Case No. 14-35420

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. "BUTCH" OTTER,

Defendant-Appellant,

CHRISTOPHER RICH,

Defendant,

And

STATE OF IDAHO,

Intervenor-Defendant

On Appeal from the United States District Court
For the District of Idaho
Case No. 1:13-cv-00482-CWD
The Honorable Candy W. Dale, Magistrate Judge

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

DEFENDANT-APPELLANT GOVERNOR C.L. (BUTCH) OTTER'S MOTION FOR STAY PENDING APPEAL

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9th Cir. R. 27-3 Certificate

Pursuant to 9th Cir. R. 27-3, Appellant Governor Otter respectfully certifies that his motion for a stay pending appeal is an emergency motion requiring "relief … in less than 21 days" to "avoid irreparable harm." The facts so showing are these:

Idaho's federal district court late on the afternoon of May 13, 2014 filed its Memorandum Decision and Order ("Injunction"; Exhibit 1) invalidating and enjoining enforcement of all of Idaho's statutory and constitution provisions preserving marriage as the union of a man and a woman. The Injunction by its terms becomes effective at 9:00 a.m. on Friday, May 16, 2014, and, as of about 11:15 a.m. on May 14, 2014, the district court denied Governor Otter's motion for stay refused to stay the Injunction pending appeal or even pending efforts to seek a stay from this Court.

If the Injunction becomes effective, Idaho will experience the same unseemly chaos, confusion, conflict, uncertainty, and spawn of further litigation and administrative actions seen in Utah and, to a lesser extent, in Michigan and resulting from a period of time when those district courts' decisions, very similar to the Injunction, were not stayed and hundreds of same-sex couples "married" in contravention of their respective States' marriage laws. (The United States

Supreme Court ultimately stayed the Utah decision; the Sixth Circuit, the Michigan decision. But too late to avoid much of the harms.)

Before filing his motion, Governor Otter notified counsel for the other parties by email and also emailed them a service copy of the motion.

All grounds advanced in support of this emergency motion were submitted to the district court as part of the Governor's motion to stay, which motion the district court denied.

Pursuant to 9th Cir. R. 27-3(a)(3)(i), the telephone numbers, email addresses, and office addresses of the attorneys for the parties are as follows:

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DATE: May 14, 2014.

By: s/ *Monte N. Stewart*
Lawyers for Defendant-Appellant Governor Otter

EMERGENCY MOTION

Pursuant to Circuit Rule 27-3, Defendant-Appellant Governor C.L. "Butch" Otter moves on an emergency basis for a stay of the district court's late afternoon May 13, 2014 Memorandum Decision and Order ("Injunction"; Exhibit 1) invalidating and enjoining enforcement of all of Idaho's statutory and constitutional provisions preserving marriage as the union of a man and a woman. The Injunction by its terms becomes effective at 9:00 a.m. on Friday, May 16, 2014, and, as of about 11:15 a.m. on May 14, 2014, the district court refused to stay it.

This emergency motion is made on the grounds that:

1. On January 6, 2014, the United States Supreme Court made clear that it will decide the constitutionality of man-woman marriage and until that time no lower court decision holding against man-woman marriage should operate to allow same-sex couples to marry or have their marriages recognized contrary to the law of their particular States. The Supreme Court did this by the extraordinary measure of staying the Utah district court's injunction against man-woman marriage after both that court and the Tenth Circuit had refused to do so.
2. Since at Supreme Court's intervention, all but one of the numerous district courts that subsequently ruled against man-woman marriage stayed their

own decisions. The one exception was the decision in the Michigan "same-sex marriage" case, and the Sixth Circuit on an emergency basis stayed that decision within hours. The Idaho district court's Injunction is now the second exception.

3. Absent the stay requested by Governor Otter's emergency motion, there will be a repetition in Idaho of the unseemly chaos, confusion, conflict, uncertainty, and spawn of further litigation and administrative actions seen in Utah and, to a lesser extent, in Michigan and resulting from a period of time when those district court decisions, very similar to the Injunction, were not stayed.
4. The law governing issuance of a stay fully supports Governor Otter's emergency motion.

INTRODUCTION

This Court is well aware of the history and scope of the litigation of what is rightly referred to as the ultimate marriage issue: Whether any federal constitutional norm invalidates a State's laws preserving marriage as "the union of a man and a woman" and mandates redefinition to "the union of two persons." Just last Term, the United States Supreme Court granted certiorari from a decision of this Court for the purpose of resolving that ultimate issue but was precluded from doing so by justiciability issues. *Hollingsworth v. Perry*, 570 U.S. ___, 133

S. Ct. 2652 (2013). The Eighth Circuit has already ruled in favor of man-woman marriage. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006). The issue is now pending post-oral argument before the Fourth and Tenth Circuits, *Bostic v. Harris*, Case No. 14-1167 (4th Cir.) (Virginia); *Bishop v. Smith*, Case No. 14-5003 (10th Cir.) (Oklahoma); *Kitchen v. Herbert*, Case No. 13-4178 (10th Cir.) (Utah), and is now pending pre-oral argument before this Court and the Fifth and Sixth Circuits. *Sevcik v. Sandoval*, Case No. 12-17668 (9th Cir.); *Tanco v. Haslam*, Case No. 14-5297(6th Cir.) (Tennessee); *DeLeon v. Perry*, No. 14-50196 (5th Cir.) (Texas); *DeBoer v. Snyder*, Case No. 14-1341 (6th Cir.) (Michigan); *Obergefell v. Himes*, Case No. 14-3057 (6th Cir.) (Ohio); *Bourke v. Beshear*, Case No. 14-5291 (6th Cir.) (Kentucky).

On November 8, 2013, the Plaintiffs (now Appellees) initiated a civil action squarely raising the ultimate marriage issue. On May 5, 2014, after oral argument, Magistrate Judge Candy Dale (sitting by consent of all parties) took under advisement the parties' various dispositive motions. On Monday, May 12, 2014, the Governor filed his Contingent Motion for Stay Pending Appeal ("Stay Motion), setting forth powerful reasons why the district court, in the event it ruled for the Plaintiffs, should stay its decision pending appeal or, at the very least, should allow the Governor seven days to seek in a fair and orderly way such a stay from this Court. (The contingency was issuance of a district court order in favor of the

Plaintiffs on the merits.) Late in the afternoon of that next day, Tuesday, May 13, 2014, the district court entered its Memorandum Decision and Order ("Injunction") invalidating all of Idaho's laws preserving man-woman marriage and enjoining their enforcement, effective at 9:00 a.m. on Friday, May 16, 2014. Exhibit 1. Later that night, the Governor filed his Emergency Request for Immediate Hearing on his pending Stay Motion. On Wednesday morning, May 14, 2014, the district court declined to hold a hearing but at about 11:15 a.m. MDT entered an order denying the Governor's Stay Motion. Exhibit 2. Within the hour, the Governor had filed his Notice of Appeal, transferring jurisdiction of the case to this Court.

When it refused any kind of stay, even a seven-day stay to allow this Court to consider in a fair and orderly way issuing its own stay, the district court did so against this background:

On December 23, 2013, Utah's district court entered a permanent injunction adverse to that State's man-woman marriage laws and then refused to stay the injunction. The Tenth Circuit also refused to stay it. In the meantime, hundreds of same-sex couples got marriage licenses and used them to conduct marriage ceremonies. That came to a halt on January 6, 2014, when the United States Supreme Court stayed the Utah district court's injunction. Exhibit 3. But the damage had already been done to the rule of law and the orderly resolution of the hugely important and consequential issue of the constitutionality of man-woman

marriage. At the time and since, Utah, its administrative agencies, its same-sex couples, and its citizens generally have been plunged into uncertainty, chaos, and confusion over the marital status of the same-sex-couples who got marriage licenses in that State before the United States Supreme Court stepped in. *Id.* The chaos has spawned further litigation, a series of directives and other communications between Utah's Governor and Attorney General and various State agencies, and, relative to federal-law consequences, pronouncements by the United States Attorney General. *Id.* And the uncertainty and resulting conflict continue.

Because of both the disorder in Utah and the clear and decisive action by the Supreme Court, all but one of the subsequent district court decisions ruling against man-woman marriage have provided for a stay. *Id.* The one exception was in Michigan; that district court declined to take that sensible approach, with the consequence that some Michigan same-sex couples married on a Saturday morning before the Sixth Circuit intervened with a stay order issued about noon that same day. *Id.*

Regarding Ninth Circuit practice, only Judge Walker in the Northern District of California has ruled against man-woman marriage, *id.*, and he entered a stay to allow the appellants seven days to seek a stay from this Court. *Id.* The Ninth Circuit granted that stay, which remained in effect through the Ninth Circuit's decision affirming the district court judgment, through the process of petitioning

the United States Supreme Court for a writ of certiorari, and through all subsequent Supreme Court proceedings in the case. The stay ended only when the Ninth Circuit issued its mandate after vacating, at the Supreme Court's direction, its prior decision of affirmance. *Id.*

This civil action squarely presents the ultimate marriage issue, the one the Supreme Court expressly left open last Term in *United States v. Windsor*, 133 S. Ct. 2675 (2013), namely, whether the States, in the exercise of their 'historic and essential authority to define the marital relation,'… may continue to utilize the traditional definition of marriage." *Id.* at 2696 (Roberts, C.J., dissenting); *see also id.* ("This opinion and its holding are confined to … lawful marriages" between people of the same sex) (majority opinion); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (declining to reach issue on jurisdictional grounds). In all due respect to this Court and the other circuit courts grappling with the marriage issue, it must be the United States Supreme Court that can give the answer to that issue in a way that commands the respect, allegiance, and compliance of the entire Nation—and until the Supreme Court gives that answer, *any* lower court ruling will be subject to reversal. The Supreme Court's January 6, 2014, action in the Utah case clearly evidences the justices' understanding of this reality, their intention to grant

certiorari so as to answer that ultimate issue,[1] and their intention that same-sex-couple marriages not occur in contravention of State law during the months leading up to the Supreme Court's authoritative ruling.[2]

Governor Otter seeks some form of stay relief from this Court before noon on Thursday, May 15, 2014; otherwise, he will have no responsible alternative—in the face of the Injunction's 9:00 a.m., Friday, May 16, 2014 effective time—but to begin at that time seeking relief from the Circuit Justice.

ARGUMENT

Four factors guide this Court's consideration of Governor Otter's emergency motion for stay pending the exhaustion of all appeals: (1) Governor Otter's likelihood of success on the merits; (2) the possibility of irreparable harm absent a stay; (3) the possibility of substantial injury to the other parties if a stay is issued; and (4) the public interest. *See Humane Soc'y of the U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). These factors all point to the same conclusion: This Court should "suspend [ ] judicial alteration of the status quo" on the important issues at stake in this litigation by staying the Injunction. *Nken v. Holder*, 556 U.S. 418, 429 (2009) (quotation marks omitted).

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[1] As already noted, the Supreme Court had already granted certiorari to resolve the ultimate marriage issue but was precluded from doing so by a justiciability problem. *Hollingsworth* v. *Perry*, 570 U.S. ___, 133 S.Ct. 2652 (2013).

[2] Perhaps ironically, the Injunction closely tracks throughout the Utah district court's decision, the implementation of which the Supreme Court itself stayed.

I. Governor Otter is Likely to Succeed on the Merits on Appeal.

Multiple reasons suggest a very strong likelihood that Governor Otter will ultimately succeed on the merits on appeal.

First: This case is a contest between two mutually exclusive and profoundly different social institutions, each vying to bear authoritatively the name of "marriage." One is constituted by the core meaning of the union of a man and a woman; the other, by the core meaning of the union of two persons without regard to gender. The law's power—which is adequate to the task—either will perpetuate the former or will suppress the former and mandate the latter. This matters because the core meanings constituting fundamental social institutions like marriage affect us all greatly; they shape our beliefs, attitudes, projects, and ways of behaving. The man-woman marriage institution, with the law's powerful help, recognizes and valorizes the roles of mother and of father and teaches that children generally should, if at all possible, be raised with both a mother and a father and thereby with the scientifically recognized benefits of gender complementarity in child-rearing. With its Parent A and Parent B, a genderless marriage regime does just the opposite, thereby creating the risk of increased fatherlessness, with all its well-known attendant ills, but also the risk of increased motherlessness.

The only way the Plaintiffs can be married (or have their foreign marriages recognized) in any intelligible sense in Idaho is for the State, by choice or judicial

mandate, to suppress the man-woman marriage institution and put in its place a genderless marriage regime. And that regime will be what marriage *is* for *everybody*. *All* will come under its teaching and socializing influence. But that course will deprive the State of the valuable and compelling social benefits flowing uniquely from the man-woman marriage institution. These are the rock-solid social institutional realities.

Consequently, under any standard of judicial scrutiny, Idaho has sufficiently good reasons for preserving the man-woman marriage institution.

The district court, however, ignored the social institutional realities in holding that Idaho did not have sufficiently good reasons. The district court ignored the Governor's core argument. The district court ignored the robust legislative facts, many of which are the social institutional realities, presented by Governor Otter and undergirding his core arguments. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 112 (1979) ("It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.") (internal quotation marks omitted). Such a course of judicial performance certainly carries within it the seeds of reversal.

Second: The various opinions in *Windsor* itself clearly indicate the likelihood of the Governor's ultimate success. As noted above, the majority's

decision to invalidate Section 3 of DOMA—which implemented a federal policy of refusing to recognize state laws defining marriage to include same-sex unions—was based in significant part on federalism concerns. For example, the majority emphasized that, "[b]y history and tradition the definition and regulation of marriage…has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689-90. The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* at 2691 (quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84 (1930)). And the majority concluded that DOMA's refusal to respect the State's authority to define marriage as it sees fit represented a significant—and in the majority's view, unwarranted—"federal intrusion on state power." *Id.* at 2692.

Here, as previously noted, the district court's sweeping decision in favor of Plaintiffs not only failed to accommodate Idaho's definition for purposes of federal law, it altogether *abrogated* the decisions of the State and its citizens, acting through every available democratic channel, to define marriage in the traditional and usual way. *See also Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, slip op. at 16-17 (U.S. April 22, 2014) (stating "[t]hat [the democratic]

process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."). Accordingly, such a decision was therefore a far greater "federal intrusion on state power" than the intrusion invalidated in *Windsor*.

Third: The district court *never* justified its manifest departures from the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), which sets forth the "established method of substantive due process analysis," *id.* at 720. This is yet another reason to believe there is a good prospect that Governor Otter should prevail on the merits on appeal.

To begin with, the district court avoided *Glucksberg's* first requirement, which is "a 'careful description' of the asserted fundamental liberty interest." *Id.* at 721. Plaintiffs' asserted interest in marrying someone of the same sex is readily distinguishable from the Supreme Court's decisions affirming a fundamental right to marry, which were premised on marriage being a union of one man and one woman. *See Loving* v. *Virginia*, 388 U.S. 1, 2 (1967); *Zablocki* v. *Redhail*, 434 U.S. 374, 379 (1978); *Turner* v. *Safley*, 482 U.S. 78, 82 (1987).

Plaintiffs and the district court likewise flout *Glucksberg*'s second requirement for recognizing a due process right, namely, that it be among the

"fundamental rights and liberties which are objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. Rather than adhere to that requirement, the Plaintiffs and the district court wrongly believe that tradition and history are *insufficient* reasons to deny fundamental rights to an individual. And to the extent that erroneous belief is purportedly supported by *Lawrence* v. *Texas*, 539 U.S. 558 (2003), rests on a misreading *Lawrence*, as well as of *Glucksburg*. In *Lawrence* the Court emphasized, "[W]e think that our laws and traditions in the past half-century are of the most relevance here." *Lawrence*, 539 U.S. at 571-72. And there the recent history demonstrated a decided trend *away* from criminalization of homosexual relations. *Id.* at 572. Here, by contrast, the relevant history and tradition are that *no* State permitted same-sex marriage until 2003. And even abroad, no foreign nation allowed same-sex marriage until after the Netherlands did so in 2000. *Windsor*, 133 S.Ct. at 2715 (Alito, J., dissenting).

The fact that, in the last ten years of this Nation's 237-year history, a minority of States have implemented a genderless marriage regime does not transform access to such a regime a "deeply rooted" historical and traditional right. No interest still inconsistent with the laws of over 30 States and with the ubiquitous legal traditions of this and virtually every other country until a decade ago can be called "deeply rooted." For that reason too, the district court acted

beyond its constitutional authority in placing the issue presented here "outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720.

Fourth: Another indication of a good prospect of reversal by this Court is the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972). There, the Supreme Court unanimously dismissed, for want of a substantial federal question, an appeal from the Minnesota Supreme Court squarely presenting the question of whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.*; *see also Baker* v. *Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971). The Court's dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by *this Court*." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976) (emphasis added).

In this case before this Court, *Baker* remains highly relevant because it decided the very issue presented here. To be sure, a dismissal of the sort at issue in *Baker* "is not *here* [at the Supreme Court] 'of the same precedential value as would be an opinion of this Court treating the question on the merits.'" *Tully*, 429 U.S. at 74 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)). But that implies, and practice confirms, that in *this* Court *Baker* remains binding precedent, and at a minimum, of much more "precedential value" than any of these recent district

court decisions, including the one in Idaho. Accordingly, even if the *logic* of *Windsor* (or other decisions of this Court) suggested an opposite outcome—which it does not—this Court is bound to follow *Baker*. And that outcome is even more likely given the *Windsor* majority's emphasis on respect for State authority over marriage.

Fifth: The panel decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014),[3] will not sustain the Injunction against reversal. A careful reading of *Windsor* resolves the issue because the panel in *SmithKline* claimed to be doing nothing more than applying "*Windsor's* heightened scrutiny" to the unique facts of the case. *Id.* at 483. *Windsor* emphatically did not announce that laws imposing legal disadvantage on same-sex couples must be carefully scrutinized. Rather, *Windsor* focused instead on whether DOMA came within the rule that "discrimination of an *unusual character* especially suggests careful consideration to determine whether they are obnoxious to the constitutional provision." 133 S. Ct. at 2692 (emphasis added) (internal quotations omitted). Only after identifying DOMA's "unusual character" did the Court proceed—two sentences later—"to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment." 133 S. Ct. at 2692. Here, Plaintiffs and the district court are attempting to invert

[3] This Court is currently considering whether to vacate that decision and decide the case en banc.

the Supreme Court's analytical process in *Windsor* because nothing in that case—and thus nothing in *SmithKline*, which merely applied *Windsor's* holding without purporting to break new legal ground—remotely suggest that heightened scrutiny applies to distinctions based on sexual orientation absent "unusual" circumstances. Idaho's marriage laws are anything but unusual.

In any event, Idaho's marriage laws satisfy *"Windsor* scrutiny" or any other level of judicial scrutiny exactly because the vital man-woman marriage institution, unless suppressed by judicial decisions such as the Injunction and replaced with a genderless marriage regime, will continue to provide compellingly valuable social benefits, as demonstrated above. Accordingly, there is a good probability that this Court and the Supreme Court will jeopardize those benefits by accepting the plea that the Fourteenth Amendment requires federal courts to suppress the vital man-woman marriage institution and replace it with a profoundly different genderless marriage regime—one that provides no authoritative encouragement for the vital and necessary roles of mother and father, thereby devaluing those roles and almost certainly increasing the incidents and ills of fatherlessness and motherless.

Sixth: Perhaps most importantly for these purposes, the Supreme Court granted the application filed by the State of Utah to stay enforcement of a district court's injunction determining that Utah's marriage maws were unconstitutional. *Herbert v. Kitchen*, 134 S. Ct. 893 (mem.). That reality is particularly telling here

because the district court in this case with the Injunction followed very closely the Utah district court's decision. The grant of a stay by the Supreme Court after denial by the lower courts indicates that eventual certiorari review is highly likely. *E.g.*, *Packwood v. Select Comm. On Ethics*, 510 U.S. 1319, 1319-20 (1994) (Rehnquist, C.J., in chambers).

Moreover, the Supreme Court's extraordinary determination to issue a stay indicates that the Court recognizes the need for *it* to resolve the issues in this and related litigation and to maintain the status quo until the Court *actually* addresses and resolves the ultimate marriage issue. This Court, as it did in California's Proposition 8 case and as the Sixth Circuit recently did in Michigan's same-sex marriage case and as all post-*Windsor* district court decisions (save Michigan and now Idaho) have done, should follow the Supreme Court's example and stay the issuance of marriage licenses to same-sex couples until the exhaustion of all appeals.

II. Irreparable Harm Will Result Absent a Stay.

Should this Court deny a stay, it will impose certain—not merely likely—irreparable harm on Idaho and its citizens. "[I]t is clear that a state suffers irreparable injury whenever the enactment of its people … is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in

chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *accord Maryland v. King*, 567 U.S. __, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); and *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. __, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in the denial of application to vacate stay). That same principle supports a finding of irreparable injury in this case. For an injunction from this Court would not just enjoin Idaho from enforcing not only an ordinary statute, but a constitutional provision approved by the people of this State in the core exercise of their sovereignty.

Further, absent an immediate stay of the Injunction, Idaho will be subjected to the same unseemly chaos, confusion, uncertainty, conflict, and proliferation of litigation experienced in Utah and, to a lesser extent, in Michigan. We are not talking possibilities here; history teaches; the same ills will certainly befall all connected to or interested in this case. Repeating the Utah experience in Idaho would undoubtedly inflict harm on Plaintiffs and place enormous administrative burdens on the State. *See Legalization Assistance Project*, 510 U.S. at 1305-06 (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant the requested stay). Only a stay can prevent or at least mitigate that indefensible result.

III. A Stay Will Not Subject Plaintiffs to Substantial Harm.

As explained above, Idaho and its citizens will suffer irreparable injury from halting the enforcement of the State's definition of marriage: Every marriage performed under that cloud of uncertainty and before final resolution by the United States Supreme Court would be an affront to the sovereignty of Idaho and to the democratically expressed will of the people of Idaho; the State may also incur ever-increasing administrative and financial costs to deal with the marital status of same-sex unions performed before this case is finally resolved; and same-sex couples may be irreparably harmed in their dignity and financial interests if their marital status is retroactively voided.

By contrast, a stay would at most subject Plaintiffs to a period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship or have their foreign marriages recognized in Idaho. As demonstrated above, Governor Otter is at least likely to ultimately succeed on the merits. And that likelihood certainly creates the uncertainty that a future court may "unwind" marriages Plaintiffs and other same-sex couples enter into in the interim.

IV. The Public Interest Weighs in Favor of a Stay.

Avoiding such uncertainty should weigh very heavily in favor of staying a judgment invalidating Idaho's marriage laws pending appeal. And given the

Supreme Court's willingness to stay the Utah litigation pending appeal further evinces the public interest in granting a stay.

Further, by reaffirming Idaho's commitment to man-woman marriage in 2006, the people of Idaho have declared clearly and consistently that the public interest lies with preserving the current marriage institution. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal."); *Golden Gate Rest. Ass'n*, 512 F.3d 1112, 1126-1127 ("[O]ur consideration of the public interest is constrained in this case, for the responsible officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal.").

The people of Idaho have expressed their "concerns and beliefs about this sensitive area" and have "defined what marriage is," *id.* at 680—namely, as the "union of a man and a woman." In short, there is nothing in the Fourteenth Amendment that compels this Court to second-guess the people of Idaho's considered judgment of the public interest. In any event, all the concrete realities cry out for this Court to do as it did in the Proposition 8 case and stay the Injunction pending exhaustion of all appeals.

CONCLUSION

This Court should stay the Injunction pending the exhaustion of all appeals. If it declines to do so, this Court should stay the Injunction for a reasonable period to allow the Governor to seek in a fair and orderly way a stay from the Circuit Justice and/or full Supreme Court.

DATED: May 14, 2014

By /s/ *Monte Neil Stewart*
Lawyers for Defendant-Appellant Governor Otter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 14, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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