, "[t]he policy of the civilized world[] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). 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. *See, e.g.*, *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 18,000 same-sex couples that had already taken place).[6] This longstanding, consistent, and specific practice demonstrates a deeply rooted Anglo-American tradition of protecting marriages from retroactive

[6] *See also 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. App. Div. 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, 181 (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, 385 (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); *Callahan v. Callahan*, 15 S.E. 727, 728 (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.").

invalidation by the state in which they were validly and legally solemnized. *See* Brief of *Amici Curiae* Professors of Family Law in Support of Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), 2009 WL 491806, at *25 (filed Jan 16, 2009) ("[A]s far as *amici* know, no court has ever held that a marriage validly entered into in one state was later rendered invalid and unrecognizable in that same state by a change in that state's laws regarding qualifications for marriage.").

Defendants cannot establish that they are likely to succeed in their attempts to retroactively invalidate legal marriages for perhaps the first time in this nation's history.

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

As the district court explained, 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. *See Tufts*, 30 P. at 310. 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*, 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 that Utah's marriage amendment does not apply retroactively to impair those vested rights.[7]

[7] 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

Defendants do not dispute these principles, but they argue that the Utah courts would not find "vested rights" or apply the presumption against retroactivity in this case because the relevant change in the law occurred as a result of a non-final court judgment with a pending appeal. In support of that argument, Defendants confuse the difference between claiming a "vested right" in the continuation of a rule of law and claiming a "vested right" in property acquired while that rule of law was in effect. For example, 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), which held that prisoners have no vested rights in the continuation of a prospective injunction arising from a consent decree because prospective decrees are not "final" for purposes of *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211 (1995). Those cases were based on the distinction between prospective decrees and final judgments, not the distinction between judgments where appeals are still pending and judgments where appeals have been exhausted. The prisoners in *Plyler* and *Gavin* contended that they had vested rights in the continuation of the consent decrees indefinitely. Here, Plaintiffs are not claiming they have a vested right in the continuation of the *Kitchen* injunction that would entitle them to get married at any time in the

---

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." *Waddoups*, 2013 UT 64, 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.

future. Rather, they are claiming they have vested rights in their marriages that have already legally taken place and been fully solemnized.[8]

Defendants are not likely to prevail in arguing that Utah courts would not apply the state's strong presumption against retroactivity to the facts of this case. To the contrary, Utah state judges in at least four different cases have already *rejected* Defendants' legal arguments and granted step-parent adoptions to couples who legally married while the *Kitchen* injunction is in effect. Indeed, Defendants have failed to identify "any case in the Utah state courts that ha[s] been favorable to the State's position." Stay App. A 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.

There is no irreparable harm in this case comparable to the alleged irreparable harm that apparently prompted this Court to grant a stay pending appeal in *Kitchen*. The question before this Court when asked to grant an emergency stay in *Kitchen* was whether Utah should have to continue issuing *additional* marriage licenses beyond those that were already issued. The State Defendants in that case told this Court that "[h]undreds of marriage licenses have been issued already, with many more couples expected to apply for licenses in the coming days." Application for Emergency Stay at 21, *Kitchen v. Herbert*, No. 13A687 (filed Dec. 31, 2013), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/13A687-Herbert-v-

[8] Similarly, Plaintiffs are not claiming they have a vested right to the continuation of a rule of law in the face of an intervening change in legal authority. *Contra* Stay Mot.16 (citing *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986); *Tonya K. v. Bd. of Educ. of the City of Chicago*, 847 F.2d 1243, 1247 (7th Cir.1988)). They are claiming vested rights in marriages that were fully solemnized before any change in law occurred.

Kitchen-Application.pdf. 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." Stay App. A 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.

Defendants argue they will suffer irreparable harm without a stay because they will be forced to violate Utah's constitutional amendment prohibiting same-sex couples' marriages from being recognized. But every court to rule on the question has already rejected Defendants' interpretation of Utah's marriage bans. As a matter of statutory interpretation, when read in light of Utah's strong presumption against retroactivity and protection of vested rights, the marriage bans simply do not apply to Utah marriages that were valid at the time they took place. Even if the *Kitchen* injunction were overturned, Defendants would be able to fully enforce the State's marriage bans without invalidating the finite number of marriages that already took place. The same state of affairs existed in California from the time Proposition 8 went into effect in 2008 until the time the court's injunction in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), went into effect in 2013. During that time period, California fully enforced Proposition 8's bans on any new marriages while still respecting the constitutional rights of the 18,000 same-sex couples who had already married in California. *See Strauss*, 207 P.3d at 122 (concluding that retroactive application of a ban on marriage for same-sex couples is "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").

Defendants also assert that if the lower court injunction is not stayed, it may interfere with the proceedings pending before the Utah Supreme Court. But, as the district court correctly observed, Defendants cannot credibly argue that the federal court should have deferred to state court proceedings when Defendants are the ones who sought out a federal ruling by removing this case to federal court and then initially opposing Plaintiffs' request to certify state law questions. Stay App. A at 33 n.5. The fact that Defendants now have buyers' remorse does not entitle them to a stay pending appeal.[9]

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 married 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 the next couple of years. *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").

In dissent from the Tenth Circuit's denial of a stay pending appeal, Judge Kelly asserted that Plaintiffs are not harmed by a stay placing their marriages "on hold" because their interests

[9] 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. Defendants failed to intervene in the underlying adoption proceedings, and Utah Code § 78B-6-133(7)(c) conclusively bars "all attempts to contest an adoption (i) regardless of whether the adoption is contested directly or collaterally; and (ii) regardless of the basis for contesting the adoption, including claims of . . . mistake of law."

may still be vindicated at the end of the appellate process. (*Order* dated 7/11/14, at 5 (Ct. App. Doc. 01019277937) (Kelly, J., concurring in part and dissenting in part).) But no one knows what the next twelve months (or more) may bring; while appeals are pending, children may be born, people may die, and loved ones may fall unexpectedly ill. As the district court 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." Stay App. A at 26. Defendants' attempt to place their marriages "on hold" also stigmatizes Plaintiffs and their families by "tell[ing] those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor*, 133 S. Ct. at 2694. 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, Defendants cannot show any harm 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, although Defendants repeatedly claim to represent Utah's sovereign interests in enforcing Utah's laws, every state and federal court to rule on the merits of the issue has rejected Defendants' interpretation of what Utah law requires. If, as the district court concluded, Utah's marriage bans do not even apply to Plaintiffs marriages as a matter of statutory interpretation, then there can be no possible harm to the sovereign interest of Utah because Defendants are being prevented from acting based on an interpretation of Utah law that is both incorrect and unconstitutional.

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, as the district court explained, "the public is well served by having certainty about the status of Plaintiffs' marriages. That certainty not only benefits Plaintiffs and the[ir] 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." Stay App. A at 28.

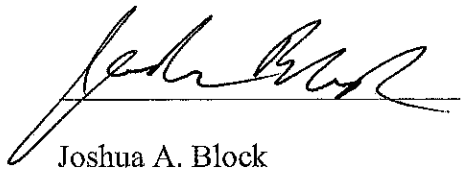
Defendants argue that granting a stay pending appeal would promote certainty, but it is difficult to conceive how the state recognizing valid marriages would create any uncertainty. Indeed, several courts have already held that these marriages are legally valid under Utah law. Simply obeying those court decisions and recognizing Plaintiffs' marriages as valid regardless of the ultimate outcome of the *Kitchen* litigation would put an end to the uncertainty Defendants say they want to avoid.

If any legal uncertainty currently exists, it is the product of Defendants' own intransigence in retroactively applying Utah's marriage amendment in an unprecedented way and filing 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' request for a stay should be denied.

Respectfully Submitted,



Joshua A. Block
Counsel of Record
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, Floor 18
New York, New York, 10004
Telephone: (212) 549-2593
Facsimile: (212) 549-2650
jblock@aclu.org

Erik Strindberg
Lauren I. Scholnick
Kathryn Harstad
STRINDBERG & SCHOLNICK, LLC
675 East 2100 South, Ste. 350
Salt Lake City, UT 84106
Telephone: (801) 359-4169
Facsimile: (801) 359-4313
erik@utahjobjustice.com
lauren@utahjobjustice.com
kass@utahjobjustice.com

John Mejia
Leah Farrell
AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION
355 N. 300 W.
Salt Lake City, Utah 84103
Telephone: 801.521.9862
Facsimile: 801.532.2850
aclu@acluutah.org

Attorneys for Plaintiffs-Respondents

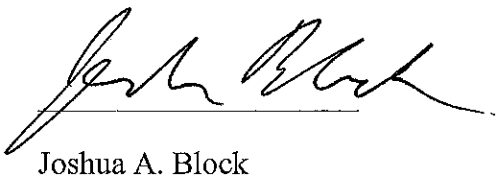
Dated: July 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I served the foregoing Opposition to Stay by e-mail and U.S. Mail on the following counsel of record.

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

July 17, 2014



Joshua A. Block