UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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 of Governor of Utah; and BRIAN L. TARBET, in his official capacity as Acting Attorney General of Utah, Defendants-Appellants.	No. 13-4178

PLAINTIFFS-APPELLEES' OPPOSITION TO STATE DEFENDANTS-APPELLANTS' EMERGENCY MOTIONS FOR STAY PENDING APPEAL AND TEMPORARY STAY PENDING RESOLUTION OF MOTION TO STAY [DOC. #01019176532]

Plaintiffs-Appellees Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge (collectively, "Plaintiffs"), by and through their counsel of record, Magleby & Greenwood, P.C., respectfully submit this Plaintiffs-Appellees' Opposition to State Defendants-Appellants' Emergency Motions for Stay Pending Appeal and Temporary Stay Pending Resolution of Motion to Stay [Doc. #01019176532] ("Motion").

INTRODUCTION

This Court should deny Appellants' Motion for a stay. The District Court based its summary judgment order on extensive findings and conclusions regarding serious constitutional harms imposed by Utah Amendment 3—including violations of and interference with the fundamental right to marry and to equal protection of the laws. This Court has held that the

infringement of an important constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (quoting *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, as the District Court explained in its summary judgment order, "the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed" in this matter. Mem. Decision and Order at 50, *Kitchen v. Herbert*, No. 13-217 (D. Utah Dec. 20, 2013) (Doc. No. 90) (attached as Addendum A to Appellants' Motion) (hereinafter "Order").[1]

The District Court based its thorough and well-reasoned opinion on the Supreme Court's recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), as well as the Supreme Court's prior decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996).

Appellants bear the burden of demonstrating the necessity for the stay through a four-part test, including (1) that Appellants have made "a strong showing" that they will likely succeed on the merits; (2) that Appellants will be irreparably harmed absent a stay; (3) that a stay will not "substantially injure" the other parties, and; (4) that a stay is in the public's interest. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009); *see also* Fed. R. App. P. 8; 10th Cir. R. 8.1. When demonstrating irreparable harm, more than a mere "possibility of irreparable injury" is required. *Nken*, 556 U.S. at 434-35 (quotation omitted). All of these elements strongly counsel against granting a stay in this case.

[1] The District Court's December 23, 2013, Order on Motion to Stay ("Order Denying Stay") is attached hereto as Exhibit "A." In addition, the transcript of the December 23, 2013, hearing on that motion is attached hereto as Exhibit "B."

I. SUPREME COURT PRECEDENTS SUPPORT THE DISTRICT COURT'S DECISION AND APPE LLANTS CANNOT SHOW A ST RONG LIKELIHOOD OF SUCCESS ON APPEAL

Appellants do not make any relevant showing, much less the requisite "strong showing," that they are likely to succeed on appeal. *Nken*, 556 U.S. at 434 (quotation omitted). The legal landscape has shifted as a result of the Supreme Court's decision in *Windsor*. Even though Windsor does not decide the ultimate issues in this case—regarding whether Utah must let same-sex couples marry or recognize their existing marriages—in light of the reasoning in *Windsor*, Utah cannot meet its burden of showing a strong likelihood of success on the merits.

A. *Windsor* Strongly Supports the District Court's Judgment

The District Court relied on *Windsor's* reasoning, as well as principles from *Lawrence* and *Romer*, that strongly support the District Court's ruling. First, *Windsor* affirmed that state marriage laws are "subject to constitutional guarantees" and must "respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Second, citing the Court's prior holding in *Lawrence v. Texas*, *Windsor* affirmed that the Constitution "protects the moral and sexual choices" of same-sex couples and held that their relationships, including the relationships of legally married same-sex couples, have the same constitutional protections as others and are entitled to be treated by the government with "equal dignity." *Id.* at 2693-94. The District Court properly relied on this aspect of *Windsor* in explaining why gay and lesbian persons have the same fundamental right to marry as others.

Third, *Windsor* affirmed that "discriminations of an unusual character," including against gay people with respect to marriage, warrant careful consideration. The District Court carefully outlined how the challenged Utah laws, which like similar laws in many other states, were enacted expressly in order to exclude same-sex couples from marriage, are unusual. Order at 39-40. In *Windsor*, the Court found that Section 3 of the federal Defense of Marriage Act was

motivated by animus, *Windsor*, 133 S. Ct. at 2693, even though it was supported by large majorities of Congress. *Windsor* makes clear that state laws enacted in quick succession to make sure that no gay couple could be married anywhere also warrant close scrutiny from the court.

Finally, *Windsor* held that laws enacted expressly in order to deny recognition to legally married same-sex couples inflict injuries of constitutional dimensions. *Id.* at 2694 (ruling that DOMA "demeans" same-sex couples, and "humiliates tens of thousands of children now being raised" by those couples). That holding applies directly to Utah's refusal to recognize the lawful marriages of same-sex couples who married in other states. The harm inflicted by the government's refusal to recognize an existing marital relationship is no less when it is a state, rather than the federal government, that denies recognition. And as the District Court correctly held, the Court's analysis of the profoundly stigmatizing impact of laws that single out same-sex couples for discrimination with respect to marriage applies equally to Utah's laws excluding same-sex couples from the ability to marry. Those laws stigmatize and harm these families, while providing no benefit to others.

B. Baker Does Not Bind This Court and Provides No Support for Appellants' Contention that They Are Likely To Prevail

Appellants invoke the Supreme Court's 1972 summary dismissal of the appeal for want of a substantial federal question in *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed w/o op*., 409 U.S. 810 (1972), contending that *Baker* requires dismissal of Appellees' challenge to Utah's laws barring same-sex couples from marriage and refusing to recognize valid marriages entered into by same-sex couples in other states. But the Supreme Court has cautioned that, "'when doctrinal developments indicate otherwise,'" the lower federal courts should not "'adhere to the view that if the Court has branded a question as unsubstantial, it remains so.'" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting *Port Auth. BondholdersProtective Comm.*

v. Port of N.Y. Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)). "In the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor*, 699 F.3d at 178-79. As the Second Circuit has explained:

> When Baker was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully 'demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime.'"

Id. at 179 (citations omitted).

Baker did not and could not address how any of these doctrinal developments bear on Appellees' equal protection claims. Similarly, *Baker* could not and did not address how Appellees' substantive due process claims should be evaluated in light of the court's intervening decisions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987), and *Lawrence v. Texas*, 539 U.S. 558 (2003).[2]

Further, *Baker* did not address whether a State violates equal protection and due process by categorically excluding legally married same-sex couples from its longstanding practice and law that a marriage valid where celebrated generally will be recognized as valid in Utah. The *Baker* decision did not even consider this question, much less resolve it; therefore, *Baker* cannot

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[2] Several courts in addition to the Second Circuit have held that *Baker* is not controlling precedent. *See Smelt v. County of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) ("Doctrinal developments show it is not reasonable to conclude the questions presented in the *Baker* jurisdictional statement would still be viewed by the Supreme Court as "'unsubstantial.'"), *vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (explaining that "*Baker* is not binding precedent" because of, among other things, "the possible impact of recent Supreme Court decisions, particularly as articulated in *Lawrence*"); *Garden State Equality v. Dow*, No. CIV.A. MER-L-1729-11, 2012 WL 540608, at *4 (N.J. Super. Ct. Feb. 21, 2012) ("The United States Supreme Court has decided several pertinent cases both contemporaneous with *Baker* and more recently which indicate that the issue of denying same-sex couples access to the institution of marriage would not be considered 'unsubstantial' today.").

be deemed to resolve whether Utah must afford equal recognition to the valid out-of-state marriages of same-sex couples. *Mandel v. Bradley*, 432 U.S. 173, 176 (1979) (holding that a summary dismissal by the Supreme Court for want of a substantial federal question is dispositive only on "the precise issues presented and necessarily decided").

For all these reasons, *Baker* is irrelevant to Plaintiffs' challenge to Utah's Discriminatory Marriage Laws.

C. Appellees Are Likely To Prevail on the Merits

Appellees have raised numerous constitutional claims; Appellants must show a strong likelihood that all of these claims will fail, which they cannot do. Appellees are highly likely to succeed on their claim that Utah's law violates their fundamental right to marry. The United States Supreme Court has repeatedly held that the freedom to marry is a fundamental right deeply rooted in privacy, liberty, and freedom of intimate association. *See, e.g., Loving*, 388 U.S. at 12; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U.S. 78, 95 (1987). Without deciding whether a state must permit same-sex couples to marry, the Supreme Court has held that individuals in same-sex relationships have the same liberty and privacy interest in their intimate relationships as other people. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). In *Windsor*, the Supreme Court reaffirmed that principle and further held that legally married same-sex couples—like some of the Plaintiffs in this case—have a protected liberty interest in their marriages, and that the marriages of same-sex couples and opposite-sex couples must be treated with "equal dignity." *Windsor*, 133 S. Ct. at 2693.

These precedents strongly support the District Court's determination that persons in same-sex relationships have the same stake as others in the underlying autonomy, privacy, and associational interests protected by the fundamental freedom to marry. When determining the

contours of a fundamental right, the Supreme Court has never held that the right can be limited based on who seeks to exercise it or on historical patterns of discrimination. The position urged by Appellants—that Appellees seek not the same right to marry as others, but a new right to "same-sex marriage—repeats the analytic error made by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court erroneously framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id*. at 190. As the Supreme Court explained when it reversed *Bowers* in *Lawrence*, that statement "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." 539 U.S. at 567. Similarly here, there is no principled basis for framing the right at stake as a new right specific only to gay and lesbian persons. Appellees and others seek to exercise the same right to marry enjoyed by all other citizens of this nation, and the District Court properly held that the State of Utah lacks even a rational basis, much less a justification sufficient under the heightened scrutiny applied to laws that infringe upon a fundamental liberty, for categorically excluding same-sex couples from that right.

Appellees are also highly likely to succeed on their claims that Utah's marriage ban violates their right to equal protection of the laws by discriminating based on sex and sexual orientation. Appellants argue that Utah's marriage laws do not discriminate based on sex because they equally prevent both men and women from marrying a person of the same sex. A virtually identical argument was made and rejected in *Loving v. Virginia*, 388 U.S. 1, 8 (1967). Appellees seek to distinguish *Loving* by arguing that the law challenged there was held to be invalid because it was based on racial animosity. Motion at 14. But *Loving* expressly held that even if the law reflected "an even-handed state purpose," it would still warrant heightened

review. 388 U.S. at 11 fn. 11. Similarly here, it is plain that Utah's marriage laws embody a sex-based classification that warrants heightened review.

Utah's marriage laws also warranted heightened review because they additionally discriminate based on sexual orientation. In *Windsor*, the Supreme Court noted that lower courts across the country are considering whether "heightened equal protection scrutiny should apply to laws that classify based on sexual orientation." 133 S. Ct. at 2684-85. In addition, the Supreme Court let stand the Second Circuit's holding that heightened scrutiny applies to such laws. *Id*. at 2684 (noting that the Second Circuit "applied heightened scrutiny to classifications based on sexual orientation"). Applying the criteria used by the Court in prior cases to determine when certain classifications warrant heightened scrutiny, many courts have now concluded that laws that discriminate against gay people must be subjected to careful review.[3] In light of these precedents and the Supreme Court's application of "careful consideration" in *Windsor*, Appellees are likely to succeed on their claim that Utah's discrimination against same-sex couples must be subjected to heightened review.

Moreover, even under rational basis review, Appellees are likely to succeed on their equal protection claim because, as the District Court carefully demonstrated, and as numerous other courts have also found, there is no rational connection between Utah's discriminatory marriage laws and the promotion of "responsible procreation" by opposite-sex couples. To the extent the benefits and protections of marriage encourage opposite-sex couples to marry before having children, those incentives existed long before those discriminatory laws were enacted,

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[3] *See*, *e.g*., *Griego v. Oliver*, No. 34,306, 2013 WL 6670704 at *18 (N.M. Dec. 19, 2013); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 175, 957 A.2d 407, 432 (Conn. 2008) *In re Marriage Cases*, 43 Cal. 4th 757, 844, 847 (2008). *See also Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012), cert. denied, 133 S. Ct. 2887 (U.S. 2013) (holding that review of DOMA "require[s] a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage").

and they would continue to exist if those laws were struck down. *Cf. Windsor v. United States,* 699 F.3d 169, 188 (2d Cir. 2012) ("DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before."); see also, e.g., *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) (holding "responsible procreation" argument failed to "explain how denying benefits to same-sex couples will reinforce heterosexual marriage"); *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009) ("[T]he County fails to address the real issue in our required analysis of the objective: whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation?") (emphasis in original).

Appellants' contention that they need not show that the exclusion of same-sex couples from marriage would advance the asserted state interest in responsible procreation has no merit. Appellants' Mtn. at 26. Appellants rely on the statement in *Johnson v. Robinson*, 415 U.S. 361, 383 (1974) that classifications are acceptable if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Id.* at 25-26. But when state laws classify citizens differently, "the distinctions [the State] makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). In other words, the State must justify its *exclusion* of same-sex couples from the benefits of marriage, and not just its inclusion of opposite-sex couples. *See, e.g.*, *id.* (while purpose of rewarding Vietnam Veterans was valid, equal protection was violated by exclusion from tax benefit of persons who did not reside in the state before a certain date); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (examining the city's interest in excluding housing for people with developmental disabilities from general residential

zoning ordinance); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-38 (1973) (testing the federal government's interest in excluding unrelated households from food stamp benefits, not in maintaining food stamps for related households); *Eisenstadt v. Baird*, 405 U.S. 438, 448-53 (1972) (requiring a state interest in excluding unmarried couples from lawful access to contraception, not merely an interest in allowing married couples access).

The fact that same-sex couples procreate only through planned conception or adoption does not provide a rational basis for excluding those couples and their children from the many protections marriage provides. Indeed, the asserted governmental interest in encouraging procreation and child-rearing to occur within the stable family context that marriage provides applies just as strongly to same-sex couples and their children as it does to opposite-sex couples. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 339 (D. Conn. 2012); *In re Marriage Cases,* 43 Cal.4th 757, 828, 183 P.3d 384, 433 (2008).

Furthermore, marriage in Utah as in other states is tied to a wide array of governmental programs and protections, many of which have nothing to do with child-rearing or procreation. The fact that same-sex couples do not engage in unplanned procreation does not provide a rational basis for excluding married same-sex couples from all of the other protections provided to married couples under Utah law. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, as in *Romer*, "[t]he breadth of [Utah's discriminatory marriage laws] is so far removed from these particular justifications that [it is] impossible to credit them." *Id.* at 635. Appellants' "responsible procreation" argument fails to provide even a rational justification for Utah's categorical exclusion of an entire class of its citizens from marriage, let alone a justification

strong enough to overcome the laws' "purpose and effect to disparage and to injure" those couples and their children, as *Windsor* requires. 133 S. Ct. at 2696.

In sum, the State Defendants have not made a strong showing that they are likely to succeed on the merits; to the contrary, *Windsor* and other Supreme Court precedents show that Appellee same-sex couples are likely to succeed in overturning Utah's unconstitutional laws.

II. THE STATE DEFENDANTS HAVE NOT SHOWN THEY WILL SUFFER IRREPARABLE HARM

To obtain a stay, Appellants must show they will suffer more than a mere "possibility of irreparable injury" in the absence of the stay. *Nken*, 556 U.S. at 434-35 (quotation omitted). Here, Appellants assert only speculative harms that do not meet this test. Appellants assert that permitting same-sex couples to marry will create "uncertainty" and threaten "the democratic process in Utah." But the democratic process is strengthened, not threatened, when courts vindicate the fundamental rights and liberties of citizens. Appellants argue that there is irreparable harm whenever an enactment of a state is enjoined. Motion at 4. In so doing, they cite to *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997), a Ninth Circuit case in which the court had found the challenged state measure to be constitutional. This is the opposite situation of this case, where this Court has ruled that the laws at issue violate the United States Constitution. The State does not suffer irreparable harm where the law that is enjoined is likely unconstitutional. Otherwise, any time a state were seeking a stay of an injunction of an unconstitutional law, the state would win. This would unduly tip the scale in favor of the government in any case challenging a government enactment, and against the constitutional rights of the citizenry.

Moreover, the only relevant "cloud of uncertainty" is the one hanging over Appellees and other same sex couples who, as a direct result of being denied the right to marry, are unable to financially and legally protect their families.

In fact, as the district court pointed out in its decision below, the immediate implementation of marriage equality will not harm the state in any way. Appellants can simply apply its existing marriage laws and administrative structures to same-sex couples. No new laws, procedures, or administrative requirements are necessary and the county clerks can simply issue marriage licenses as they do in the regular course of their business. *See* Order at 47-48 ("[T]he process of allowing same-sex marriage is straightforward and requires no change to state tax, divorce, or inheritance laws.").

III. A STAY WOULD CAUSE SUBSTANTIAL AND IRREPARABLE HARM TO PLAINTIFFS-APPELLEES

Appellees have demonstrated, and the district court agreed, that Utah's laws deprive them of due process and equal protection of the laws. As the Supreme Court, this Circuit, and many other courts have held, violations of constitutional rights, even for short periods of time, constitute irreparable harm. *See Elrod v. Burns,* 427 U.S. 347, 373 (1976) (infringement of a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury."); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005).

In addition to irreparable constitutional harms, Appellees also suffer severe dignitary and practical harms right now that cannot be redressed by money damages or a subsequent court order. As *Windsor* affirmed, marriage is a status of "immense import." *Windsor*, 133 S. Ct. at 2692. Utah's laws barring same-sex couples from that status and denying recognition to same-sex couples who are legally married subjects these families to severe and irreparable harms. In addition to subjecting same-sex couples and their children to profound legal and economic

vulnerability and harms, those laws stigmatize their relationships as inferior and unequal. In *Windsor*, the Court echoed principles set forth in *Loving v. Virginia*, 388 U.S. 1 (1967), forty-six years earlier, finding that discrimination against same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S.Ct. at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). The Court made clear that the discriminatory treatment "humiliates tens of thousands of children now being raised by same-sex couples" and that "the law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id*. Thus, as the District Court concluded below, "[i]n contrast to the State's speculative concerns, the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed. Order at 50.

Appellants attempt to minimize Appellees' harms by arguing that a stay, "at most," would lead only to a delay in Appellees' ability to marry. Motion at 29. But cases across the country have already demonstrated that the inability to marry, or have an existing marriage recognized by the State, subjects gay and lesbian couples not only to catastrophic and permanent harm, but also to the intolerable threat of such harm. A district court in Illinois, for instance, granted a temporary restraining order to "medically critical plaintiffs" who, if not permitted to marry immediately, would "be deprived of significant federal rights and benefits." *Lee v. Orr*, No. 13-CV-8719, 2013 WL 6490577, at *3 (N.D. Ill. Dec. 10, 2013). The stay of the Northern District of California's ruling in *Hollingsworth v. Perry* pending appeal cost California couple Stacey Schuett and Lesly Taboada-Hall the opportunity to legally marry before Lesly's death just six days before the Supreme Court issued its decision, leaving her partner's status a widow in legal limbo. *See* Mary Callahan, *Judge Tentatively Sides with Sebastopol Widow in Gay*

Marriage Case, The Press Democrat, Sept. 17, 2013, http://www.pressdemocrat.com/article/20130917/articles/130919583; Mary Callahan, *Judge Grants Legal Recognition to Sebastopol Women's Marriage After Legal Battle*, The Press Democrat, September 18, 2013, http://www.pressdemocrat.com/article/20130918/articles/130919524.[4]

In this case, Appellees Karen Archer and Kate Call face a similar fate if a stay is issued pending resolution of this appeal. It is undisputed that Karen Call is suffering from a terminal illness that may very well prevent her from surviving the instant appeal. Order at 5-6. Forcing same-sex couples and their families to wait and hope for the best during the pendency of this appeal imposes an intolerable and dehumanizing burden that no family should bear.[5]

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[4] *See also Obergefell v. Wymyslo*, Case No. 1:13-cv-501, Final Order Granting Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction, slip op. at 46 (S.D. Ohio Dec. 23, 2013) (holding that incorrectly classifying plaintiffs as unmarried on a death certificate would result in severe and irreparable harm including denial of status as surviving spouse with its attendant benefits and inability to comply with decedent's final wishes); *Griego v. Oliver*, Case No. D 202 CV 2013 2757, Declaratory Judgment, Injunction, and Peremptory Writ of Mandamus, slip. op. at *4 (N.M. Dist. Ct. Sep. 3, 2013) (holding denial of right to marry constitutes irreparable harm after terminally ill plaintiff moved for temporary restraining order allowing her to marry her partner before dying); *Griego v. Oliver*, Case No. D 202 CV 2013 2757, Plaintiffs Roper and Neuman's Motion for Temporary Restraining Order (N.M. Dist. Ct. Aug. 21, 2013) (detailing irreparable harms same-sex couple with terminally ill partner would suffer if unable to legally marry in New Mexico).

[5] The State Defendants urge this Court to "follow the example" of the Ninth Circuit in the California Proposition 8 litigation by granting a stay pending appeal. Motion at 2. Yet as soon as the Supreme Court issued its decision in *Windsor*, the Ninth Circuit immediately lifted its stay. *See Perry v. Brown*, 725 F.3d 968, 970 (2013) ("The stay in the above matter is dissolved effective immediately."). In addition, courts that have considered this issue since *Windsor* have refused to stay their rulings or to stay lower court rulings allowing same-sex couples to marry pending appeal. *See, e.g.*, *Garden State Equality v. Dow*, __ A.3d. __, 2013 WL 5687193 (N.J. Oct. 18, 2013) (New Jersey Supreme Court order denying stay); *Griego v. Oliver*, Case No. D 202 CV 2013 2757, Declaratory Judgment, Injunction, and Peremptory Writ of Mandamus, slip. op. at 2-3 (N.M. Dist. Ct. Sep. 3, 2013) (ordering county clerks in Bernalillo and Sandoval Counties to begin issuing marriages licenses to qualified same-sex couples based on court's determination that any exclusion of those couples from marriage was unconstitutional); *Gray v. Orr*, No. 1:13-cv-08449 (N.D. Ill. Dec. 5, 2013) (granting injunction permitting a same-sex couple to marry before the effective date of recently enacted Illinois statute eliminating the state's ban on marriage by same-sex couples)

IV. THE PUBLIC INTEREST WILL BE HARMED BY A STAY

"It 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) (citations and quotations omitted); *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir.1994) ("While the public has an interest in the will of the voters being carried out ... the public has a more profound and long-term interest in upholding an individual's constitutional rights.").

Appellants argue that the public has a right to decide issues of societal important "through the democratic process," and that there is a public interest in avoiding uncertainty. Yet none of these purported and undefined interests outweigh the public's interest "in constitutional rights being upheld and in unconstitutional decisions by the government being remedied." *See Planned Parenthood of Arkansas & E. Oklahoma v. Cline*, 910 F. Supp. 2d 1300, 1308 (W.D. Okla. 2012) (citing *Awad*, 670 F.3d at 1132)). Indeed, there is no "public interest" in depriving a class of Utah's citizens of their constitutional rights while appellate review is pursued. *See, e.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law."). This is true even where the laws at issue are the result of a popular vote. *See Awad*, 670 F.3d at 1131-32 ("Appellants argue that the balance weighs in their favor because Oklahoma voters have a strong interest in having their politically expressed will enacted, a will manifested by a large margin at the polls. But when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [Plaintiff's] in having his constitutional rights protected"). The public has no interest in enforcing unconstitutional laws.

Moreover, as recognized in *Windsor* and the lower court's ruling, the public is harmed when families and children are deprived of the benefits and stability that that marriage provides:

> If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiffs' assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. . . . These children are also worthy of the State's protection[.]

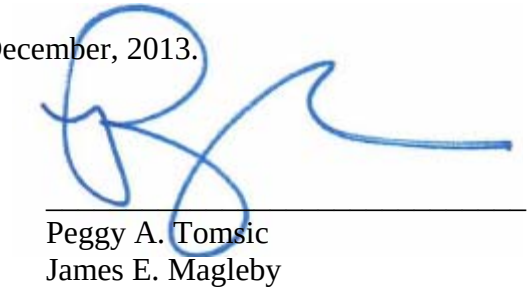
Order at 46.

The public has no interest in enforcing unconstitutional laws or in relegating same-sex couples and their families to a perpetual state of financial and legal vulnerability. The public interest weighs decidedly in favor of denying a stay pending appeal.

CONCLUSION

For the reasons discussed above, and in the Order Denying Stay, the Court should deny the Appellants' Motion.

DATED this 23rd day of December, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 850, Salt Lake City, Utah 84101, and that a true and correct copy of the foregoing **PLAINTIFFS-APPELLEES' OPPOSITION TO STATE DEFENDANTS-APPELLANTS' EMERGENCY MOTIONS FOR STAY PENDING APPEAL AND TEMPORARY STAY PENDING RESOLUTION OF MOTION TO STAY [DOC. #01019176532]** was delivered to the following this 23rd day of December, 2013, via the Court's CM/ECF system:

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Exhibit “A”

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DEREK KITCHEN, MOUDI SBEITY, KAREN ARCHER, KATE CALL, LAURIE WOOD, and KODY PARTRIDGE, Plaintiffs, vs. GARY R. HERBERT, JOHN SWALLOW, and SHERRIE SWENSEN, Defendants.	ORDER ON MOTION TO STAY Case No. 2:13-cv-217

On December 20, 2013, the court granted summary judgment for the Plaintiffs in this lawsuit. (Order, Dec. 20, 2013, Dkt. 90.) The court held that provisions in the Utah Code and the Utah Constitution[1] that prohibited same-sex marriage (collectively, Amendment 3) were unconstitutional because they denied the Plaintiffs their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The court enjoined the State of Utah from enforcing Amendment 3 to the extent that it prohibited a person from marrying another person of the same sex. The court's Order did not include a stay of its judgment as none had been requested by the State.

The court had a telephone conversation with counsel from both parties a few hours after it

[1]The court's Order specifically mentioned Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution. The court's Order also applies to any other Utah laws that prohibit same-sex couples from marrying.

issued its Order. The State represented to the court that same-sex couples had already begun marrying in the Salt Lake County Clerk's Office and requested the court to stay its Order of its own accord. The court declined to issue a stay without a written record of the relief the State was requesting, and asked the State when it was planning to file a motion. The State was uncertain about its plans, so the court advised the State that it would immediately consider any written motion as soon as it was filed on the public docket. The State filed a Motion to Stay later that evening. The court ordered expedited briefing on the State's Motion and set a hearing for 9:00 a.m. on December 23, 2013. The State requested in its Reply Brief that, if the court denied the State's Motion to Stay, the court order a temporary stay of its Order to allow the Tenth Circuit to make its own determination about whether a stay should be issued.

Having carefully reviewed the parties' briefing and oral arguments, and for the reasons discussed below, the court DENIES the State's Motion to Stay and the State's request for a temporary stay.

ANALYSIS

Rule 62(c) of the Federal Rules of Civil Procedure provides: "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction . . . on terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). The purpose of a stay is to preserve the status quo pending an appeal. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996). When considering a motion to stay pending appeal, the court considers four factors:

> (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 issuance of the stay will substantially injure the other parties

interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The court analyzes each of these factors below.

I. The State Has Not Shown that It Is Likely to Succeed on Its Appeal

The State argues that the court should stay its judgment because the State is likely to succeed on appeal. But the majority of the State's assertions in support of its argument are the same assertions the State made in its Motion for Summary Judgment. For the same reasons the court denied that motion, the court finds that the State has not submitted any evidence that it is likely to succeed on its appeal. The court granted summary judgment for the Plaintiffs on two separate grounds. First, the court found that Amendment 3 violated the Plaintiffs' fundamental right to marry. Second, the court found that Utah's prohibition on same-sex marriage was a violation of the Plaintiffs' equal protection rights.[2] The State can only succeed on its appeal if the Tenth Circuit rejects both of these holdings, and the State has not provided any reason to this court to suggest that the court overlooked crucial cases or other issues in its Order.

The only new argument the State makes to challenge the court's reasoning is its assertion that the court misconstrued the case of *United States v. Windsor*, 133 S. Ct. 2675 (2013), because the court cited portions of the Honorable Antonin Scalia's dissenting opinion. The court is not persuaded by the State's argument. Although Justice Scalia clearly disagreed with the outcome in *Windsor* and believed the majority of the Supreme Court had decided the case wrongly, his opinion about the reasoning underlying *Windsor* and the possible effects of this reasoning in future cases is nevertheless perceptive and compelling. The court therefore cited Justice Scalia's

[2]The court applied rational basis to its analysis of the Plaintiffs' equal protection claim, but noted that the claim was also subject to heightened scrutiny because Amendment 3 discriminated against the Plaintiffs on the basis of their sex.

dissent not as binding precedent, but as persuasive authority.

For these reasons, the court finds that the State has not carried its burden to make a strong showing that it is likely to succeed on appeal.

II. The State Has Not Shown that It Will Suffer Irreparable Harm

The State argues that it will suffer irreparable harm for three reasons. First, the State contends that Utah has recognized only opposite-sex marriage for over one hundred years and that it must therefore be cautious about any changes to this approach. The court addressed this argument in its Order and found that neither the State's asserted need to proceed with caution or its interest in preserving its previous laws about marriage were sufficient to withstand rational basis scrutiny.

Second, the State maintains: "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined." *Coal. 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)). The Plaintiffs point out that both cases cited by the State are inapposite because they involved statutes that the court considering the stay believed were valid. *See Wilson*, 122 F.3d at 719 (holding that a stay of the Ninth Circuit's mandate would be "tantamount to extending the preliminary injunction entered by the district court . . . which we have already held rests on an erroneous legal premise."); *New Motor Vehicle Bd.*, 434 U.S. at 1347 ("I am also of the opinion that a majority of the Court will likely reverse the judgment of the District court. . . . [T]he respondents for whom judgment is stayed are free to move the full Court to vacate a stay if they feel the Circuit Justice has miscalculated on [this] point."). The court agrees with the Plaintiffs that these cases are distinguishable from the facts presented here.

If the court were to follow the State's argument, it should automatically grant a stay of its judgment whenever it invalidates a State law. The court is unaware of any such practice within the Tenth Circuit.

Finally, the State argues that same-sex couples who marry pending an appeal to the Tenth Circuit face a cloud of uncertainty. It is the State's position that it will seek to invalidate any same-sex marriages lawfully entered into during this time if the Tenth Circuit or Supreme Court later upholds Amendment 3. But under this prong of the court's analysis, the court only considers the harm done to the State and not to the same-sex couples whose marriage arrangements may be subject to legal challenge. For the reasons stated in the court's previous Order, the court finds that there is no harm to the State in allowing same-sex couples to marry.

III. Granting a Stay Will Irreparably Harm the Plaintiffs and Other Same-Sex Couples

In contrast to the speculative harm faced by the State, there is no dispute that same-sex couples face harm by not being allowed to marry. In its Order, the court has already discussed these harms, which include harms to the partners in a same-sex couple and to members of their family. The State argues that the only harm caused by a stay would be a delay in the time that a same-sex couple would have to wait to marry in Utah or have their out-of-state marriage recognized. But some couples, including Plaintiffs Karen Archer and Kate Call, may be facing serious illness or other issues that do not allow them the luxury of waiting for such a delay.

IV. The Public Interest Will Be Harmed by a Stay

Finally, the State contends that the public interest will be harmed if the court does not issue a stay because the public has an interest in deciding public policy issues such as the definition of marriage. The court agrees that the public has a strong interest in exercising its

democratic powers. But as stated in its Order, the Constitution does not permit either a state legislature or the state's citizens through a referendum to enact laws that violate constitutionally protected rights. And "while the public has an interest in the will of the voters being carried out . . . the public has a more profound and long-term interest in upholding an individual's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012). The court therefore finds that the public interest factor weighs in favor of protecting the constitutional rights of Utah's citizens.

V. Temporary Stay

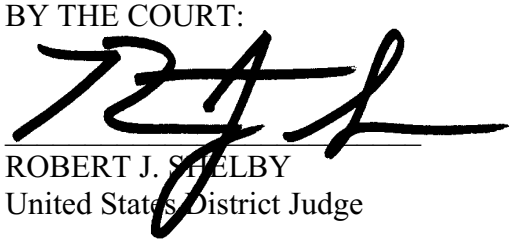
The State requests that, in the event the court denies its Motion to Stay, the court grant a temporary stay to allow the Tenth Circuit an opportunity to decide whether a stay is warranted. But the purpose of a temporary stay is to preserve the status quo. The court agrees with Defendant Sherrie Swenson in her official capacity as the Clerk of Salt Lake County that the status quo is currently that same-sex couples are allowed to marry in the State of Utah. As a result, the court would no longer be issuing a stay of its judgment, but an injunction enjoining county clerks in Utah from issuing marriage licenses to same-sex couples. Under these circumstances, the court finds that its appropriate role is to issue a ruling on the merits of the Defendants' Motion to Stay as expeditiously as possible, thereby immediately allowing the Tenth Circuit to exercise jurisdiction over the merits of the case and the question of whether a stay should be issued pending appeal.

ORDER

For the reasons stated above, the court hereby DENIES the Defendants' Motion to Stay (Dkt. 94).

SO ORDERED this 23rd day of December, 2013.

BY THE COURT:



ROBERT J. SHELBY
United States District Judge

Exhibit “B”

(825)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DEREK KITCHEN, INDIVIDUALLY;
MOUDI SBEITY, INDIVIDUALLY;
KAREN ARCHER, INDIVIDUALLY;
KATE CALL, INDIVIDUALLY;
LAURIE WOOD, INDIVIDUALLY; AND
KODY PARTRIDGE, INDIVIDUALLY.

PLAINTIFFS,

VS.

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH;
JOHN SWALLOW, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF UTAH; AND SHERRIE SWENSEN, IN HER OFFICIAL CAPACITY AS CLERK OF SALT LAKE COUNTY,

DEFENDANTS.

CASE NO. 2:13-CV-217

SALT LAKE CITY, UTAH
DECEMBER 23, 2013

DEFENDANTS' MOTION TO STAY PENDING APPEAL
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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P-R-O-C-E-E-D-I-N-G-S

(9:20 A.M.)

THE COURT: GOOD MORNING. LET ME TRY THAT AGAIN. THERE WE GO. GOOD MORNING, EVERYONE. WE'LL GO ON THE RECORD IN CASE NUMBER 2:13-CV-217. THIS IS KITCHEN, ET AL. VERSUS HERBERT AND THE STATE OF UTAH, ET AL.

COUNSEL, WHY DON'T YOU TAKE A MOMENT AND MAKE YOUR APPEARANCES, IF YOU WOULD, PLEASE.

MR. MAGLEBY: YOUR HONOR, PEGGY TOMSIC AND JENNIFER FRASER PARRISH ON BEHALF OF THE PLAINTIFFS. I WOULD ASK THAT THE COURT EXCUSE MR. MAGLEBY. HE IS OUT OF THE COUNTRY.

THE COURT: OF COURSE, THANK YOU.

MR. LOTT: YOUR HONOR, PHIL LOTT. TOGETHER WITH ME HERE IS ACTING ATTORNEY GENERAL BRIAN TARBET, AND ALSO STEVE WALKENHORST FROM THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE STATE DEFENDANTS.

THE COURT: THANK YOU.

MS. GODDARD: AND DARCY GODDARD AND RALPH CHAMNESS ON BEHALF OF CO-DEFENDANT SALT LAKE COUNTY.

THE COURT: THANK YOU. GOOD MORNING TO ALL OF YOU.

THIS IS THE TIME SET FOR HEARING ON THE STATE DEFENDANTS' MOTION FOR A STAY PENDING APPEAL. MY APOLOGIES TO KEEP -- FOR KEEPING ALL OF YOU THIS MORNING. WE WERE NOTIFIED JUST BEFORE WE WERE ABOUT TO COME OUT THAT THE TENTH CIRCUIT WAS ISSUING AN ORDER IN RESPONSE TO A MOTION I THINK THE STATE RENEWED I

THINK AT 1:00 O'CLOCK THIS MORNING. WE RECEIVED THE 10TH CIRCUIT'S WRITTEN RULING MOMENTS AGO. I JUST WANTED TO ENSURE WE HAD AN OPPORTUNITY TO REVIEW IT BEFORE WE CAME OUT SO THAT I WASN'T DOING SOMETHING IN VIOLATION OF THE TENTH CIRCUIT'S DIRECTIVES.

COUNSEL, A COPY OF THAT ORDER WAS PROVIDED TO BOTH OF YOU, IS THAT CORRECT?

MR. LOTT: YES.

MS. TOMSIC: YES, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, MR. LOTT, I'VE REVIEWED THE SUBMISSIONS ON BEHALF OF ALL THE PARTIES. IT'S THE STATE'S MOTION. THE FLOOR IS YOURS.

MR. LOTT: THANK YOU.

THE COURT: THANK YOU.

MR. LOTT: MAY IT PLEASE THE COURT. THIS COURT'S DECISION IS NOT THE FINAL WORD ON WHETHER UTAH'S MARRIAGE LAWS ARE CONSTITUTIONAL. IT HAS ALWAYS BEEN UNDERSTOOD THAT BOTH SIDES INTENDED TO APPEAL ONCE THE DECISION WAS ENTERED IN THIS CASE. HERE THE COURT HAS DECIDED TO IMPOSE ITS OWN VIEW OF MARRIAGE ON UTAH REGARDLESS OF THE FACT THAT THE PEOPLE OF UTAH HAVE DEMOCRATICALLY CHOSEN THE TRADITIONAL MAN/WOMAN DEFINITION OF MARRIAGE.

CONSIDERING HOW IMPORTANT AND HOW HOTLY CONTESTED THE DEFINITION OF MARRIAGE IS, AND THE FACT THAT NEITHER THE TENTH CIRCUIT COURT OF APPEALS OR THE SUPREME COURT HAS ISSUED A

FINAL RULING ON THIS ISSUE, THE NEED FOR A STAY IS READILY APPARENT. UTAH SHOULD BE ALLOWED TO FOLLOW ITS DEMOCRATICALLY CHOSEN DEFINITION OF MARRIAGE UNTIL AN APPELLATE COURT OF LAST RESORT HAS DECLARED OTHERWISE.

THE STATE DEFENDANTS ARE ENTITLED TO HAVE THIS COURT -- THIS COURT'S DECISION REVIEWED BY A HIGHER COURT BEFORE IT GOES INTO EFFECT. A MORE ORDERLY APPROACH THAN THE CURRENT FRENZY IS TO MAINTAIN THE STATUS QUO WHILE HIGHER COURTS REVIEW THE DECISION. NOT ALLOWING THE STAY PREJUDICES THE STATE'S RIGHT TO HAVE APPELLATE REVIEW BEFORE THIS COURT'S DECISION GOES INTO EFFECT.

THE COURT: WHAT IS THE STATUS QUO NOW, MR. LOTT? THE STATE -- THERE WAS NO MOTION AND NO REQUEST BY EITHER PARTY IN ADVANCE OF THE COURT'S RULING IN THIS CASE THAT THE RULING WOULD EVER BE STAYED PENDING AN APPEAL. IT WAS CLEAR THAT MY RULING WAS GOING TO BE APPEALED. HAVING NO MOTION BEFORE ME, THERE WAS NOTHING FOR THE COURT TO ADDRESS.

IN THE INTERIM, OF COURSE, PEOPLE BEGAN ACTING IN RELIANCE ON THE COURT'S ORDER. THE QUESTION IS WE NOW HAVE IN FRONT OF US A MOTION FOR STAY AND WE'RE ADDRESSING IT, BUT WHAT IS -- WHAT IS THE STATUS QUO?

MR. LOTT: WELL, TYPICALLY OUR -- OUR VIEW AND UNDERSTANDING IN A CASE LIKE THIS, TYPICALLY A CASE WOULD STAY SUA SPONTE BEFORE ENTERING AN ORDER THAT'S GOING TO GO INTO EFFECT. AND WE WERE FRANKLY SURPRISED BOTH WHEN THE ORAL

REQUEST THAT WAS MADE LAST WEEK WHEN THE STATE WAS NOTIFIED OF THE RULING WAS NOT CONSIDERED, AND THAT WE DO HAVE A WINDOW OF PERIOD -- A WINDOW OF TIME HERE THAT HAS RESULTED.

THE COURT: WELL, LET'S -- SO LET'S BE -- LET'S MAKE SURE OUR RECORD ABOUT THAT IS COMPLETE SO THAT BOTH PARTIES HAVE THE BENEFIT OF THAT IN YOUR APPEAL PROCESS. AND SO WE WERE -- WE WERE CONTACTED BY YOUR OFFICE ABOUT ROUGHLY TWO OR THREE HOURS AFTER THE ORDER ISSUED, I BELIEVE, AND WERE ASKED ABOUT -- I THOUGHT WITH TWO QUESTIONS THAT SOUNDED PROCEDURAL, AND FOR THAT REASON WE DIDN'T HAVE A COURT REPORTER ON HAND. I WASN'T NOTIFIED THAT THE STATE WAS INTENDING TO MAKE ANY MOTION AT THAT TIME. WE WERE ASKED WHETHER THE COURT INTENDED TO ISSUE A SUA SPONTE STAY, WHICH OF COURSE I WASN'T CONTEMPLATING AND NEITHER PARTY HAD REQUESTED ANYTHING AT THAT POINT.

AND I NOTIFIED THE STATE AND THE PLAINTIFFS, WE ENSURED BOTH PARTIES WERE ON THE LINE, NOTIFIED EVERYONE THAT WE WOULD TAKE UP IN URGENT FASHION ANY MOTION THAT ANYONE WISHED TO FILE BUT THAT WE WOULD REQUIRE IT BE IN WRITING SO THAT IT IDENTIFIED THE RELIEF SOUGHT, THE BASIS FOR THAT RELIEF, AND THE STANDARD THAT APPLIES, AND AFFORD THE PLAINTIFFS AN OPPORTUNITY TO RESPOND IN EXPEDITED FASHION. I DON'T KNOW IF YOU WISH TO ADD ANYTHING MORE TO COMPLETE THE RECORD ON THAT ISSUE BEFORE WE FINISH TODAY, AND I'LL ALLOW MS. TOMSIC TO AS WELL IF SHE'D LIKE.

BUT IN THE COURT'S VIEW, WE'RE HERE NOW ADDRESSING THE COURT'S STAY. WE HAVE A COMPLICATED STATE OF AFFAIRS. WE HAVE PEOPLE STANDING IN CLERKS' OFFICES RIGHT NOW. WE HAVE THE TENTH CIRCUIT WAITING TO SEE HOW THIS COURT RULES. AND I GUESS THE QUESTION IN MY MIND IS HOW DO WE PROCEED?

MR. LOTT: WE'RE HERE TO CONVINCE THE COURT TO ENTER STAY.

THE COURT: IF I CONCLUDE, APPLYING THE FACTORS THAT I'M REQUIRED TO ANALYZE IN DETERMINING WHETHER THE STAY SHOULD ISSUE, AND I DETERMINE THAT THE STATE HASN'T SATISFIED ITS BURDEN AS THE MOVING PARTY, IS THERE SOME INTERMEDIATE LEVEL OF RELIEF THAT THE STATE REQUESTS THAT I ENTER?

MR. LOTT: YES.

THE COURT: WHAT IS THAT?

MR. LOTT: IN OUR REPLY MEMORANDUM, THE COURT PROBABLY NOTICED AT THE END, WE'VE REQUESTED AS AN ALTERNATIVE IF THE COURT DOES NOT ENTER A STAY, A PERMANENT STAY, THAT THE COURT ENTER AT LEAST A STAY UNTIL THE TENTH CIRCUIT COURT OF APPEALS MAKES A FINAL DECISION ON THE MOTION BEFORE IT. THE MOTION THAT WAS BEFORE THE TENTH CIRCUIT TO THIS POINT IN TIME WAS AN EMERGENCY MOTION REQUESTING A STAY PENDING THIS COURT'S RULING. THAT'S BEEN DENIED, AS WE'RE AWARE NOW, WITHOUT PREJUDICE, AND THE STATE IS GOING TO REFILE AFTER THIS HEARING TODAY DEPENDING ON WHAT THE COURT'S DECISION IS.

SO AS AN ALTERNATIVE RELIEF, IF THE COURT DECIDES NOT TO

ISSUE A PERMANENT STAY PENDING APPEAL, THE ALTERNATIVE REQUEST IS THAT THE COURT AT LEAST GRANT A STAY UNTIL THE TENTH CIRCUIT DECIDES. AND THERE IS PRECEDENCE FOR THAT. JUDGE WALKER IN THE PROPOSITION 8 PERRY CASE GRANTED THAT RELIEF.

AS THE COURT HAS NOTED, THERE IS A CLOUD OF UNCERTAINTY OVER SAME-SEX MARRIAGES THAT HAVE CURRENTLY TAKEN PLACE. THE COURT CAN STOP THIS CHAOTIC SITUATION FROM CONTINUING BY PLACE -- BY STAYING ITS ORDER PENDING APPEAL.

NO ONE WINS, NOT UTAH, NOT THE PLAINTIFFS, NOR ANY SAME-SEX COUPLES IF UTAH'S MARRIAGE LAWS ARE CHANGED BACK AND FORTH DURING THE PENDENCY OF THIS PROCEEDING, DEPENDING ON WHICH COURT IS REVIEWING THE QUESTION. ON SUCH AN IMPORTANT SOCIAL ISSUE, THE STATUS QUO SHOULD REMAIN INTACT OF -- OF A STAY BEING IN PLACE UNTIL -- UNTIL THERE'S BEEN APPELLATE REVIEW.

THERE'S GREAT IRONY IN THE FACT THAT THE -- TO BE ALLOWED TO BECOME A STATE UTAH WAS COMPELLED BY THE FEDERAL GOVERNMENT TO ADOPT A DEFINITION OF MARRIAGE AS BEING A UNION OF ONE MAN AND ONE WOMAN, AND NOW THE FEDERAL DISTRICT COURT HAS IMPOSED UPON UTAH TO ABANDON THAT TRADITIONAL DEFINITION AND HAS ORDERED UTAH TO CHANGE ITS DEFINITION OF MARRIAGE TO INCLUDE SAME-SEX MARRIAGE.

THE COURT DECISION REACHES CONCLUSIONS UNPRECEDENTED IN THE TENTH CIRCUIT AND SUPREME COURT. NEITHER THE TENTH CIRCUIT NOR THE SUPREME COURT HAS EVER HELD THAT THE STATE IS

CONSTITUTIONALLY PROHIBITED FROM DEFINING MARRIAGE AS ONLY THE UNION BETWEEN A MAN AND A WOMAN. NEITHER THE TENTH CIRCUIT NOR THE SUPREME COURT HAS EVER HELD THAT THE FUNDAMENTAL RIGHT TO MARRY INCLUDES SAME-SEX MARRIAGE. NEITHER THE TENTH CIRCUIT OR THE SUPREME COURT HAS EVER HELD THAT A TRADITIONAL -- THE TRADITIONAL DEFINITION OF MARRIAGE SOMEHOW CONSTITUTES GENDER DISCRIMINATION. AND NEITHER THE TENTH CIRCUIT NOR THE SUPREME COURT HAS EVER HELD THAT TRADITIONAL MAN/WOMAN MARRIAGE IS IRRATIONAL, DISCRIMINATORY OR UNCONSTITUTIONAL.

IN FACT THE TWO MOST RECENT FEDERAL DISTRICT COURTS THAT HAVE CONSIDERED AND RULED ON THE CONSTITUTIONALITY OF THE STATE'S LAWS LIMITING MARRIAGE TO THE LEGAL UNION BETWEEN A MAN AND A WOMAN, BOTH IN THE NINTH CIRCUIT, HAVE REACHED A DIFFERENT CONCLUSION THAN THIS COURT HAS REACHED. THOSE ARE THE JACKSON CASE FROM HAWAII AND THE SEVCICK CASE FROM NEVADA.

MOREOVER, THE ONLY FEDERAL CIRCUIT COURT TO SQUARELY RULE ON THIS ISSUE, THE EIGHTH CIRCUIT, HAS UPHELD THE CONSTITUTIONALITY OF THE TRADITIONAL DEFINITION OF MARRIAGE. THAT'S THE BRUNING CASE.

AND THOSE DECISIONS DO NOT STAND ALONE. AS CITED IN THE STATE DEFENDANTS' COURT PLEADINGS, 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.

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 AND DISSENT OF JUSTICE SCALIA OF WHAT THE SUPREME COURT'S VIEW WOULD BE IF CONSIDERING STATE MARRIAGE LAWS. THE DISTRICT COURT'S APPROACH IS IN EFFECT TO JUMP THE GUN AND TO JOIN JUSTICE SCALIA IN SPECULATING ABOUT WHAT THE SUPREME COURT WOULD DO BEFORE IT HAS ACTUALLY RULED ON THIS ISSUE.

THE COURT: WELL, THAT'S WHAT I WAS CALLED TO DO IN THIS CASE, WAS I NOT, TO DETERMINE AS BEST I COULD WHAT GUIDANCE THE SUPREME COURT WAS PROVIDING ON THIS ISSUE? AND WHILE I WISH I WASN'T THE FIRST COURT IN THE NATION TO WEIGH IN ON THAT AFTER THE WINDSOR DECISION, ISN'T THE -- ISN'T THE DISSENTING VIEW MAYBE THE -- MAYBE THE BEST PLACE TO LOOK TO SEE WHAT THE PEOPLE ON THE LOSING SIDE OF THAT PROPOSITION BEFORE THE SUPREME COURT THOUGHT THE EFFECT OF THE COURT'S RULING WAS?

IT'S NOT CLEAR, OF COURSE, IN THE WINDSOR DECISION, AS WE'VE DISCUSSED AT ORAL ARGUMENT. THE WINDSOR COURT DIDN'T ANSWER THIS QUESTION. SO WE'RE FORCED TO READ THE TEA LEAVES AND DO THE BEST WE CAN WITH THAT DECISION. THE STATE CLEARLY DISAGREES. BUT MY -- MY DECISION DOESN'T REST ON THE MINORITY OPINION OF JUSTICE SCALIA OR THE DISSENTS IN THE WINDSOR CASE.

IT'S NOT A BAD PLACE TO LOOK TO SEE WHAT THE SUPREME COURT JUSTICES THEMSELVES THINK OF THE DECISION THOUGH, IS IT?

MR. LOTT: THE STATE IS RESPECTFULLY TRYING TO POINT OUT THE LIKELIHOOD OF SUCCESS ON APPEAL.

THE COURT: OKAY, VERY GOOD, THANK YOU. GO AHEAD.

MR. LOTT: THE DISTRICT COURT CONCEDES IN ITS OPINION THAT, QUOTE, THE COURT'S ROLE IS TO NOT DEFINE MARRIAGE, AN EXERCISE THAT WOULD BE IMPROPER GIVEN THE STATE'S PRIMARY AUTHORITY IN THIS REALM. AND THAT'S IN THE OPINION AT PAGE 16, THE COURT'S DECISION AT PAGE 16. AND THEN THE COURT PROCEEDS TO DO EXACTLY THAT, TO REDEFINE MARRIAGE IN SUCH A BROAD WAY TO ENCOMPASS SAME-SEX MARRIAGE.

THE DISTRICT COURT CITES TO AND APPLIES SUPREME COURT PRECEDENT RECOGNIZING THE FUNDAMENTAL RIGHT TO MARRY -- RECOGNIZING A FUNDAMENTAL RIGHT TO MARRY IN CASES THAT UNIVERSALLY INVOLVE MARRIAGE BETWEEN A MAN AND A WOMAN AS THOUGH THE GENDER OF THE SPOUSE IS IRRELEVANT. THE COURT CONCLUDES, QUOTE, 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, AT PAGE 28 OF THE DECISION.

BY REFUSING TO RECOGNIZE THE TRADITIONAL MAN/WOMAN MARRIAGE, THAT TRADITIONAL MAN/WOMAN MARRIAGE IS MATERIALLY DIFFERENT FROM SAME-SEX MARRIAGE, THE COURT SIDESTEPS THE

HOLDING OF THE WASHINGTON V. GLUCKSBERG CASE THAT SETS FORTH THE ESTABLISHED METHOD OF SUBSTANTIVE DUE PROCESS ANALYSIS.

THE COURT STATES, QUOTE, BECAUSE THE RIGHT TO MARRY HAS ALREADY BEEN ESTABLISHED AS A FUNDAMENTAL RIGHT, THE COURT FINDS THAT THE GLUCKSBERG ANALYSIS IS INAPPLICABLE HERE, AT PAGE 29.

IN THE DISTRICT COURT'S VIEW, TRADITION AND HISTORY ARE INSUFFICIENT REASONS TO DENY FUNDAMENTAL RIGHTS TO AN INDIVIDUAL. THE COURT'S REFUSAL TO CONSIDER HISTORY AND TRADITION, HOWEVER, GO FAR BEYOND WHAT EVEN THE LAWRENCE CASE CONTEMPLATED. THERE IN THE LAWRENCE CASE THE COURT STATED, WE THINK OUR LAWS AND TRADITIONS OF THE PAST HALF-CENTURY ARE OF THE MOST RELEVANCE HERE.

THE RELEVANT HISTORY AND TRADITION REGARDING SAME-SEX MARRIAGE IS MUCH SHORTER THAN THAT, MUCH SHORTER THAN THE PAST HALF-CENTURY. NO STATE PERMITTED SAME-SEX MARRIAGE UNTIL 2003. EVEN ABROAD, NO FOREIGN NATION ALLOWED SAME-SEX MARRIAGE UNTIL THE NETHERLANDS IN 2000. IN THE LAST TEN YEARS OF THIS NATION'S 237 YEAR HISTORY, ONLY A MINORITY OF STATES HAVE PERMITTED SAME-SEX MARRIAGE, AND NEARLY ALL OF THOSE HAVE DONE SO BY THE DEMOCRATIC PROCESS RATHER THAN BY JUDICIAL DECREE.

THE DISTRICT COURT IN THE STATE'S OPINION HAS FAILED TO EXERCISE THE UTMOST CARE THAT'S REQUIRED BY THE GLUCKSBERG ANALYSIS. THE DISTRICT COURT'S DECISION PLACES THE MATTER

OUTSIDE THE ARENA OF PUBLIC DEBATE AND LEGISLATIVE ACTION AND CONSTITUTES POLICY PREFERENCE OF THE COURT. THE DISTRICT COURT'S DECISION IS A FUNDAMENTAL SHIFT AWAY FROM SOCIETY'S UNDERSTANDING OF WHAT MARRIAGE IS AND OVERRIDES THE DEMOCRATIC VOICE OF THE PEOPLE OF UTAH.

THE DISTRICT COURT ALSO HELD THAT MAN/WOMAN -- THE MAN/WOMAN DEFINITION OF MARRIAGE IS GENDER DISCRIMINATION, AND THE STATE OBVIOUSLY DISAGREES WITH THAT CONCLUSION.

THE COURT ALSO WRONGLY CONCLUDED THAT UTAH'S MARRIAGE LAWS DO NOT EVEN SATISFY THE MINIMAL REQUIREMENTS OF A RATIONAL BASIS TEST. NUMEROUS STATE AND FEDERAL COURT'S AT THE TRIAL AND APPELLATE COURT LEVELS HAVE REACHED THE OPPOSITE CONCLUSION. THESE COURTS HAVE FOUND THAT THE TRADITIONAL DEFINITION OF MARRIAGE IS RATIONALLY RELATED TO LEGITIMACY AND INTEREST, AND EVEN THAT MAN/WOMAN MARRIAGE PROMOTES THE STATE'S COMPELLING INTEREST IN THE CARE AND WELL-BEING OF CHILDREN BY FACILITATING RESPONSIBLE PROCREATION AND THE IDEAL MODE OF CHILD REARING.

THE VERY FACT THAT SO MANY OTHER COURTS HAVE FOUND THE TRADITIONAL DEFINITION OF MARRIAGE TO SATISFY RATIONAL BASIS REVIEW IS REASON ENOUGH TO CONCLUDE THAT THE STATE DEFENDANTS HAVE SUFFICIENT LIKELIHOOD OF SUCCESS ON APPEAL TO WARRANT STAY PENDING APPEAL.

THE STATE ALSO BELIEVES THE COURT DID NOT PROPERLY FRAME THE ISSUE BEFORE IT. 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. THAT'S THE JOHNSON V. ROBISON CASE.

AND AS THE FEDERAL DISTRICT COURT IN THE HAWAII JACKSON CASE EXPLAINED, 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. RATHER, THE RELEVANT QUESTION IS WHETHER AN OPPOSITE-SEX DEFINITION OF MARRIAGE FURTHERS A LEGITIMATE INTEREST THAT WOULD NOT BE FURTHERED, OR FURTHERED TO THE SAME DEGREE, BY ALLOWING SAME-SEX COUPLES TO MARRY.

THE DISTRICT COURT'S DECISION CONSTITUTES A FUNDAMENTAL SHIFT AWAY FROM SOCIETY'S UNDERSTANDING OF WHAT MARRIAGE IS. FOR OVER 100 YEARS UTAH HAS ALWAYS ADHERED TO A DEFINITION OF MARRIAGE AS THE UNION OF A MAN AND A WOMAN AND HAS NEVER RECOGNIZED A MARRIAGE OF ANY OTHER KIND. AND UTAH DOES NOT STAND ALONE, A MAJORITY OF STATES ADHERE TO THE SAME DEFINITION OF MARRIAGE.

AS THE SUPREME COURT RECOGNIZED IN GLUCKSBERG, EXTENDING CONSTITUTIONAL PROTECTION TO AN ASSERTED RIGHT OR LIBERTY INTEREST TO A GREAT EXTENT PLACES THE MATTER OUTSIDE THE ARENA OF PUBLIC DEBATE AND LEGISLATIVE ACTION. THE DISTRICT COURT'S DECISION HAS TAKEN THE IMPORTANT PUBLIC POLICY QUESTION OF

SAME-SEX MARRIAGE AWAY FROM THE PEOPLE OF UTAH AND AS SUCH CONSTITUTES A THREAT OF IRREPARABLE HARM TO THE DEMOCRATIC PROCESS IN UTAH.

WE CITED TO THE COURT THE CASE OF COALITION FOR ECONOMIC EQUITY VERSUS WILSON, WHICH HELD IT IS CLEAR THAT A STATE SUFFERS IRREPARABLE INJURY WHENEVER AN ENACTMENT OF ITS PEOPLE IS ENJOINED.

THE COURT: IS THERE ALSO IRREPARABLE HARM WHEN CITIZENS ARE DEPRIVED CONSTITUTIONAL RIGHTS? I MEAN I UNDERSTAND THE STATE BELIEVES THAT I INCORRECTLY CONCLUDED THAT THERE'S A FUNDAMENTAL RIGHT TO MARRY, AND WE WON'T KNOW UNTIL ANOTHER COURT ABOVE ME SOUNDS IN ON THAT ISSUE. BUT HAVING CONCLUDED THAT THAT'S A CONSTITUTIONAL RIGHT THAT ALL OF THE CITIZENS OF THE STATE ENJOY, IS THERE IRREPARABLE HARM TO CITIZENS WHEN WE DISALLOW THEM FROM ENJOYING A CONSTITUTIONAL RIGHT?

MR. LOTT: AS A GENERAL PROPOSITION I WOULD AGREE, BUT AS THE COURT KNOWS, THE STATE DISAGREES WHETHER THERE'S A CONSTITUTIONAL RIGHT TO SAME-SEX MARRIAGE.

THE CASE CITED ALSO --

THE COURT: HOW DO WE -- HOW DO WE RESOLVE THAT QUESTION IN YOUR MIND? HAVING CONCLUDED THAT THERE ARE CONSTITUTIONAL RIGHTS AT ISSUE HERE, AND THAT THOSE RIGHTS ARE BEING DEPRIVED -- SOME CITIZENS OF THE STATE ARE BEING DEPRIVED OF THE ENJOYMENT OF THOSE RIGHTS, AND THEN THE

STATE'S INTEREST IN, AS YOU FRAMED IT, ALLOWING THE STATE TO MAKE THESE POLICY CONSIDERATIONS THROUGH THE VOICE OF THE ELECTORATE, HOW DO WE BALANCE THOSE HARMS IN YOUR VIEW IN DETERMINING WHETHER A STAY SHOULD ISSUE?

MR. LOTT: WE'VE POINTED OUT TO THE COURT THAT FROM OUR PERSPECTIVE THE HARM TO THE PLAINTIFFS AND ALSO TO SAME-SEX COUPLES THAT WISH TO MARRY IF ANYTHING WOULD BE DELAYED. THE APPELLATE COURT IS GOING TO REVIEW THIS COURT'S DECISION, AND IF THE APPEAL IS UPHELD, IT PUTS THOSE THAT HAVE ENTERED INTO A MARRIAGE INTO AN UNCOMFORTABLE SITUATION WHERE THEIR MARRIAGES MOST LIKELY WOULD BE VOID. AND THE WAY TO AVOID THAT SITUATION FROM OCCURRING TO THE BENEFIT OF EVERYONE IS TO ENTER A STAY.

THE COURT: IT'S THE STATE'S POSITION THAT IF MY RULING IS REVERSED ON APPEAL, THAT ANY MARRIAGE -- ANY MARRIAGE LICENSES THAT ISSUED IN THE INTERIM WOULD BE VOID; IS THAT RIGHT?

MR. LOTT: THAT'S CORRECT.

THE COURT: SO THEN WHAT IS THE HARM TO THE STATE? WHAT IS THE IRREPARABLE INJURY TO THE STATE IF THE EFFECT OF A REVERSAL IS THAT THERE WERE NO VALID MARRIAGES PERFORMED?

MR. LOTT: WELL, THE STATE IS CONCERNED WITH ALL OF ITS CITIZENS, NOT ONLY THOSE THAT -- THAT DO NOT WANT TO HAVE SAME-SEX MARRIAGE. IT ALSO INCLUDES AN INTEREST TO THOSE THAT WANT SAME-SEX MARRIAGE, AND THERE'S A CONCERN FOR THOSE

CITIZENS OF THE STATE AS WELL. THAT'S -- THAT'S APART FROM THE CONCERN THE STATE HAS IN HAVING ITS DEMOCRATIC VOICE RECOGNIZED.

I WAS GOING TO QUOTE JUSTICE RENQUIST. HE STATED, IT ALSO SEEMS TO ME THAT ANYTIME A STATE IS ENJOINED BY A COURT FROM EFFECTUATING STATUTES ENACTED BY REPRESENTATIVES OF ITS PEOPLE, IT SUFFERS A FORM OF IRREPARABLE INJURY.

THE STATE, AS WE POINTED OUT, ALSO FACES ADMINISTRATIVE BURDENS DURING THIS PERIOD OF UNCERTAINTY. AND ALSO ACTIONS THAT WOULD BE TAKEN IN RELIANCE OF MARRIAGE BY THIRD PARTIES, BY EMPLOYERS, CREDITORS, OTHERS, ALSO ARE GOING TO BE IMPACTED. THE PUBLIC ALSO HAS AN INTEREST IN CERTAINTY AND IN ORDER AND IN AVOIDING UNNECESSARY EXPENDITURES.

WE HAVE ALSO IN OUR REPLY THAT WE FILED THIS MORNING HAVE ADDRESSED THE -- THE THREE CASES THAT THE PLAINTIFFS CITE POST WINDSOR, AND WE HAVE DISTINGUISHED THOSE CASES. THE NEW JERSEY CASE, OF COURSE, WAS BASED UPON NEW JERSEY STATE LAW. IT'S A CASE THAT ARISES FROM NEW JERSEY STATE COURTS APPLYING THEIR STANDARDS FOR A STAY, WHICH ARE NOT THE SAME AS IN FEDERAL COURT.

AND THE NEW MEXICO CASE INVOLVES A STATE WHERE THERE IS NO LAW EITHER PROHIBITING OR GRANTING THE RIGHT OF SAME-SEX MARRIAGE, SO IT'S AN ENTIRELY DIFFERENT SITUATION. AND THE CASE FROM ILLINOIS INVOLVES A STATE STATUTE THAT HAS ALREADY ADOPTED SAME-SEX MARRIAGE, AND A COUPLE FILING THE MOTION

SIMPLY WANTED TO MARRY BEFORE THE STATUTE WENT INTO EFFECT, WHICH IS VERY DIFFERENT FROM THE SITUATION WE FACE HERE.

THE MOST APPLICABLE EXAMPLE THAT WE WOULD URGE THE COURT TO FOLLOW IS THAT OF THE NINTH CIRCUIT AND THE DISTRICT COURT IN PERRY V. BROWN PROPOSITION 8 CASE. JUDGE WALKER GRANTED A STAY PENDING A DECISION FROM THE NINTH CIRCUIT AS TO WHETHER THEY WERE GOING TO GRANT A STAY, AND THE NINTH CIRCUIT DID GRANT A STAY IN THAT CASE, IN THE PROPOSITION 8 LITIGATION. SO WE WOULD URGE THE COURT TO FOLLOW THAT EXAMPLE.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, MR. LOTT. WE'LL HEAR AGAIN FROM YOU BEFORE WE CONCLUDE.

MS. TOMSIC.

MS. TOMSIC: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

MS. TOMSIC: YOUR HONOR, FUNDAMENTALLY THE STATE IS ASKING YOU TO LOOK BACKWARD AND TO NOT -- DENY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND TO GRANT THEIR MOTION ON EXACTLY THE SAME MERIT GROUNDS THAT THEY ARGUED IN TENS OF PAGES OF BRIEFING DURING ALMOST FOUR HOURS OF ORAL ARGUMENT THAT THIS COURT SOUNDLY AND DEFINITIVELY REJECTED IN A WELL-REASONED FOUNDATIONALLY SUPPORTED DECISION.

THERE IS NOT A SINGLE ISSUE FROM A LEGAL STANDPOINT THAT THE STATE HAS RAISED, EITHER IN ITS WRITTEN PAPERS BEFORE THIS COURT OR IN THE ORAL ARGUMENT THAT HAS NOW BEEN MADE BEFORE

YOUR HONOR, THAT WOULD JUSTIFY THIS COURT FINDING THAT THERE IS NOT ONLY A LIKELIHOOD OF YOUR HONOR BEING REVERSED ON APPEAL, BUT THE STANDARD IN THIS DISTRICT REQUIRES THE STATE TO SHOW, MAKE A STRONG SHOWING -- IT IS NOT JUST A SHOWING, AS IT IS IN A PRELIMINARY INJUNCTION, IT IS A STRONG SHOWING. AND THERE IS GOOD REASON FOR THAT REQUIREMENT, YOUR HONOR.

THE REASON THAT REQUIREMENT EXISTS, AND PARTICULARLY IN A SITUATION LIKE THIS CASE, IS THAT WE HAVE A DECISION FROM YOUR HONOR THAT IS NOT A PRELIMINARY INJUNCTION. WE HAVE A DECISION FROM THIS COURT THAT ACTUALLY SORT OF FLOWED OUT OF THE STATE ASKING THIS COURT TO DECIDE THE ISSUE ON SUMMARY JUDGMENT. IT IS A DECISION THAT IS PREDICATED ON BOTH SIDES HAVING AN AMPLE OPPORTUNITY TO PUT THEIR BEST FOOT FORWARD, TO PUT THEIR BEST ARGUMENTS, THEIR BEST UNDISPUTED FACTS, THEIR BEST LEGAL AUTHORITIES, AND WE DID THAT, YOUR HONOR.

STARTING ON OCTOBER 22ND -- OR EXCUSE ME -- 11TH OF THIS YEAR WE PROVIDED YOUR HONOR MAYBE WITH WE COULD CALL IT A MOUNTAIN OF PAPER, WHERE EACH SIDE HAD A FULL OPPORTUNITY TO ADVISE YOUR HONOR OF HOW WE BELIEVED YOU SHOULD RULE. AND THEN ON NOVEMBER 22ND WE INUNDATED YOU WITH FURTHER PAGES EXPLAINING WHY THE OTHER SIDE'S POSITION WAS FUNDAMENTALLY WRONG AS A MATTER OF LAW. AND THEN YOUR HONOR GAVE US AMPLE TIME. YOU SAID THIS IS AN IMPORTANT ISSUE. I AM GIVING BOTH SIDES ALL THE TIME THEY NEED IN ORAL ARGUMENT TO HELP ME MAKE THE RIGHT DECISION.

AFTER THAT PROCESS, WHERE YOU HAVE A PERMANENT DECISION -- OR INJUNCTION DECLARING WHAT THE LAW IN UTAH IS, A COURT REQUIRES MORE THAN SIMPLY A REARGUMENT OF THE POSITIONS THAT WERE REJECTED AND DENIED IN THE FIRST PLACE. IF THAT WERE NOT TRUE, EVERY TIME A COURT ISSUES AN ORDER, A PRELIMINARY INJUNCTION OR A PERMANENT INJUNCTION, THE STATE COULD SIMPLY MEET THAT MANDATORY REQUIREMENT BY REARGUING THE SAME POSITIONS AND SAYING, GOSH, YOUR HONOR, YOU GOT IT WRONG THE FIRST TIME. YOU BETTER AGREE WITH US NOW. WELL, THAT'S NOT THE STANDARD AND THE STATE HASN'T MET IT.

AND WHAT'S IMPORTANT, YOUR HONOR, IS WHAT YOU'VE HEARD IN THEIR PAPERS, AND WHAT YOU HEARD MR. LOTT SAY IN THIS CASE IS, GEE, JUDGE, YOU OUGHT TO GRANT US A MOTION TO STAY BECAUSE THIS IS A DIVISIVE AND IMPORTANT PUBLIC STATE INTEREST.

THE COURT: THAT SEEMS A REASONABLE REQUEST, DOES IT?

MS. TOMSIC: ABSOLUTELY NOT, YOUR HONOR. IF THAT WERE THE STANDARD, THE TENTH CIRCUIT WOULD NOT HAVE MANDATORY FACTORS. THE IMPORTANCE OF THAT PARTICULAR FACTOR IS ONLY ONE OF THEM, AND THAT IS THE PUBLIC'S INTEREST. AND, YOUR HONOR, YOU KNOW BETTER THAN I DO BECAUSE YOU WROTE YOUR DECISION, ONE OF THE ARGUMENTS THAT THE STATE MADE AS TO WHY YOU SHOULD DENY OUR MOTION FOR SUMMARY JUDGMENT AND GRANT THEIRS IS PROCEEDING WITH CAUTION. THIS IS JUST A REPACKAGED AND DRESSED-UP VERSION OF THAT ARGUMENT, WHICH YOU HAVE ALREADY REJECTED.

AND TO SAY, JUDGE, THIS IS IMPORTANT SO LET'S IGNORE ALL THE OTHER FACTORS THAT ARE MANDATORY. THEY'RE NOT SUGGESTED, LIKE, OH, GEE, LOOK AT THESE, BUT IF YOU DON'T THINK THEY APPLY, GO AHEAD AND ISSUE A STAY BECAUSE IT'S IMPORTANT. THAT'S NOT THE LAW. AND THE REASON THEY MAKE THAT IMPASSIONED PLEA IS BECAUSE THEY CANNOT AND HAVE NOT MET THE MANDATORY FACTORS THAT THE TENTH CIRCUIT REQUIRES THIS COURT TO APPLY.

THE COURT: IF I AGREE WITH YOU, WHAT AM I TO MAKE OF THE STATE'S ALTERNATIVE REQUEST THAT WE AT LEAST IMPOSE A TEMPORARY STAY TO ALLOW THE TENTH CIRCUIT TO DECIDE HOW IT WISHES TO PROCEED?

MS. TOMSIC: YOUR HONOR, NUMBER ONE, A REQUEST THAT THIS COURT DO TEMPORARILY WHAT IT CAN'T DO PERMANENTLY IS NO BETTER THAN THE INITIAL REQUEST. YOU STILL HAVE TO MAKE A DEMONSTRATION WARRANTING A STAY, AND THE TENTH CIRCUIT TWICE NOW HAS TOLD THESE GUYS WE'RE NOT GOING TO DO THAT, AND IT WOULD BE WHOLLY IMPROPER FOR THIS COURT TO DO IT.

AND THEY TALK ABOUT THIS CLOUD OF CONFUSION. WELL, THE CLOUD OF CONFUSION, WHICH I'LL GET TO, IS IN THEIR MINDS. IT'S NOT IN ANYBODY ELSE'S. BUT THE BOTTOM LINE IS, YOUR HONOR, THE STATUS QUO IN THIS CASE, THE LAW IN THIS JURISDICTION RIGHT NOW IS YOUR ORDER. AND --

THE COURT: I THINK THIS IS MR. LOTT'S POINT. BUT MY ORDER IS ONLY THE FIRST RULING IN THIS CASE. IT IS CERTAINLY NOT GOING TO BE THE LAST. I THINK THE STATE'S POINT

IS EXACTLY THAT, SHOULDN'T WE ALLOW SOMEBODY ABOVE ME TO WEIGH IN ON THAT?

MS. TOMSIC: YOUR HONOR, THEY'RE GOING TO WEIGH IN ON IT, AND YOU KNOW WHAT, NOTHING IS GOING TO CHANGE BETWEEN NOW AND THERE, NOTHING. I MEAN WHAT THE STATE HAS TO SHOW EVEN FOR A TEMPORARY STAY -- WHICH THEY HAVEN'T CITED AUTHORITY. THEY WENT TO JUDGE WALKER'S OPINION IN THE PROP 8 CASE. JUDGE, BUT REMEMBER, HIS OPINION WAS BEFORE WINDSOR. IT WAS BEFORE ALL THESE OTHER CASES THAT HAVE COME DOWN AFTER WINDSOR. IT'S NOT A TENTH CIRCUIT DECISION.

THE COURT: BUT WINDSOR DIDN'T ANSWER THE QUESTION THAT THIS CASE PRESENTED TO ME. AND I DID THE BEST I COULD TO INTERPRET HOW I THOUGHT I WAS SUPPOSED TO RULE IN LIGHT OF WINDSOR. BUT MR. LOTT IS CORRECT, THE STATE OF UTAH IS CORRECT, RIGHT, THE TENTH -- NEITHER THE TENTH CIRCUIT NOR THE SUPREME COURT HAS ANSWERED THE QUESTION THAT I WAS REQUIRED TO ANSWER IN THIS CASE?

MS. TOMSIC: YOUR HONOR, I WOULD ABSOLUTELY BE CANDID AND AGREE WITH YOU, BUT WOULD YOU TELL ME A SINGLE CASE IN THIS CIRCUIT OR FROM THE SUPREME COURT WHERE A COURT HAD SAID, GOSH, IF YOUR CIRCUIT HASN'T RULED, AND THE SUPREME COURT HASN'T RULED, YOU BETTER GRANT A STAY? BECAUSE YOU KNOW WHAT, IF THAT WAS THE STANDARD, WE WOULD HAVE STAYS ISSUED ALMOST IN EVERY CASE. EVERY CASE STANDS ON ITS OWN. THAT ISN'T THE STANDARD, YOUR HONOR, AND THERE ISN'T A CASE THAT

STANDS FOR THAT PROPOSITION.

YOUR HONOR, HAD YOU BELIEVED THAT THERE SHOULD BE A STAY IN PLACE, REGARDLESS OF ANY PENDING MOTION, SO THE TENTH CIRCUIT WOULD HAVE AN OPPORTUNITY TO RULE ON THIS ISSUE, IT SURE AS HECK COULD HAVE DONE A TEMPORARY STAY IN ITS ORDER AND IT DIDN'T DO IT. IT DID NOT DO IT, AND THE STATUS QUO HAS CHANGED.

THE COURT: WHAT IS THE STATUS QUO?

MS. TOMSIC: THE STATUS QUO RIGHT NOW IS THE LAW IN UTAH IS THAT COUNTY CLERKS ARE OBLIGATED TO ISSUE LICENSES TO SAME-SEX COUPLES TO GET MARRIED. SAME-SEX COUPLES ARE GETTING MARRIED, ARE MARRIED. THERE WERE HUNDREDS OF SAME-SEX COUPLES MARRIED BY THE END OF THE DAY ON FRIDAY. THAT IS THE STATUS QUO. AND TO NOW SAY, GOSH, I WAS JUST KIDDING, FOLKS. I'M GOING TO STOP THE IMPORT OF MY RULING, AND LET'S CHANGE IT NOW BACK TO THE WAY IT WAS AND LET THE TENTH CIRCUIT DO IT.

THE COURT: IT'S NOT.

MS. TOMSIC: WAIT, LET ME JUST --

THE COURT: IT'S NOT A QUESTION THAT I WAS KIDDING. IT'S THERE WAS NO MOTION FOR A STAY PENDING BEFORE I ENTERED MY RULING. THERE IS NOW.

MS. TOMSIC: AND I UNDERSTAND IT. AND IN THAT INTERIM, THE STATUS QUO HAS CHANGED, YOUR HONOR. AND WHAT THE STATE IS ASKING YOU TO DO IS PUT THEM IN A POSITION WHERE THEY CAN ARGUE TO THE TENTH CIRCUIT, GOSH, JUDGE SHELBY HAS NOW

ISSUED AN INTERIM TEMPORARY STAY, EVEN THOUGH THERE'S NO AUTHORITY TO DO THAT. AND GUESS WHAT, THE STATUS QUO IN UTAH NOW IS SAME-SEX COUPLES CAN GET MARRIED, AND WE ARE JUST ASKING YOU TO MAINTAIN THE STATUS QUO. THEY ARE TRYING TO AVOID THEIR BURDEN, WHICH IS YOU SHOW ME HOW THE STATE IS GOING TO BE IRREPARABLY HARMED BY MORE SAME-SEX MARRIAGES OCCURRING. THE STATUS QUO IS THE STATUS QUO.

AND I WANT TO COME BACK AND PUT ON THE RECORD, YOUR HONOR, KIND OF THE CHRONOLOGY OF HOW WE GOT HERE. WHEN YOUR HONOR ASKED FOR BRIEFING ON SUMMARY JUDGMENTS, THERE WAS NO QUESTION THAT THERE WAS AN ABSOLUTE RISK AND POSSIBILITY FOR BOTH SIDES THAT YOU WERE GOING TO ISSUE A SELF-EXECUTING OPINION. I MEAN, MY GOSH, JUDGE, YOU DON'T HAVE TO BE MORE THAN A LAW STUDENT TO KNOW THAT.

SECOND, WE'VE ALL MADE IT CLEAR, YOUR HONOR IS CLEAR, THIS THING IS NOT GOING TO END HERE, AND WE KNOW THAT. THE APPEAL NOTICE WAS FILED ON FRIDAY. IT'S GOING TO GO TO THE TENTH CIRCUIT FOR FINAL RESOLUTION IN THIS CIRCUIT, UNLESS THE SUPREME COURT GRANTS CERT. AND WE ALL KNOW THAT. YET THE STATE NEVER ONCE RAISED THE ISSUE OF A STAY.

AND WE KNEW WHEN WE ENDED OUR HEARING ON DECEMBER 4TH THAT THERE WASN'T GOING TO BE ANY WARNING ABOUT YOUR DECISION COMING OUT. YOU WERE GOING TO ISSUE AN OPINION AND WE WOULD GET IT ELECTRONICALLY. WE KNOW THAT. SO IF THE STATE DID NOTHING TO PROTECT THE STATUS QUO, I THINK THIS COURT CAN

INFER THAT IN REALITY IT WAS NOT CONCERNED ABOUT IRREPARABLE HARM.

AND I THINK THE OTHER THING THAT'S IMPORTANT, YOUR HONOR, IS WHEN YOUR HONOR ISSUED THIS OPINION, AND IT CAME TO US ALL AT THE SAME TIME ELECTRONICALLY, THE STATE DIDN'T DO ANYTHING FOR A COUPLE OF HOURS. THEY COULD HAVE FILED A STAY. THEY COULD HAVE SAID, JUDGE, MAKE THEM BRIEF IT IN TWO HOURS. LET'S HAVE THIS HEARD NOW. THINGS ARE GOING NUTS. PEOPLE ARE GETTING MARRIED. LET'S DO IT NOW BEFORE THERE'S MORE CHAOS AND HARM, AS THEY CALL IT. THEY DIDN'T DO IT.

WHAT HAPPENED INSTEAD IS YOU ON YOUR OWN INITIATIVE PLACED A CONFERENCE CALL AND HAD US ON THE PHONE, AND YOU WERE CRYSTAL CLEAR IN THAT CONFERENCE CALL THAT YOU BELIEVED YOU NEEDED A WRITTEN MOTION SO YOU UNDERSTOOD WHAT THE STANDARDS WERE AND WHETHER THEY WERE MET.

AND IF YOU WILL RECALL, WHICH I'M SURE YOU DO, YOUR HONOR, YOU ASKED THE STATE WHEN -- WHAT ARE YOU GOING TO DO? ARE YOU GOING TO FILE A MOTION? WHEN ARE YOU GOING TO FILE IT? I'LL SET AN EXPEDITED BRIEFING SCHEDULE. LET'S GET THIS TAKEN CARE OF.

WHAT THE STATE TOLD YOU IS, GOSH, WE DON'T KNOW WHAT WE'RE GOING TO DO OR WHEN. AND WE ENDED THE CALL WITH NO SCHEDULE, NO HEARING, BECAUSE THE STATE IN THE FACE OF MY STATEMENT, JUDGE, PEOPLE ARE GETTING MARRIED, SAME-SEX COUPLES ARE GETTING MARRIED NOW, DID NOTHING, NOTHING. AND WHAT THEY

LET THE COUNTY CLERKS, INCLUDING -- EXCLUDING UTAH COUNTY, DO WAS ISSUE MARRIAGE LICENSES TO SAME-SEX COUPLES, ALLOWED THEM TO GET MARRIED, DIDN'T FILE A MOTION FOR A STAY. THEY FILED A MOTION FOR -- OR A NOTICE OF APPEAL. THEY DIDN'T EVEN FILE THEIR MOTION UNTIL AFTER THE OFFICES HAD CLOSED AT ABOUT 8:30 AT NIGHT.

NOW, IF THIS MOTION WOULD HAVE BEEN A 20 PAGE BLOCKBUSTER INTELLECTUALLY CHALLENGING MOTION, GOSH, MAYBE YOU CAN SAY MAYBE IT'S OKAY THAT THEY WAITED, BUT IT'S A FIVE PAGE MEMO, JUDGE. COME ON. IF THEY WERE WORRIED ABOUT IRREPARABLE HARM AND TRYING TO MAINTAIN SOME STATUS QUO THAT EXISTED BEFORE THIS ORDER, THEY SURE AS HECK HAD THE OPPORTUNITY TO MAKE IT HAPPEN. WELL, THEY DIDN'T. WE'RE IN A SITUATION WHERE WE HAVE A DIFFERENT STATUS QUO. WE NEED TO KEEP THAT STATUS QUO UNLESS A HIGHER COURT DETERMINES THAT IT SHOULD CHANGE.

THIS CONCEPT OF PING-PONGING, JUDGE, NOW STAY IT. GOSH, LET'S GO TO THE TENTH CIRCUIT. WHAT IF THEY DON'T STAY IT? THEN WE'RE BACK TO THIS -- I MEAN YOU TALK ABOUT CONFUSION AND UNCERTAINTY. THAT'S EXACTLY WHAT THEY'RE ASKING.

AND I WOULD ASK YOUR HONOR TO UPHOLD THE MERITS OF YOUR DECISION, STAND BEHIND THEM, BECAUSE THERE IS NO LIKELIHOOD IT'S GOING TO BE REVERSED ON APPEAL, AND THERE SURE AS HECK ISN'T ANY STRONG SHOWING IT WILL BE REVERSED. AND THE FAILURE TO ESTABLISH THAT FUNDAMENTAL CRITICAL FACTOR IS ABSOLUTELY DEVASTATING TO THIS MOTION. IF YOU CANNOT DEMONSTRATE THAT,

YOU ARE NOT ENTITLED TO A STAY AND YOU'RE SURE AS HECK NOT ENTITLED TO UPSET THE STATUS QUO TEMPORARILY WHILE WE HAVE THEM MAKE EXACTLY THE SAME INEFFECTIVE AND MERITLESS ARGUMENTS TO THE TENTH CIRCUIT. PLEASE DO NOT CHANGE THE STATUS QUO BASED ON ARGUMENTS THAT HAVE NO MERIT HERE AND CAN'T MEET THE STANDARDS OF THE TENTH CIRCUIT UNDER RULE 8.

BUT LET ME TALK ABOUT THE OTHER FACTORS, YOUR HONOR, BECAUSE IT'S NOT JUST THAT FACTOR. I MEAN THE REASON THEY WANT TO KIND OF CLOUD EVERYTHING AND SAY, GOSH, THERE'S THIS CLOUD OF CONFUSION. YOU NEED TO CLEAR IT UP. WELL, YOU KNOW WHAT, THERE IS NO CLOUD OF CONFUSION. THERE IS A FEDERAL ORDER THAT DECLARES THE LAW IN UTAH. THE COUNTIES, INCLUDING SALT LAKE COUNTY, HAS NO QUESTION ABOUT WHAT THEIR OBLIGATION TO FOLLOW THE LAW IS. THEY'RE DOING EXACTLY WHAT THE LAW IS, AS I UNDERSTAND MOST OF THE OTHER COUNTIES IN THIS STATE ARE DOING, OTHER THAN UTAH COUNTY.

AND, YOUR HONOR, WHILE I'M ON THIS, WHILE IT'S A LITTLE BIT OF AN OFF POINT, IT'S SOMETHING I WANT IN THIS RECORD. THE DEFENDANT GOVERNOR HERBERT IN THIS CASE ON SATURDAY -- MAY I APPROACH?

THE COURT: PLEASE.

MS. TOMSIC: ISSUED A LETTER TO ALL OF THE COUNTY CLERKS. NOW, THIS IS AFTER YOUR ORDER HAS BEEN SELF-EFFECTUATING SINCE BETWEEN 1:30 AND 2:00 FRIDAY AFTERNOON, AFTER PEOPLE HAVE BEEN GRANTED MARRIAGE LICENSES,

AFTER THEY'VE BEEN MARRIED, HE SENDS OUT THIS LETTER.

AND, YOUR HONOR, I WANT YOU TO LOOK AT THE SECOND PARAGRAPH OF THIS LETTER, AND PARTICULARLY THE LAST SENTENCE. GOVERNOR HERBERT, THE DEFENDANT IN THIS ACTION, THE GOVERNOR OF THE STATE OF UTAH, REQUIRED TO FOLLOW UTAH LAW IS TELLING THESE CLERKS, PENDING A DETERMINATION OF THE STAY, PLEASE CONSULT WITH YOUR COUNTY ATTORNEY AND COUNCIL -- COUNTY COUNCIL OR COMMISSION FOR DIRECTION OF HOW TO PROCEED, END QUOTE.

YOUR HONOR, HE IMPLICITLY IS TELLING THEM NOT TO FOLLOW YOUR ORDER. THIS IS NO DIFFERENT THAN GOVERNOR WALLACE STANDING IN FRONT OF THAT YOUNG BLACK WOMAN IN ALABAMA AND SAYING, I DON'T CARE IF A FEDERAL COURT DETERMINED THAT THIS GIRL HAS A CONSTITUTIONAL RIGHT TO ENTER OUR ALL WHITE SCHOOL. YOU'RE NOT COMING IN BECAUSE THE PEOPLE OF THIS STATE SAY YOU CAN'T. WELL, YOU KNOW WHAT, YOUR HONOR, GOVERNOR HERBERT DOESN'T GET TO DECIDE WHAT THE LAW IS. YOU DO AND YOU HAVE. AND THE STATE OFFICIALS IN THIS STATE NEED TO ABIDE BY THEIR OATH OF OFFICE AND WHAT THE LAW OF THIS STATE IS.

AND I WANT TO TURN TO IRREPARABLE HARM. YOUR HONOR, THE STATE SKIRTS THE ISSUE THAT WE RAISED AND THE QUESTION YOU POSED TO THEM, WHICH IS WHAT IS THE STATUS QUO? AND THE REASON THAT'S IMPORTANT FOR IRREPARABLE HARM, YOUR HONOR, IS BECAUSE YOU NEED TO LOOK AT WHAT WOULD HAPPEN IF YOU ISSUE THIS STAY NOW. THIS ISN'T LIKE GOING BACK IN TIME BEFORE YOUR

DECISION WAS ISSUED AND SAYING, NOPE, WE'RE GOING TO JUST HOLD STILL. WE'RE NOT GOING TO DO ANYTHING. THIS IS A SITUATION WHERE YOUR ORDER HAS NOW BEEN IN EFFECT, GOSH, MOST OF FRIDAY AFTERNOON AND PART OF MONDAY MORNING. IT IS THE STATUS QUO. IT IS THE LAW IN UTAH. AND THE STATE MUST DEMONSTRATE HOW PERMITTING ADDITIONAL SAME-SEX COUPLES TO MARRY WILL HARM ITS INTEREST, WILL CREATE IRREPARABLE HARM. AND, YOUR HONOR, THEY HAVE NOT MADE THAT SHOWING.

IN FACT YOUR POINTED QUESTION ABOUT, GOSH, IF YOU'RE SAYING ALL THESE MARRIAGES ARE INVALID, IF THE TENTH CIRCUIT REVERSES ME, WHAT'S YOUR HARM?

AND, YOUR HONOR, I WOULD ASK YOU TO LOOK BACK AT YOUR OPINION AGAIN IN TERMS OF IRREPARABLE HARM OF THE STATE. THE STATE'S ARGUMENT ABOUT PROTECTING THE PUBLIC WILL, AND PROTECTING THE TRADITIONAL FAMILY, AND PROTECTING THE PUBLIC PROCESS ARE ALL THE STATE INTERESTS THAT THE STATE ARGUED TO THIS COURT AS JUSTIFICATION FOR THE DISCRIMINATORY MARRIAGE LAWS IN UTAH.

AND YOUR HONOR SQUARELY HELD THAT THE STATE WHOLLY FAILED TO DEMONSTRATE THAT EVEN ASSUMING THOSE WERE LEGITIMATE STATE INTERESTS, THAT THERE WAS ANY RATIONAL RELATIONSHIP BETWEEN BANNING SAME-SEX MARRIAGE AND ACCOMPLISHING THOSE OBJECTIVES. IF THE STATE CANNOT MEET THAT STANDARD, WHEN NO SAME-SEX MARRIAGES HAVE TAKEN PLACE, THEY SURE AS HECK CAN'T SHOW THEY MEET A STANDARD OF SHOWING HOW MORE SAME-SEX MARRIAGES WILL

HARM THE STATE'S INTERESTS.

AND I WOULD ASK YOUR HONOR, IF YOU ARE LOOKING AT THIS IN TERMS OF HARMS -- AND YOU AGAIN ASKED THE QUESTION, GOSH, HOW DO YOU BALANCE, IF THE STATE IS ARGUING THAT IT IS GOING TO BE HARMED HERE BECAUSE THE -- YOU'VE GOT ALL THESE ARGUMENTS ABOUT TRADITIONAL MARRIAGE AND PUBLIC SUPPORT FOR DISCRIMINATING AGAINST SAME-SEX COUPLES, HOW DO YOU BALANCE THAT AGAINST MY FINDING THAT THE PLAINTIFFS IN THIS CASE HAVE TWO FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION THAT ARE BEING VIOLATED? HOW CAN YOU JUSTIFY, WHEN I HAVE FOUND AS A FEDERAL JUDGE, MANDATED BY ARTICLE 3, NOT TO CARRY OUT THE WILL OF THE PEOPLE, THAT'S THE LEGISLATURE AND GOVERNOR'S JOB. IT IS MY JOB AS A FEDERAL JUDGE TO HONOR AND IMPLEMENT THE PROTECTIONS OF THE UNITED STATES CONSTITUTION. IF I FIND THOSE CONSTITUTIONAL RIGHTS EXIST AND THEY ARE BEING DEPRIVED, HOW CAN YOU POSSIBLY WEIGH WHAT I FOUND TO BE INSUFFICIENT TO JUSTIFY THESE DISCRIMINATORY LAWS WOULD IN ANY WAY OUTWEIGH THE DEPRIVATION OF CONSTITUTIONAL RIGHTS UNTIL THE TENTH CIRCUIT APPELLATE PROCESS RUNS ITS COURSE, WHICH MAY BE YEARS?

AND I WOULD POINT OUT AGAIN, YOUR HONOR, THIS CONCEPT THAT, GOSH, ALL WE'RE TALKING ABOUT IS DELAYING LETTING THESE FOLKS EXERCISE THEIR CONSTITUTIONAL RIGHTS. WELL, TO ME THAT ARGUMENT IS JUST ALMOST THE SAME AS THEIR ARGUMENT IN THEIR PAPERS THAT THERE'S NOT A LONG ENOUGH HISTORY OF DISCRIMINATION. LET'S MAKE IT LONGER. THAT'S NOT A GOOD

ARGUMENT, YOUR HONOR. IT'S NOT A FAIR ARGUMENT. YEAH, THAT'S WHAT THEY THINK, BUT THAT'S NOT A LEGAL JUSTIFICATION.

AND I WOULD POINT OUT AGAIN, AS I DID IN MY PAPERS, AS I DID IN MY ORAL ARGUMENT BEFORE, I HAVE TWO PLAINTIFFS, ONE OF WHOM IS TERMINALLY ILL AND DYING. AND THEY ARE SAYING, OH, GOSH, YOU KNOW, TOO BAD. IF THAT HAPPENS TO ALL THESE OTHER SAME-SEX COUPLES WHO AREN'T MARRIED, IT'S JUST THE BREAKS. WELL, IT'S NOT THE BREAKS.

JUDGE, YOU BALANCE THOSE HARMS. OURS WIN. THEIRS ARE SHALLOW AND NONEXISTENT. AND I WOULD ASK YOU TO SAY TO YOURSELF, IF I STAY THIS ACTION, WHAT IS THE WORST THAT'S GOING TO HAPPEN TO THE STATE? AND BALANCE IT AGAINST WHAT IS THE WORST THAT'S GOING TO HAPPEN TO SAME-SEX COUPLES? AND LIKE YOUR DECISION, IT IS NOT A CLOSE CALL.

AND FINALLY, YOUR HONOR, LET'S TALK ABOUT THE PUBLIC INTEREST. THEY TALK ABOUT WANTING TO PROTECT ALL OF UTAH'S CITIZENS BECAUSE, GOSH, THERE'S THIS WHOLE GROUP OF PEOPLE WHO BELIEVE THAT THIS ORDER IS VIOLATING GOD'S LAW. AND THEY WANT TO PROTECT THOSE CITIZENS. WELL, YOU KNOW WHAT, YOUR HONOR, IT'S NOT THIS COURT'S PLACE TO PROTECT A MORAL MAJORITY'S VIEWPOINT. THE LAW IS CLEAR ON THAT. IT'S TO PROTECT THE CONSTITUTIONAL RIGHTS OF OUR CITIZENS.

AND WHEN WE'RE TALKING ABOUT THE PUBLIC INTEREST HERE, THIS COURT FOUND, AND THE STATE ADMITTED, THAT THE PLAINTIFFS AND OTHER SAME-SEX COUPLES, BY BEING KEPT FROM MARRIAGE, WERE

SUFFERING CONSTITUTIONAL INJURIES. AND THE LANGUAGE YOU QUOTE IS OUT OF WINDSOR. IT IS A CONSTITUTIONAL INJURY, YOUR HONOR, AND IT IS AN INJURY THAT WILL HAPPEN EVERY DAY A STAY IS IN PLACE, JUST LIKE IT DID BEFORE YOUR RULING. AND THERE IS NO JUSTIFICATION FOR THAT.

BUT, MORE IMPORTANTLY, WHEN THE STATE SAYS THEY WANT TO PROTECT ALL ITS CITIZENS, THAT IS BALONEY. LOOK AT THE UNCONTROVERTED RECORD IN THIS CASE, WHICH IS CITED IN YOUR OPINION, WHICH IS THERE ARE AROUND 3,000 CHILDREN OF SAME-SEX COUPLES WHO ARE EXPERIENCING ON A DAILY BASIS THE KIND OF HARM, DISCRIMINATION AND INSECURITY THAT NO CHILD, NO CHILD, SHOULD EVER HAVE TO ENDURE. PROTECT THOSE KIDS.

YOUR HONOR, AND FINALLY THEIR EFFORT TO RELY ON DECISIONS IN HAWAII AND NEVADA THAT ARE CURRENTLY PENDING BEFORE THE NINTH CIRCUIT, AND ALSO THE EIGHTH CIRCUIT OPINION.

THE COURT: BUT THE JACKSON DECISION IS RENDERED MOOT, IS IT NOT, BY THE ACTION OF --

MS. TOMSIC: IT IS. IT ABSOLUTELY IS. SO WE'RE REALLY TALKING ABOUT THE NEVADA DECISION AND THE EIGHTH CIRCUIT DECISION. AND I WOULD SAY A COUPLE THINGS ABOUT THAT. NUMBER ONE, YOUR HONOR, THOSE COURTS ARE NOT IN OUR JURISDICTION.

NUMBER TWO, THOSE CASES WERE -- AND I KNOW YOU DON'T LOVE WINDSOR THE WAY I LOVE WINDSOR, BUT THEY WERE CLEARLY BEFORE WINDSOR, AND THEY WERE CLEARLY BEFORE THE SUPREME COURT LEFT

JUDGE WALKER'S DECISION IN PROP 8 INTACT. AND I WOULD SAY THAT IF YOU LOOK AT ACTUALLY THE DECISIONS THAT WERE DECIDED AFTER WINDSOR, INCLUDING THE NEW JERSEY CASE, THOSE CASES HAVE REFUSED TO ISSUE INJUNCTIONS FOR THE SAME TYPE OF -- I MEAN STAYS FOR THE SAME REASONS YOU SHOULD.

AND THE EFFORT OF THE STATE IN THE PLEADINGS THEY FILED THIS MORNING AND IN ORAL ARGUMENT AND SAY, OH, GOSH, THEY'RE DISTINGUISHABLE. NO, THEY'RE NOT, JUDGE. IF YOU READ THE ORDER IN NEW JERSEY, THE STANDARDS FOR STAY IN NEW JERSEY ARE THE SAME WHETHER IT'S A STATE LAW OR A FEDERAL LAW. IT'S THE SAME. IT IS NO DIFFERENT.

AND I WOULD JUST SAY TO YOUR HONOR, PLEASE, DO THE RIGHT THING.

THE COURT: THANK YOU, MS. TOMSIC.

MR. LOTT.

MR. LOTT: JUST A COUPLE OF POINTS IN RESPONSE.

THE COURT: WOULD YOU MOVE THE MICROPHONE A LITTLE CLOSER.

MR. LOTT: JUST A COUPLE OF POINTS IN RESPONSE. REGARDING THE TIMING OF THE COURT'S ORDER ISSUING, IT WAS THE FRIDAY BEFORE CHRISTMAS, AND IT WOULD HAVE BEEN NICE TO HAVE RECEIVED NOTICE OF THE COURT'S GOING TO BE ISSUING A RULING AND TO HAVE SOME EXPECTATION. I THINK THE CHRONOLOGY MAY HAVE WORKED OUT A LITTLE BIT DIFFERENTLY HAD THAT HAPPENED.

ON THE CHARACTERIZATION OF THE TENTH CIRCUIT'S CURRENT

RULING, AGAIN, IT'S WITHOUT PREJUDICE, AND I DON'T THINK ANYTHING MORE THAN THAT NEEDS TO BE READ INTO IT. THE STATE IS NOT --

THE COURT: I DON'T READ EITHER OF THE TENTH CIRCUIT ORDERS TO BE SUBSTANTIVE ORDERS. THE FIRST WAS CLEARLY PROCEDURAL. THE RULING WAS THAT THE APPLICATION WAS INSUFFICIENT, AND SO IT WAS DENIED FOR THAT REASON. IT DIDN'T MEET THE LEGAL REQUIREMENTS. AND THE ONE THIS MORNING IS NOT MUCH EXPLANATION, EXCEPT TO SAY THAT I THINK, AS BEST I CAN READ IT, IS THEY WANTED THIS HEARING TO PROCEED BEFORE THEY MADE A DECISION. BUT IN BOTH INSTANCES THEIR ORDERS DENYING THE STATE'S REQUEST ARE WITHOUT PREJUDICE, WHICH INVITES THE STATE TO RENEW THOSE MOTIONS. IS THAT WHAT THE STATE INTENDS TO DO IF I DENY THE STATE'S MOTION FOR A STAY?

MR. LOTT: YES.

THE COURT: ALL RIGHT.

MR. LOTT: THE STATE HAS NOT CITED TO OR RELIED UPON GOD'S LAW IN THIS, AND I THINK THAT'S AN IRRELEVANT ASSERTION. AND AS TO THE GOVERNOR'S LETTER, I HADN'T SEEN THAT BEFORE TODAY, BUT --

THE COURT: NEITHER HAD I.

MR. LOTT: IN MY VIEW THE GOVERNOR'S ADVICE TO A COUNTY CLERK TO CHECK WITH A COUNTY ATTORNEY SEEMS LIKE A REASONABLE ADVICE TO ME. I DON'T SEE --

THE COURT: I DON'T SEE THAT IT'S PARTICULARLY

RELEVANT TO WHAT WE'RE DOING TODAY. MS. TOMSIC WANTED IT IN THE RECORD, AND IT WILL BE RECEIVED FOR THAT REASON.

MR. LOTT: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU. ALL RIGHT. LET'S DO THIS. LET'S TAKE A -- LET'S TAKE A BRIEF RECESS.

MS. GODDARD: YOUR HONOR, I'M SO SORRY. THIS IS GOING TO BE A LITTLE ANTICLIMACTIC, BUT I DO THINK THERE IS SOMETHING THE COUNTY IS UNIQUELY POSITIONED TO ADDRESS.

THE COURT: MY APOLOGIES. PLEASE, THE PODIUM IS YOURS.

MS. GODDARD: YOUR HONOR ASKED EARLIER WHAT THE STATUS QUO IS, AND I THINK BOTH PARTIES ANSWERED IT TO THE BEST THEY COULD. I THINK THAT SALT LAKE COUNTY AS THE FIRST ENTITY TO ISSUE THE MARRIAGE LICENSES MIGHT BE THE BEST TO GIVE YOU THE ACTUAL NUMBERS.

ON FRIDAY WE ISSUED OVER 100 MARRIAGE LICENSES TO SAME-SEX COUPLES. THE FIRST ONE WAS ISSUED WITHIN I WOULD SAY PROBABLY 45 MINUTES OF OUR RECEIVING NOTICE OF THE COURT'S ORDER.

AS OF THIS MORNING WE HAVE ISSUED OVER 90 I AM TOLD ALREADY, AND THAT NUMBER IS PROBABLY A LITTLE BIT STALE. WHEN WE CAME HERE THIS MORNING THERE WAS -- THERE WAS A LINE OF PEOPLE STRETCHING THROUGH ALL THREE FLOORS OF OUR BUILDING.

BUT MORE THAN THAT, YOUR HONOR, THERE IS ACTUALLY SOME CONFUSION AMONG THE COUNTY CLERKS THAT I THINK WOULD BE

HELPFUL FOR YOU TO ADDRESS. THERE IS A PROVISION IN THE UTAH CODE THAT ALSO AFFECTS THE ABILITY OF CLERKS TO ISSUE LICENSES TO SAME-SEX COUPLES THAT IS NOT EXPLICITLY ADDRESSED IN YOUR RULING.

THIS CODE SECTION IS 31-8, AND IT IS APPLICATION FOR A LICENSE. AND TWICE IN THAT SECTION OF THE CODE IT REFERENCES THAT A MARRIAGE LICENSE MAY BE ISSUED BY THE COUNTY CLERK TO A MAN AND A WOMAN. THAT IS IN THE FIRST SECTION. IT IS ALSO IN THE NEXT SUBSECTION THAT TALKS ABOUT THE FULL NAMES OF A MAN AND A WOMAN.

NOW, OUR INTERPRETATION IN SALT LAKE COUNTY OF YOUR ORDER ON FRIDAY, WHEN IN FOOTNOTE ONE ON PAGE EIGHT YOU INDICATED THAT YOU WERE ADDRESSING ALL OF THE LAWS THAT WOULD RESTRICT THE ISSUANCE OF LICENSES TO SAME-SEX COUPLES, WAS THAT YOU MEANT WHAT YOU SAID. AND SO WE INTERPRETED IT, AND WE ADVISED OUR CLERK THAT REGARDLESS OF THIS SEPARATE SECTION IN THE CODE, SHE NEEDED TO COMPLY WITH YOUR ORDER.

THAT SAID, OVER THE WEEKEND WE BECAME AWARE THAT THIS IS AN ISSUE IN A NUMBER OF COUNTY CLERKS OFFICES THROUGHOUT THE STATE OF UTAH WHERE THEY ARE CONCERNED ABOUT THE LANGUAGE THAT WAS UNADDRESSED IN YOUR OPINION, AND IN PARTICULAR THEY ARE CONCERNED BECAUSE IT IS A CLASS-A MISDEMEANOR FOR CLERKS TO ISSUE LICENSES IN VIOLATION OF THE LAW.

AND BECAUSE THAT CODE SECTION IS NOT SPECIFICALLY MENTIONED, I THINK THERE IS SOME CONFUSION, NOT THE CONFUSION

THE STATE OR MS. TOMSIC IS TALKING ABOUT, BUT A CONFUSION AMONG THE COUNTY ATTORNEYS AND THE COUNTY CLERKS AS TO WHETHER THEY COULD POTENTIALLY BE CRIMINALLY LIABLE UNDER THAT SEPARATE PROVISION.

NOW, AGAIN, SALT LAKE COUNTY VIEWS YOUR ORDER AS ENCOMPASSING ALL THE LAWS THAT WOULD PURPORT TO LIMIT THE ABILITY OF THE CLERKS TO ISSUE LICENSES TO SAME-SEX COUPLES. BUT TO THE EXTENT YOU ARE NOT INCLINED TO STAY YOUR RULING TODAY, AND SO WE ALL LEAVE THIS COURTROOM AND CLERKS ARE CONTINUING TO ISSUE LICENSES, WE THINK IT WOULD BE HELPFUL NOT JUST IN SALT LAKE COUNTY BUT TO OTHER CLERKS THROUGHOUT THE STATE FOR YOU TO CLARIFY THAT YOUR RULING ENCOMPASSES THAT SECTION OF THE CODE AS WELL.

THE COURT: ALL RIGHT, THANK YOU, MS. GODDARD. OF COURSE THAT SECTION OF THE CODE WASN'T RAISED BY ANY OF THE PARTIES IN THE BRIEFING, AND I WAS COMPLETELY UNAWARE OF IT UNTIL THIS MORNING.

MS. TOMSIC: MEA CULPA, YOUR HONOR.

THE COURT: ALL RIGHT. ANYTHING MORE IN LIGHT OF THAT, MR. LOTT, MS. TOMSIC?

MS. TOMSIC: NO, YOUR HONOR.

MR. LOTT: NO.

THE COURT: LET'S TAKE A BRIEF RECESS FOR 15 OR 20 MINUTES AND WE'LL COME BACK.

(RECESS FROM 10:19 A.M. UNTIL 11:08 A.M.)

THE COURT: ALL RIGHT. THANK YOU ALL FOR YOUR PATIENCE. ONCE AGAIN THE PARTIES HAVE GIVEN ME A GREAT DEAL TO CONSIDER.

AT THE OUTSET LET ME FIRST ADDRESS THE ISSUE RAISED BY SALT LAKE COUNTY AT THE CONCLUSION OF OUR ARGUMENT. TO THE EXTENT THAT IT'S NOT ALREADY CLEAR FROM THE COURT'S RULING, MY INTENT AND THE EFFECT OF MY RULING ON FRIDAY WAS TO FIND THAT THE LAWS OF THE STATE OF UTAH THAT OPERATE TO DENY SAME-SEX COUPLES THE OPPORTUNITY TO MARRY OPERATE IN VIOLATION OF THE DUE PROCESS PROTECTIONS AND EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION. FOR THAT REASON, THEY COULD NOT BE APPLIED.

WHILE I DID NOT ATTEMPT TO IDENTIFY OR SPECIFY EVERY PROVISION OF THE STATE CODE THAT MIGHT OPERATE IN VIOLENCE TO THOSE CONSTITUTIONAL GUARANTEES, THE INTENT AND EFFECT OF MY ORDER IS TO PREVENT THE STATE OF UTAH OR ANYONE ACTING ON BEHALF OF THE STATE OF UTAH FROM ENFORCING ANY LAW THAT WOULD DEPRIVE SAME-SEX COUPLES OF THOSE CONSTITUTIONAL GUARANTEES, INCLUDING THAT PROVISION THAT MS. GODDARD SPECIFICALLY RAISED AT THE CONCLUSION OF OUR ARGUMENT.

BUT TURNING TO THE ISSUE BEFORE US, THE -- BEFORE THE COURT IS THE STATE DEFENDANTS' MOTION FOR A STAY PENDING APPEAL. WE HAVE CAREFULLY REVIEWED THE BRIEFS SUBMITTED BY THE PARTIES, BOTH IN SUPPORT OF AND IN OPPOSITION TO THAT MOTION, AND OF COURSE HAVE CONSIDERED THE ARGUMENTS PRESENTED

HERE THIS MORNING. WE'VE ALSO CONSIDERED THE LEGAL AUTHORITIES CITED BY THE PARTIES AND THE STANDARDS THAT GOVERN APPLICATIONS FOR STAYS PENDING APPEAL.

I'LL NOTE THAT I THINK MS. TOMSIC'S DISCUSSION CONCERNING THE PROCEDURAL HISTORY THAT LED US TO THIS POINT WAS CORRECT AND APT, AND I ADOPT THAT DISCUSSION. AND OUR REALITY, OF COURSE, IS THAT THIS IS SOMETHING OF A MESS, FOR THOSE REASONS I THINK THAT MS. TOMSIC EXPLAINED.

I'LL NOTE THAT THERE IS NO DISPUTE AMONGST THE PARTIES ABOUT THE STANDARD THAT I AM REQUIRED TO APPLY IN ADDRESSING AND RESOLVING THIS MOTION FOR A STAY PRESENTED BY THE STATE DEFENDANTS. EVERYONE AGREES WHAT THOSE FACTORS ARE.

BEFORE I ANNOUNCE MY RULING, I'LL JUST NOTE THAT ULTIMATELY THE STATE DEFENDANTS ENCOURAGE ME TO FOLLOW THE COURSE TAKEN BY JUDGE WALKER IN CALIFORNIA IN DECIDING THE PROPOSITION 8 LITIGATION. BUT, IMPORTANTLY, WE ARE IN A DIFFERENT PROCEDURAL POSTURE THAN JUDGE WALKER WAS, FOR THE REASON THAT THE PARTIES IN THAT CASE CONSIDERED AND HAD PREPARED TO FILE A MOTION REQUESTING THAT THE COURT STAY THE EFFECT OF ITS ORDER EVEN BEFORE THE COURT ISSUED ITS RULING. THE INTERVENOR DEFENDANTS IN THE PROPOSITION 8 LITIGATION MADE THAT REQUEST IN A MANNER THAT PERMITTED JUDGE WALKER TO CONSIDER IT SIMULTANEOUSLY WITH THE ISSUANCE OF HIS RULING ON THE MERITS.

AND OF COURSE JUDGE WALKER DID THAT. HE ISSUED TWO

ORDERS ESSENTIALLY SIMULTANEOUSLY, ONE RESOLVING THE LEGAL ISSUES ADDRESSED, AND THEN, SECOND, A SECOND ORDER STAYING THE EFFECT OF THAT RULING TO PRESERVE THE STATUS QUO UNTIL THE PARTIES HAD AN OPPORTUNITY FULLY TO BRIEF A REQUEST FOR A STAY.

AND IN THIS INSTANCE WE HAD NO SUCH REQUEST FROM ANY PARTY, EITHER PRIOR TO THE COURT'S SUBSTANTIVE RULING FRIDAY OR IMMEDIATELY THEREAFTER. SO THIS COURT DID WHAT IT HAS DONE IN EVERY CASE, IN EVERY ORDER THAT I HAVE ISSUED SINCE I TOOK MY OATH AND TOOK THIS POSITION, AND THAT WAS TO ISSUE AN ORDER RESOLVING THE ISSUES PRESENTED BY THE PARTIES, AND NOTHING ELSE, AND THAT'S EXACTLY WHAT WE DID.

AND I'LL NOTE THAT AT ITS CORE I BELIEVE MS. TOMSIC IS CORRECT, THAT THE STATE ESSENTIALLY RELIES AND REASSERTS HERE ARGUMENTS THAT IT PREVIOUSLY SUBMITTED IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, ARGUMENTS THAT I PREVIOUSLY CONSIDERED AND DECIDED ON THE MERITS. AND THOSE FINDINGS -- PARDON ME -- THOSE FINDINGS PREVENT ME FROM PROVIDING THE RELIEF THAT THE STATE IS REQUESTING TODAY.

FOR REASONS THAT I WILL FURTHER AND MORE COMPLETELY ARTICULATE IN A BRIEF WRITTEN RULING THAT I'LL ISSUE BEFORE THE END OF THE DAY TODAY, I CONCLUDE THAT THE STATE HAS FAILED TO CARRY ITS BURDEN AS THE MOVING PARTY TO DEMONSTRATE AND SATISFY THE FACTORS IT IS REQUIRED TO MEET IN ORDER TO OBTAIN A STAY PENDING RESOLUTION OF THE DEFENDANTS' APPEAL TO THE

TENTH CIRCUIT.

AND IMPORTANTLY I'LL NOTE THAT THERE IS NO AUTHORITY CITED BY THE PARTIES, AND I AM AWARE OF NO AUTHORITY, THAT OTHERWISE GRANTS ME A LEGAL BASIS TO PROVIDE A TEMPORARY STAY WHILE THE TENTH CIRCUIT CONSIDERS WHAT I EXPECT WILL BE AN EXPEDITIOUSLY FORTHCOMING MOTION FROM THE STATE OF UTAH.

IN LIGHT OF THAT, IT SEEMS TO ME THAT MY OBLIGATION AS A DISTRICT COURT JUDGE IS TO MAKE A SUBSTANTIVE RULING ON THE MERITS AS QUICKLY AS POSSIBLE AND THEN TO STEP ASIDE AND ALLOW THE TENTH CIRCUIT TO WEIGH IN AND DETERMINE HOW BEST TO PROCEED.

AND SO WHILE THERE WILL BE A BRIEF WRITTEN ORDER FORTHCOMING, THE ORDER THAT I'VE JUST ARTICULATED IS THE RULING OF THE COURT, AND THE STATE IS WELCOME TO PROCEED IMMEDIATELY WITH ANY APPLICATION FOR ANY FURTHER RELIEF IT WOULD LIKE FROM THE TENTH CIRCUIT OR ANYONE ELSE.

IN LIGHT OF THAT RULING, ARE THERE ANY FURTHER -- ARE THERE ANY QUESTIONS OR ANYTHING MORE WE SHOULD TAKE UP TODAY?

MR. LOTT?

MR. LOTT: NOT ON BEHALF OF THE STATE DEFENDANTS. WE THANK THE COURT FOR THE CLARITY OF THE RULING.

THE COURT: THANK YOU, AND THANK YOU BOTH, BOTH PARTIES, FOR -- YOU HAVE BOTH WORKED OVER THE WEEKEND AND LATE AT NIGHT TO PREPARE YOUR BRIEFS AND ARGUMENTS, AND I VERY MUCH APPRECIATE THAT.

MS. TOMSIC, IS THERE ANYTHING FURTHER?

MS. TOMSIC: NO, YOUR HONOR. THANK YOU FOR THE TIME THIS MORNING.

THE COURT: THANK YOU. WE'LL BE IN RECESS.

(HEARING CONCLUDED AT 11:16 A.M.)

* * *

CERTIFICATE OF REPORTER

I, RAYMOND P. FENLON, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH, DO HEREBY CERTIFY THAT I REPORTED IN MY OFFICIAL CAPACITY, THE PROCEEDINGS HAD UPON THE HEARING IN THE CASE OF KITCHEN, ET AL. VS. HERBERT, ET AL., CASE NO. 2:13-CV-217, IN SAID COURT, ON THE 23RD DAY OF DECEMBER, 2013.

I FURTHER CERTIFY THAT THE FOREGOING PAGES CONSTITUTE THE OFFICIAL TRANSCRIPT OF SAID PROCEEDINGS AS TAKEN FROM MY MACHINE SHORTHAND NOTES.

IN WITNESS WHEREOF, I HAVE HERETO SUBSCRIBED MY NAME THIS 23RD DAY OF DECEMBER, 2013.

/S/ RAYMOND P. FENLON