

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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DEREK KITCHEN, individually;  
MOUDI SBEITY, individually;  
KAREN ARCHER, individually;  
KATE CALL, individually;  
LAURIE WOOD, individually; and  
KODY PARTRIDGE, individually,

Plaintiffs - Appellees,

v.

GARY R. HERBERT, in his official  
capacity as Governor of Utah, and  
BRIAN L. TARBET, in his official  
capacity as Acting Attorney  
General of Utah,

Defendants – Appellants,

and

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

Defendant.

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**No. 13-4178**

**STATE DEFENDANTS – APPELLANTS’ EMERGENCY  
MOTIONS FOR STAY PENDING APPEAL AND TEMPORARY  
STAY PENDING RESOLUTION OF MOTION TO STAY**

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Utah State Defendants Governor Gary R. Herbert and Acting

Attorney General Brian L. Tarbet, by and through their counsel of record, pursuant to Federal Rule of Appellate Procedure 8 and 10<sup>th</sup> Cir. R. 8, hereby move this Court for a stay pending appeal of the district court's order entered December 20, 2013, and a temporary stay of that order pending resolution of the State Defendants' motion to stay.

### **INTRODUCTION AND SUMMARY**

Less than one month after the parties<sup>1</sup> completed briefing on their cross-motions for summary judgment and barely two-weeks after the summary judgment hearing at which the district court wondered aloud whether he could issue an opinion before early January 2014, the district court issued a 50-plus page order declaring irrational the age-old definition of marriage as the union of a man and a woman. The court then enjoined Utah from enforcing its constitution and laws adopting that definition—the only definition of marriage the State, much of the country, and even much of the world has ever used--effective immediately.

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<sup>1</sup> Unless otherwise indicated, the term “parties” as used herein does not include Sherrie Swenson, Clerk of Salt Lake County.

The district court did not *sua sponte* stay its order pending review by this Court despite knowing its decision would not be the final word on whether the State's adherence to the traditional definition of marriage is constitutional. At the very least, this Court will have its say and it is widely expected that the United States Supreme Court will ultimately resolve the issue. In effect, the district court determined to impose its own view of marriage on Utah regardless of the fact that Utah had democratically chosen the man-woman definition of marriage and regardless of the fact that the district court's view might be rejected by this Court.

Considering how important the marriage institution is, how hotly contested the definition of marriage remains both publicly and politically, the value in promoting both separation of powers and federalism principles, the fact that many other courts have upheld the constitutionality of man-woman marriage, and the fact that neither this Court nor the Supreme Court has issued a final ruling on this issue, the need for a stay pending appeal is readily apparent. Utah should be allowed to enforce its democratically chosen definition of marriage until the appropriate appellate court of last resort has declared otherwise.

In addition, as explained below, the traditional stay factors favor granting a stay pending appeal and a stay pending resolution of the State Defendants' motion to stay. In particular, State Defendants have a real likelihood of success on the merits given the number of other courts that have held the traditional definition of marriage is rationally related to a legitimate state interest.

### **FACTS**

1. On Friday, December 20, 2013, the district court issued a Memorandum Decision and Order declaring Utah's definition of marriage as between a man and a woman unconstitutional. (A copy of the decision and order is attached hereto).

2. The decision enjoins the State of Utah from enforcing Article I, § 29 of the Utah Constitution and Utah Code § 30-1-2 and § 30-1-4.1. Memorandum Decision and Order at 53.

3. A final judgment was entered shortly after the decision was issued and State Defendants promptly filed a notice of appeal.

4. Shortly after the district court issued its decision, counsel for the State of Utah contacted the district court. The district court held a conference call with counsel for Plaintiffs and State Defendants. During

the conference call, the district court declined to issue a stay *sua sponte* and refused to entertain an oral motion to stay.

5. Instead, the district court stated that it would entertain only a written motion and written response from the non-moving parties.

6. Thereafter, State Defendants filed a written motion for stay pending appeal in the district court.

7. The district court held hearing on the motion to stay on Monday, December 23, 2013 at 9:00 a.m.

8. The district court denied the motion to stay from the bench on the grounds that the State Defendants had not met their burden. The district court made clear that this ruling was final and the State Defendants could seek relief from the Tenth Circuit.

9. As widely reported in the press, after the district court issued its decision on Friday afternoon, the Salt Lake County Clerk's office began issuing marriage licenses to same-sex couples and some sex-couples were married Friday afternoon.

10. Also, as widely reported in the press, beginning Monday morning, December 23, 2013, at 8:00 a.m., county clerk's offices have been issuing marriage licenses to same-sex couples and same-sex

marriages have been performed and will undoubtedly continue to be performed until the district court's order is stayed pending appeal or until the district court's order is reversed on appeal.

### **SUBJECT MATTER JURISDICTION**

Inasmuch as this action alleges violation of rights arising under the Fourteenth Amendment of the Constitution, the district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has subject matter jurisdiction under 28 U.S.C. § 1291.

### **AN EMERGENCY NEED EXISTS FOR A STAY**

The district court's order enjoined Utah from enforcing its definition of marriage. The district court's order may prove (and State Defendants' argue that it will prove) to be wrong and should be reversed. Until this Court or the United States Supreme Court has determined that Utah's marriage laws are unconstitutional, it is premature to require Utah to change its definition of marriage and abide by the district court's conception of marriage.

Nonetheless, marriages in violation of Utah's existing law have taken place, are taking place and will continue to take place pursuant to the district court's order. The district court has refused to stay his

order. Time is of the essence to stop these marriages by staying the district court's injunction pending appeal (and this Court's resolution of the motion for stay) in order to maintain the historic status quo of man-woman marriage that the State and its citizens validly enshrined in the Utah Constitution.

**THE COURT SHOULD STAY THE DISTRICT COURT'S ORDER  
ENJOINING UTAH FROM ENFORCING ITS DEFINITION OF  
MARRIAGE PENDING APPEAL**

The Court should stay pending appeal (and temporarily stay pending resolution of the motion to stay) the district court's order enjoining Utah from enforcing its constitution and laws adopting the historic understanding of marriage as only the legal union of one man and one woman. The district court's conclusion that this definition is irrational, discriminatory and unconstitutional is flawed and only the first of several steps in a legal process that will finally determine the constitutionality of the man-woman definition of marriage. This Court will have the final say in the states encompassing the Tenth Circuit, and it is widely expected that the Supreme Court will ultimately determine this issue. Accordingly, it was premature, to say the least, for the district court to presume its views were so final that they should

be immediately enforceable on Utah and its citizens. The district court's apparent disregard for the views of this Court and the views of the people of Utah, who passed the constitutional amendment the court struck down, has created a cloud of uncertainty over the same-sex marriages currently taking place. The Court can stop the chaotic situation from continuing any further by staying the district court's order until it can be fully and fairly reviewed by this Court. Until the final word has been spoken by this Court or the Supreme Court on the constitutionality of Utah's marriage laws, Utah should not be required to enforce Judge Shelby's view of a new and fundamentally different definition of marriage. No one wins—not Utah, not its citizens, not the Plaintiffs, nor any same-sex couples who have been married—if Utah's definition of marriage is required to change back and forth with the latest judicial decree. On so important of a social issue, the status quo of man-woman marriage should remain intact until the highest and last appellate tribunal to rule on the matter holds otherwise.

The importance of granting a stay pending appeal in this matter of such profound societal importance is self-evident. Nonetheless, State Defendants' request for a stay also satisfies the traditional factors



justifying a stay: (A) the likelihood of success on appeal; (B) the threat of irreparable harm if the stay or injunction is not granted; (C) the absence of harm to opposing parties if the stay or injunction is granted; and (D) any risk of harm to the public interest. Fed. R. App. P. 8; 10th Cir. R. 8.1.

### **I. LIKELIHOOD OF SUCCESS ON APPEAL**

State Defendants have significant likelihood of success on appeal. The district court's decision is wrong and ignores basic concepts of due process and equal protection. It reached conclusions that are unprecedented in Tenth Circuit and Supreme Court jurisprudence. Neither this Circuit nor the Supreme Court has ever held that a State is constitutionally prohibited from defining marriage as only the legal union of a man to a woman. Neither this Circuit nor the Supreme Court has ever held that the fundamental right to marry includes same-sex marriage. Neither this Circuit nor the Supreme Court has ever held that the traditional definition of marriage somehow constitutes gender discrimination. And neither this Court nor the Supreme Court has ever held that the man-woman definition of marriage is, and apparently

always has been, irrational, discriminatory and unconstitutional.

The shaky legal ground upon which the district court's decision stands is highlighted by the fact that the two most recent federal district courts to have considered and ruled on the constitutionality of a state's laws defining marriage as the legal union between a man and a woman have reached a different conclusion than the district court. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Hawaii 2012); *Sevcick v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). Moreover, the only federal circuit court to squarely rule on this issue has upheld the constitutionality of the traditional definition of marriage.<sup>2</sup> *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (reversing district court opinion declaring the man-woman definition of marriage to be unconstitutional). And, those decisions do not stand alone. As outlined below, many other courts have concluded that the opposite-sex definition of marriage rationally serves society's interests in regulating sexual relationships between men and women so that the unique procreative capacity of those relationships benefits rather than harms society, by increasing the likelihood that children will be born and

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<sup>2</sup> The Ninth Circuit, in a now vacated decision, held only that Proposition 8 unconstitutionally removed marriage rights that had already been given by the State of California. Those circumstances do not exist here.

raised in stable family units by their biological mothers and fathers.

**A. The District Court Misconstrued *Windsor***

Instead of considering and basing its decision on the majority opinion in the *Windsor* case, the district court quotes and cites as conclusive authority the cynical observation in dissent of Justice Scalia of what the Supreme Court's view would be if considering state marriage laws. ("The court agrees with Justice Scalia's interpretation of *Windsor* . . ." Mem. Dec. at 13. The district court's approach is to, in effect, "jump the gun" and join Justice Scalia in speculation about what the Supreme Court *would* do, not what it has done. The fact remains that the Supreme Court has *not* reviewed the constitutionality of a state law defining marriage as only the legal union between a man and a woman. *Windsor* did not establish a universal right to same-sex marriage. To the contrary, the central support upon which the *Windsor* decision stands is a State's, not the federal government's authority, to define and regulate marriage. The *Windsor* decision affirms rather than denies Utah's authority to define and regulate marriage.

In *Windsor* both the Second Circuit's and the Supreme Court's reviews of DOMA were limited to a federal statute that distinguished

between lawfully married opposite-sex couples and lawfully married same-sex couples. The Supreme Court held only that “[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” *Windsor*, 133 S. Ct. at 2696. If that statement was not limiting enough, the Court went on to emphasize that the *Windsor* “opinion and its holding are confined to those lawful marriages,” meaning those same-sex marriages in States where same-sex marriage has been made legal. *Id.* at 2696. Nothing in *Windsor* limits or restricts Utah’s sovereign authority to define and regulate the marriage of its citizens. Nor does *Windsor* hold that Utah’s “legitimate regulatory interests” relating to marriage, which “differ from those of the federal government,” are illegitimate. *See Windsor v. United States*, 699 F.3d 169, 179 (2nd Cir. 2012), *affirmed by U.S. v. Windsor*, 133 S.Ct. 2675 (2013) (“when it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government . . .”)

## **B. There Is No Fundamental Right to Same-Sex Marriage**

The district court concedes that “the court’s role is not to define

marriage, an exercise that would be improper given the states' primary authority in this realm" and then proceeds to do exactly that by redefining marriage in such a broad way as to encompass same-sex marriage. Mem. Dec. at 16. The district court cites to and applies Supreme Court precedent recognizing a fundamental right to marry, cases that universally involve marriage between a man and a woman, as though the gender of the spouses is entirely irrelevant. The district court concludes that "the Plaintiffs here do not seek a new right to same-sex marriage, but instead ask the court to hold that the State cannot prohibit them from exercising their existing right to marry on account of the sex of their chosen partner." Memorandum Decision (Doc. 90) at 28.

**1. The District Court Failed to Properly Apply *Washington v. Glucksberg***

By refusing to recognize that traditional man-woman marriage is materially different from same-sex marriage the district court sidesteps the binding precedent of *Washington v. Glusckberg*, 521 U.S. 702 (1997) which sets forth the "established method of substantive due process

analysis.” *Id.* at 720.<sup>3</sup> That analysis “require[s] ... a careful description of the asserted fundamental liberty interest.” *Id.* at 722. Plaintiffs’ asserted liberty interest here is the right to marry a person of the same sex. Plaintiffs’ asserted interest, however, is manifestly distinguishable from the Supreme Court’s decisions affirming a fundamental right to marry. Those decisions were premised on the relationship between a man and a woman.

In addition, this case is wholly unlike *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967), which involved an invidious marriage system bent on racial oppression. The district court joins the Plaintiffs in begging the question when they presume that gays and lesbians are entitled to the same judicial protection accorded racial minorities, especially where the traditional definition of marriage exists not to oppress homosexuals but to further other vital social ends. In fact, as the district court itself recognizes, sexual orientation (unlike race) is not a suspect class entitled to strict or even heightened scrutiny. Mem. Dec. at 35-36.

The second factor to be considered in the *Glucksberg* “established

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<sup>3</sup> The district court states, “Because the right to marry has already been established as a fundamental right, the court finds that the *Glucksberg* analysis is inapplicable here.” Mem. Dec. at 29.

method of substantive due process analysis” is to recognize only “those fundamental rights and liberties which are objectively, deeply rooted in this Nation’s history and tradition.” *Glucksberg*, 521 at 720-21. In the district court’s view “tradition and history are insufficient reasons to deny fundamental rights to an individual.” Mem. Dec. at 29 heading 3. Citing to and quoting *Lawrence v. Taylor*, 539 U.S. 558 (2003), the district court concludes that *Glucksberg*’s history and tradition requirement does not apply to “a new set of facts that were previously unknown,” meaning “the knowledge of what it means to be gay or lesbian.” Memorandum Decision (Doc. 90) at 29.

The district court’s refusal to consider history and tradition goes far beyond even the analysis applied by the Supreme Court in *Lawrence*. There, the Court stated, “[W]e think that our laws and traditions of the past half-century are of the most relevance here.” *Lawrence*, 539 U.S. at 571-72. The relevant history and tradition here is that no State permitted same-sex marriage until 2003. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (2003). Even abroad, no foreign nation allowed same-sex marriage until the Netherlands in 2000. *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). The fact that, in the

last 10 years of this Nation's 237 year history, a minority of States have permitted same-sex marriage does not transform same-sex marriage into a "deeply rooted" historical and traditional right. No interest still inconsistent with the laws of over 30 states and with the ubiquitous legal traditions of this country until a decade ago can be called "deeply rooted."

The *Lawrence* case cited by the district court is by its own terms irrelevant to the issue of legal recognition of same-sex unions.<sup>4</sup> The Court majority expressly stated the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578 (emphasis added). *Lawrence* did address the criminalization of private adult consensual homosexual conduct, but the Court did not even declare a fundamental right for that conduct. *See* 539 U.S. at 586 (Scalia, J., dissenting) ("nowhere does the Court's opinion declare that

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<sup>4</sup> In its analysis of *Lawrence* the district court again, instead of focusing on the majority opinion and its express limitations, focuses on a dissent from Justice Scalia to discern what the decision means. "The court therefore agrees with the portion of Justice Scalia's dissenting opinion in *Lawrence* in which Justice Scalia stated the Court's reasoning logically extends to protect an individual's right to marry a person of the same sex." Memorandum Decision (Doc. 90) at 31.



homosexual sodomy is a ‘fundamental right’ under the Due Process Clause”). Further the Court in *Lawrence* did not subject the law at issue to strict scrutiny, the standard of review that would have applied had a fundamental right been involved. *Id.* at 578. (“The Texas statute furthers no legitimate state interest.”).

In her concurring opinion Justice O’Connor pointed out that *Lawrence* did “not involve public conduct . . . It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring) (emphasis added). Justice O’Connor also emphasized that in such a case, “preserving the traditional institution of marriage” would itself constitute a legitimate state interest under rational basis review and that “other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” *Id.*

The district court has failed to exercise the “utmost care” that the Supreme Court’s *Glucksberg* substantive due process analysis requires. *Glucksberg*, 521 U.S. at 720. The district court’s decision “place[s] the matter outside the arena of public debate and legislative action” and

constitutes the “policy preferences of the [court].” *Glucksberg*, 521 U.S. at 720.

The district court has failed to give proper recognition and deference to the fact that in the majority of States where same-sex marriage has been adopted it has been accomplished through the democratic process rather than by judicial decree. And, the district court’s decision constitutes a fundamental shift away from society’s understanding of what marriage is and overrides the democratic voice of the people of Utah.

### **C. There Is No Sex Discrimination**

The district court also erroneously held that the man-woman definition of marriage is really gender discrimination warranting intermediate scrutiny under the Equal Protection Clause. Mem. Dec. at 34-35. The court first erred by stating without citation that “The State concedes that Amendment 3 involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman.” *Id.* at 35. State Defendants never conceded that its marriage laws discriminated based on gender. To the contrary, State Defendants consistently maintained that the laws are

not discriminatory because they “are generally and neutrally applicable to both genders.” State Defendants’ MSJ at 23; *see also* State Defendants’ MSJ Response at 25-26 (“the Utah marriage statutes do not discriminate between men and women. In prohibiting any person—man or woman—from marrying a person of the same sex, Utah law treats men and women equally.”). That meaning, as State Defendants pointed out to the district court, does not constitute gender discrimination because it treats men and woman equally. *See id.*; *Sevcik*, 911 F. Supp. 2d at 1005; *Jackson*, 884 F. Supp. 2d at 1098-99 (citing at least nine other cases and noting agreement with the “vast majority of courts considering the issue” that the traditional definition of marriage “does not constitute gender discrimination.”).

The court’s second error flowed from its attempt to liken man-woman marriage to the anti-miscegenation laws struck down in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* Mem. Dec. at 35. But that flawed comparison overlooks, among other things, the fact that the anti-miscegenation laws at issue in *Loving* were overtly discriminatory on the basis of race (the precise class of people the Fourteenth Amendment was enacted to protect).

Though lengthy, it is worth quoting the federal district court's opinion in *Sevcik* analyzing and rejecting the flawed *Loving* comparison the district court below relied on:

The [traditional marriage] laws at issue here are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived. So although the *Loving* reciprocal-disability principle would indicate a gender-based distinction in a case where the members of a particular gender were targeted, because it is homosexuals who are the target of the distinction here, the level of scrutiny applicable to sexual-orientation-based distinctions applies. *See Loving*, 388 U.S. at 11, 87 S.Ct. 1817 (noting that the anti-miscegenation laws at issue in that case targeted racial minorities because the laws were “designed to maintain White Supremacy”). Here, there is no indication of any intent to maintain any notion of male or female superiority, but rather, at most, of heterosexual superiority or “heteronormativity” by relegating (mainly) homosexual legal unions to a lesser status. In *Loving*, the elements of the disability were different as between Caucasians and non-Caucasians, whereas here, the burden on men and women is the same. The distinction might be gender based if only women could marry a person of the same sex, or if only women could marry a transgendered person, or if the restriction included some other asymmetry between the burdens placed on men and the burdens placed on women. But there is no distinction here between men and women, and the intent behind the law is to prevent homosexuals from marrying.

*Sevcik*, 911 F. Supp. 2d at 1005.

The district court also wrongly concluded that Utah's marriage laws do not even satisfy the minimal requirements of the rational basis test. In other words, the court held that the man-woman definition of marriage bears no rational relationship to any legitimate state interests. Mem. Dec. at 41. In the district court's view, this age-old institution is irrational, discriminatory and unconstitutional.

But numerous state and federal courts (at the trial court and appellate level) have reached the opposite conclusion. These courts have found that the traditional definition of marriage is rationally related to at least two legitimate state interests. In short, man-woman marriage promotes the State's compelling interest in the care and well-being of children (and society) by facilitating responsible procreation and the ideal mode of child-rearing. *See, e.g., Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) ("It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating,

socializing, and preparing its future citizens to become productive participants in civil society.”).

First, because “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies,” the government “may secure this against impeding restraints and dangers, within a broad range of selection.” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

Accordingly, Utah could rationally “find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. [Utah] thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.” *Hernandez v. Nobles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality op.). Many other judicial decisions have reached the same conclusion. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006); *Sevcik*, 911 F. Supp. 2d at 1015-16; *Jackson*, 884 F. Supp. 2d at 1111-1114; *In re Kandau*, 315 B.R. 123, 145-146 (Bankr. W.D. Wash. 2004) ; *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff’d on other grounds*, 673 F.2d 1036 (9th Cir. 1982);

*Standhardt v. Superior Court*, 77 P.3d 451, 461-65 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 363 (D.C. 1995) (Steadman, A.J., concurring); *Morrison v. Sadler*, 821 N.E.2d 15, 23- 31 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (plurality op.); *id.* at 1002-03 (J.M. Johnson, J., separate op. concurring in judgment only); *Singer v. Hara*, 522 P.2d. 1187, 1195 (Wash. Ct. App. 1974); *see also Goodridge*, 798 N.E.2d at 995-1004 (Cordy, J., dissenting).

Second, traditional marriage increases the likelihood that children will be raised by their biological parents. And Utah could rationally conclude that, all things being equal, it is better for children to grow up being raised by both their mother and a father. *Hernandez*, 855 N.E. 2d at 7 (plurality op.) (“[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 678 (“[t]he state also could have rationally concluded that children are benefited by being exposed to and

influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship.”); *Anderson*, 138 P.3d at 983 (“the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a ‘traditional’ nuclear family where children tend to thrive.”). Indeed, society (and Supreme Court jurisprudence) have “always presumed [biological parents] to be the preferred and primary custodians of their minor children.” *Flores*, 507 U.S. 292 at 310; *see also Bowen*, 483 U.S. at 614 (Brennan, J., dissenting) (“[t]he optimal situation for the child is to have both an involved mother and an involved father.” (quoting Henry B. Biller, *Paternal Deprivation* 10 (1974))).

The mere fact that so many other courts have found the traditional definition of marriage to satisfy rational basis review is reason enough to conclude that State Defendants have a sufficient likelihood of success on appeal to warrant a stay pending appeal of the district court’s order.

The district court’s flawed rational basis analysis resulted in large part from its failure to frame the issue properly. According to the court,



its “focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. . . . [Rather,] [t]he court must . . . analyze whether the State’s interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying.” Mem. Dec. at 42-43.

The district court could hardly have framed the issue more incorrectly. The Supreme Court has held that a classification subject to rational basis review will be upheld when “the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not.” *Johnson v. Robison*, 415 U.S. 361, 382–83 (1974). As the federal district court in *Jackson* explained:

Thus, the state is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage. *See Andersen*, 138 P.3d at 985 (plurality) (explaining the relevant inquiry is whether granting opposite-sex couples the right to marry furthers the state's interest, not whether such interests are furthered by denying same-sex couples the right to marry, and noting “the constitutional inquiry means little if the entire focus, and perhaps outcome, may be so easily altered by simply rewording the question”). Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or

furthered to the same degree, by allowing same-sex couples to marry. *See Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind.App.2005) (“The key question in our view is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under ... the Indiana Constitution.”); *Standhardt v. Superior Court*, 206 Ariz. 276, 77 P.3d 451, 463 (Ariz. App. 2003).

*Jackson*, 844 F. Supp. 2d at 1106-1107 (footnote omitted).

Traditional man-woman marriage promotes the State’s interest in responsible procreation and in the optimal mode of child-rearing. Same-sex couples, who cannot procreate, do not promote the State’s interests in responsible procreation (regardless of whether they harm it). Utah’s choice to define marriage as between a man and a woman is therefore constitutional. *Bruning*, 455 F.3d at 867 (noting the “responsible procreation” rationale “justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot.”); *Jackson*, 844 F. Supp. 2d at 1114 (“opposite-sex couples, who can naturally procreate, advance the interest in encouraging

natural procreation to take place in stable relationships and same-sex couples do not to the same extent.”); *Standhardt*, 77 P.3d at 463 (“Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”); *Morrison*, 821 N.E.2d at 25 (“the legislative classification of extending marriage benefits to opposite-sex couples but not same-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by ‘natural’ means.”); *see also Garrett*, 531 U.S. at 366-67 (“where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State’s decision to act on the basis of those differences does not give rise to a constitutional violation.” (internal quotation marks omitted)); *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (“the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”).

## II. THREAT OF IRREPARABLE HARM

The district court’s decision constitutes a fundamental shift away

from society's understanding of what marriage is. For over one hundred years Utah has always adhered to a definition of marriage as the union of a man and a woman and has never recognized as a marriage any other kind of relationship. And Utah does not stand alone. A majority of States adhere to the same definition of marriage.

As the Supreme Court has recognized, “extending constitutional protection to an asserted right or liberty interest, . . . to a great extent, place[s] the matter outside the arena of public debate and legislative action. *Washington v. Glucksberg*, 421 U.S. 702, 720 (2009). The district court’s decision has taken the important public policy question of same-sex marriage away from the people of the State of Utah and, as such, constitutes a threat of irreparable harm to the democratic process in Utah. “[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.” *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”)).

An additional threat of irreparable harm exists for same-sex couples who may proceed to marry during the pendency of an appeal. Such marriages would be entered into under a cloud of uncertainty. Should the appeal be successful those couples will suffer harm when their marriages are declared invalid. The State would also face administrative burdens associated with issuing licenses under a cloud of uncertainty. And, actions taken in reliance upon a marriage, that ultimately may prove to be invalid or not recognized in the case of an out-of-state marriage, would undoubtedly impact employers, creditors, and others. These harms can easily be avoided by granting a stay pending appeal.

### **III. ABSENCE OF HARM TO OPPOSING PARTIES**

The only potential harm Plaintiffs may suffer if a stay is granted is, at most, a delay in their ability to marry in Utah or, in the case of an out-of-state marriage, recognition of that marriage. Such a harm is not irreparable. If the district court's ruling is upheld on appeal the Plaintiffs, if not all married already, would be able to marry at that time and, in the case of an out-of-state marriage, their marriage would be recognized. Granting the stay simply preserves the status quo.

Conversely, as detailed above, the Plaintiffs and others *will* suffer harm if a stay is not granted and they proceed to marry during the pendency of an appeal that is ultimately successful.

#### **IV. RISK OF HARM TO THE PUBLIC INTEREST**

The Utah public has an interest in deciding, through the democratic process, public policy issues of such societal importance as whether to retain the traditional definition of marriage.<sup>5</sup> Removing the decision from the people is a harm to the public interest. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)(“[I]t is clear that a state suffers irreparable injury whenever an enactment of its people ... is enjoined.” ).

The public also has an interest in certainty and in avoiding unnecessary expenditures. As outlined above, should a stay *not* be granted marriages are entered into under a cloud of uncertainty and the State faces administrative burdens associated with issuing licenses under that cloud of uncertainty. And, actions taken in reliance upon a marriage that, ultimately may prove to be invalid, impacts employers, creditors, and others.

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<sup>5</sup> The district court itself noted that “[f]ew questions are as politically charged in the current climate.” Mem. Dec. at 2.

## **CONCLUSION**

This Court should follow the example of the Ninth Circuit Court of Appeals in the Proposition 8 litigation and grant a stay pending appeal. *See Perry v. Brown*, 671 F.3d 1052, 1070 (2012), *vacated and remanded*, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). The Court should also grant a temporary stay of the district court's order pending resolution of the motion to stay.

For the foregoing reasons, this court should grant a stay pending appeal.

Dated this 23<sup>rd</sup> day of December, 2013.

Respectfully submitted,

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**10<sup>TH</sup> CIRCUIT RULE 8.2 CERTIFICATE**

Pursuant to 10<sup>th</sup> Cir. R. 8.2, the undersigned certifies that:

1) State Defendants filed their Emergency Motions for Stay Pending Appeal and Temporary Stay Pending Resolution of Motion to Stay immediately after the district court denied to grant a stay pending appeal. It could not have been filed earlier.

2) The district court's Memorandum and Decision and Order was entered on December 20, 2013 at approximately 1:30 p.m. and was effective immediately.

3) The telephone numbers and email addresses for counsel of record are as follows:

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### **ECF CERTIFICATIONS**

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;
2. hard copies of the foregoing motion required to be submitted to the clerk's office are exact copies of the brief as filed via ECF; and
3. the brief filed via ECF was scanned for viruses with the most recent version of Microsoft Security Essentials v. 2.1.111.6.0, and according to the program is free of viruses.

s/ Stanford E. Purser

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd of December, 2013, a true, correct and complete copy of the foregoing Motion to Stay Pending Appeal was filed with the Court and served on the following via the Court's ECF system:

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