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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SUSAN LATTA and TRACI EHLERS, LORI WATSEN and SHARENE WATSEN, SHELIA ROBERTSON and ANDREA ALTMAYER, AMBER BEIERLE and RACHAEL ROBERTSON, Plaintiffs, vs. C.L. (BUTCH) OTTER, as Governor of the State of Idaho, in his official capacity, and CHRISTOPHER RICH, as Recorder of Ada County, Idaho, in his official capacity, Defendants, and STATE OF IDAHO, Defendant-Intervenor.	Case No. 1:13-cv-00482-CWD **(i) GOVERNOR OTTER'S CONTINGENT MOTION TO STAY PENDING APPEAL;** **(ii) MEMORANDUM IN SUPPORT; and** **(iii) AFFIDAVIT AND EXHIBITS**

MOTION

Defendant Governor Otter respectfully moves, contingent upon this Court entering an order ruling in favor of any Plaintiff on any claim and/or granting any relief to any Plaintiff ("Adverse Order"), that the Adverse Order be stayed in full until completion of all appeals pertaining to this civil action.[1]

This contingent motion is made on the grounds that:

1. In the event of an Adverse Order, Governor Otter will timely and duly appeal it to the Ninth Circuit Court of Appeals and, if the Ninth Circuit affirms any part of the Adverse Order, will timely and duly petition the United States Supreme Court for a writ of certiorari. Further, Governor Otter may, after the appeal from the Adverse Order is lodged with the Ninth Circuit, timely and duly petition the United States Supreme Court for a writ of certiorari before judgment.

2. 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 decision against man-woman marriage after both that court and the Tenth Circuit had refused to do so.

3. Absent the stay requested by Governor Otter's contingent motion, there is likely to be a repetition in Idaho of the chaos, confusion, conflict, uncertainty, and spawn

[1] If, in the event of an Adverse Order, this Court declines to grant the contingent motion in full, Governor Otter moves for a limited stay of the Adverse Order to permit him to seek a stay pending appeal from the Ninth Circuit Court of Appeals and, if necessary, the United States Supreme Court.

of further litigation and administrative actions seen in Utah and, to a lesser extent, in Michigan.

4. The law governing issuance of a stay fully supports Governor Otter's contingent motion.

The contingent motion is supported by the following Memorandum and attached affidavit and exhibits.

By making the contingent motion, Governor Otter does not concede any point on the merits and continues to strongly assert that the federal Constitution cannot be rightly read to mandate that marriage in Idaho law and society be redefined from the "union of a man and a woman" to the "union of any two persons regardless of gender."

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MEMORANDUM IN SUPPORT OF CONTINGENT MOTION

INTRODUCTION

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 received 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. Affidavit of Monte Neil Stewart ("Stewart Affidavit") at ¶ 4 and Exhibit 1. 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 received marriage licenses in that State before the United States Supreme Court stepped in. 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 federal Attorney General. And the uncertainty and resulting conflict continue. Stewart Affidavit at ¶ 4.

Seeing both the unmitigated disaster 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. Stewart Affidavit at ¶ 5. The one exception was Judge Friedman in Michigan, who declined to take that orderly approach, with the consequence that some Michigan same-sex couples married on a Saturday morning before the Sixth Circuit could intervene with a stay order issued about noon that same day. Stewart Affidavit at ¶ 5 and Exhibit 2.

Regarding Ninth Circuit practice, only Judge Vaughn in the Northern District of California has ruled against man-woman marriage, and he entered a stay to allow the appellants time to seek a stay from the Ninth Circuit. 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. Stewart Affidavit at ¶ 6.

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); and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (declining to reach issue on jurisdictional grounds).

In all due respect to this Court, and to the other district courts that have or will rule on the ultimate marriage issue, it is only 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 evinces the justices' understanding of this reality, their intention to grant certiorari so as to answer that ultimate issue,[2] and their intention that same-sex marriages not occur in contravention of state law during the months leading up to the Supreme Court's authoritative ruling.

ARGUMENT

Four factors guide this Court's consideration of Governor Otter's precautionary and contingent motion for stay pending the exhaustion of all appeals: (1) Governor Otter's likelihood of success on the merits; (2) the likelihood of irreparable harm absent a stay; (3) the balance of equities tip in his favor; 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

[2] 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).

Court should "suspend [ ] judicial alteration of the status quo" on the important issues at stake in this litigation by staying any Adverse Order pending appeal. *Nken v. Holder*, 129 S. Ct. 1749, 1758 (2009) (quotation marks omitted).

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

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

1. The various opinions in *Windsor* itself clearly indicate such a prospect. 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, judgment in favor of Plaintiffs would not just fail to accommodate Idaho's definition for purposes of federal law, it would altogether *abrogate* 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*.

2. Plaintiffs have *never* explained their 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, and provides yet another reason to believe there is a good prospect that Governor Otter should prevail on the merits at this Court, and if necessary, on appeal.

To begin with, Plaintiffs seek to avoid *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) (describing the complainants as "Mildred Jeter, a Negro woman, and Richard Loving, a white man"); *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978) ("appellee [Redhail] and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time"); *Turner v. Safley*, 482 U.S. 78, 82 (1987) ("generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason" to permit the marriage of inmates affected by the challenged prison regulation).

The contrast with *Loving* v. *Virginia*, 388 U.S. at 10-12, which involved an invidious

system bent on advancing "White Supremacy," could not be more stark. Here Plaintiffs beg the question in presuming that gays and lesbians are entitled to the same judicial protection accorded racial minorities, especially where the traditional definition of marriage exists to promote Idaho's child-centric marriage culture rather than to oppress homosexuals. To date, the Supreme Court *has not* recognized that sexual orientation (unlike race) is a suspect class entitled to strict or even heightened scrutiny despite being urged to do so in *Windsor*.

Plaintiffs 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, Plaintiffs wrongly believe that tradition and history are *insufficient* reasons to deny their effort to seek government recognition of their close personal relationship. Citing and quoting *Lawrence v. Texas*, 539 U.S. 558 (2003), moreover, the Plaintiffs conclude that *Glucksberg*'s "history and tradition" requirement simply does not apply to a new set of facts that were previously unknown—meaning, in the Plaintiffs' view, the knowledge of what it means to be gay or lesbian. But that is a misreading of both *Glucksberg* and *Lawrence.*

Indeed, 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. *See Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941 (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 10 years of this Nation's 238-year history, a minority of States have permitted same-sex marriage does not transform same-sex marriage into a "deeply rooted" historical and traditional right. No interest can be called "deeply rooted" when it is 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. Indeed, *Windsor* destroys this argument noting that "[f]or marriage between a man and woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S.Ct. at 2689. For that reason too, Plaintiffs invite this Court to act 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.

3. Another indication of a good prospect of reversal by the Supreme Court is its 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).

As this Court is aware, several recent district court decisions have refused to follow *Baker*, believing it had been substantially undercut by the majority in *Windsor*. Setting aside the fact that *Baker* was not even discussed by the *Windsor* majority, the analysis of these courts

overlook that the precise issue presented in *Windsor*—whether the *federal* government can refuse to recognize same-sex marriages performed in States where such marriages are lawful—was very different from the question presented in *Baker*, *i.e.*, whether a *State* may constitutionally refuse to *authorize* same-sex marriages under State law. Because the issues presented were different, the Supreme Court simply had no occasion to address whether *Baker* was controlling or even persuasive authority in *Windsor*; it obviously was not.

In this case and in further appeal, however, *Baker* will remain 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* [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. Accordingly, even if the *logic* of *Windsor* (or other decisions of this Court) suggested an opposite outcome—which it does not—there is at least a reasonable prospect that a majority of the Supreme Court will elect to follow *Baker* based on its precedential value. And that outcome is even more likely given the *Windsor* majority's emphasis on respect for State authority over marriage.

4. Another reason to believe there is a strong likelihood that future appellate courts will ultimately support Idaho's Marriage Laws is rooted in the robust legislative facts provided by Governor Otter demonstrating that Idaho has sufficiently good reasons for retaining the man-woman marriage institution and for avoiding the risks that would accompany a redefinition. *See, e.g.*, Governor Otter's Opening Brief, Dkt No. 57-2, at

31-48. Those robust legislative facts confirm what Idaho, its citizens, and indeed virtually all of society have until recently believed about the importance of providing unique encouragement and protection for man-woman unions: (a) that children do best across a range of outcomes when they are raised by their father and mother (biological or adoptive), living together in a committed relationship, and (b) that limiting the definition of marriage to man-woman unions, though it cannot guarantee that outcome, substantially increases the *likelihood* that children will be raised in such an arrangement. *See id.*; *Id.* at 44 (citing to Dr. Price's Affidavit).

Indeed, these core legislative facts on which legislatures and voters throughout the Nation have relied in repeatedly limiting marriage to man-woman unions. And when contravened by other evidence, they are not subject to second-guessing by the judiciary without a showing that no rational person could believe them. *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).

Accordingly, a State may rightly conclude as a matter of "legislative fact" that gender complementarity is important and, on that basis, to *try* to promote it wherever it can through encouragement and through the role of the "law as a teacher" at the center of the institutional realities of marriage. Indeed, it is difficult to imagine a governmental interest more compelling. *See, e.g.*, *Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) ("It is hard to conceive an interest more legitimate and more paramount for the state

than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society.").

How does maintaining the traditional definition of marriage advance the Idaho's powerful interest in promoting gender-diverse parenting? It obviously does not guarantee that every child will be raised in such a household. But by holding up and encouraging man-woman unions as the *preferred* arrangement in which to raise children, Idaho can increase the likelihood that any given child will in fact be raised in such an arrangement. The recent district court decisions holding that a state lacks any "rational" reason for preferring the traditional definition of marriage, ignores this fundamental reality—even placing those decisions in conflict with decisions of several state supreme courts (or equivalents), which have held that encouraging gender complementarity in parenting provides a legitimate, rational basis for limiting marriage to man-woman unions. *E.g.*, *Hernandez* v. *Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.") The fact that these courts have found a legitimate basis for limiting marriage to man-woman unions enhances the likelihood that this Court should—and future appellate courts—will do so as well.

By contrast, if Idaho is forced to allow genderless marriage necessarily loses much of its ability to encourage gender complementarity as the preferred parenting arrangement. And it thereby substantially increases the likelihood that any given child will be raised *without* the everyday influence of his or her biological mother and father—indeed, without the everyday influence of a father or a mother at all.

Even analyzing Idaho's Marriage Laws through the lens of the Ninth Circuit's decision in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) is not fatal to

the State's definition of marriage. In fact, 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 suggest 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 are attempting to invert 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. For all the reasons explained in the Governor's briefing, Idaho's Marriage Laws are anything but unusual.

In any event, Idaho's Marriage Laws satisfy "*Windsor* scrutiny." *See, e.g.*, Governor's Reply Brief, Dkt No. 90 at 13; Governor's Response Brief, Dkt No. 81, at 32-34.

To be sure, *Windsor* holds that a State is constitutionally *permitted* to decide that this risk is offset, for example, by the risk that children being raised in families headed by same-sex couples will feel demeaned by their families' inability to use the term "marriage." *See* 133 S. Ct. at 2694. But the *Windsor* majority does not suggest—and we think the Supreme Court unlikely to hold after carefully considering the manifest benefits of gender complementarity—that a

sovereign State is constitutionally *compelled* to make that choice. To hold that the Constitution allows a federal court to second-guess such a fundamental and emotional policy choice, lying as it does at the very heart of the State's authority over matters of domestic relations, would be a remarkable "federal intrusion on state power," *id.* at 2692—one that would make a mockery of the *Windsor* majority's rationale for invalidating Section 3 of DOMA.

Accordingly, there is a good probability that the Supreme Court will avoid that result and, accordingly, reject Plaintiffs' request for relief and (if it is not appropriately rejected by this Court and the Ninth Circuit).

5. Lastly, as mentioned above, 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 laws were unconstitutional. *Herbert v. Kitchen*, 134 S. Ct. 893 (mem.). 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 (1994) (Rehnquist, C.J., in chambers) ("The criteria for deciding whether to grant a stay are well established. An applicant must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed. … Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden.") (citation omitted).

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 this particular issue. Should this Court grant Plaintiffs' extraordinary request, it should follow the Supreme Court's example and stay any Adverse Order until the exhaustion of all appeals.

II. Irreparable Harm Will Result Absent a Stay.

Should this Court grant Plaintiffs' injunctive relief, it will impose certain—not just 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 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 any ruling invalidating Idaho's Marriage Laws, same-sex couples would be permitted to marry in Ada County (and possibly throughout Idaho). Genderless marriages would be licensed under a cloud of uncertainty, and should Governor Otter succeed on appeal, as he strongly maintains, any such marriages could be invalid *ab initio*. Indeed, the failures of the district courts in Utah and

Michigan to grant a stay pending appeal led to chaos, confusion, and uncertainty of a kind harmful to all involved with or concerned about the ultimate marriage issue. Stewart Affidavit at ¶¶ 3-6 and Exhibit 2.

Repeating a similar experience 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. The Balance of Equities Tip in Governor Otter's Favor.

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 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 here. It is not even clear, if given the choice, whether Plaintiffs would opt to marry while appeal of this case is pending because, as demonstrated above, Governor Otter is at least likely to ultimately succeed on

the merits. And that likelihood creates the uncertainty that a future court may "unwind" such marriages. Accordingly, the balance of equities tips in favor of Governor Otter.

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 v. San Francisco*, 512 F.3d 1112, 1126-1127 (9th Cir. 2008) ("[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."). And while it is always "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy," *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (quotation marks omitted), such considerations are particularly weighty here, as "it is difficult to imagine an area more fraught with sensitive social policy

considerations" than the regulation of marriage, *Smelt v. County of Orange, California*, 447 F.3d 673, 681 (9th Cir. 2006).

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.

CONCLUSION

Governor Otter has demonstrated that Idaho has sufficiently good reasons for retaining the man-woman definition of marriage. Accordingly, this Court should grant summary judgment in his favor. But if this Court issues any Adverse Order, it should at the same time grant the full stay requested in Governor Otter's precautionary and contingent motion. Such a stay will serve the public interest by preserving future appellate courts' ability to address matters of vital national importance *before* irreparable injury is inflicted on Idaho and its citizens. Should this Court decline to grant that full stay, at the very least it ought to issue a limited stay of any Adverse Judge to enable Governor Otter to seek in an orderly way a stay pending appeal from the Ninth Circuit and, if necessary, the United States Supreme Court.

DATED: May 12, 2014

By /s/ *Thomas C. Perry*
THOMAS C. PERRY
Counsel to the Governor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 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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/s/ *Thomas C. Perry*
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Counsel to the Governor

AFFIDAVIT OF MONTE NEIL STEWART

State of Idaho)
) ss
County of Ada)

I, Monte Neil Stewart, being first duly sworn, testify of my own personal knowledge that:

1. I am a lawyer admitted to practice in this Court, the state courts of Idaho, Utah, Nevada, and California, federal district courts in Utah, Nevada, and California, the Ninth Circuit, the Tenth Circuit, and the United States Supreme Court. I am a member of the Boise-based law firm Stewart Taylor & Morris PLLC.
2. For the past ten years, I have specialized in defending the man-woman marriage laws of various States against constitutional challenges and in that specialty have participated as counsel in one capacity or another in more than a dozen state-court actions/appeals and in more than a half-dozen federal-court actions/appeals (as well as in Canadian and South African cases). I monitor all cases in my area of specialty.
3. I represented as counsel of record before the United States Supreme Court the Utah Governor and Attorney General named as defendants in that State's "same-sex marriage" case, *Kitchen v. Herbert*, and am currently one of those defendants'/appellants' counsel of record in that case before the Tenth Circuit. In that case, I led the successful effort to get from the United States Supreme Court its January 6, 2014 stay of the district court's injunction adverse to Utah's man-woman marriage laws. I am also lead counsel for the one appellee actively defending Nevada's man-woman marriage laws before the Ninth Circuit in the case known as *Sevcik v. Sandoval*.
4. On December 23, 2013, in *Kitchen v. Herbert*, 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 received 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 1. 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 received marriage licenses in that State before the United States Supreme Court stepped in. 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 federal Attorney General. And the uncertainty and resulting conflict continue.

5. Aware of both the troubling developments in Utah and the clear and decisive action by the Supreme Court with its January 6, 2014 order, all but one of the subsequent district court decisions ruling against man-woman marriage have provided for a stay. The one exception was Judge Friedman in Michigan's "same-sex marriage" case, *DeBoer v. Snyder*. That judge ruled on a Friday and declined to stay his ruling, with the consequence that some Michigan same-sex couples married on a Saturday morning before the Sixth Circuit could put a stop to the practice with a stay order issued about noon that same day. See Exhibit 2.

6. Regarding Ninth Circuit practice, only Judge Vaughn in the Northern District of California has ruled against man-woman marriage. He did so in the case challenging Proposition 8, known then as *Perry v. Brown* and later at the Supreme

Court as *Hollingsworth v. Perry*. Judge Vaughn entered a stay to allow the appellants time to seek a stay from the Ninth Circuit. 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.

Monte Stewart

SUBSCRIBED AND SWORN TO before me this 9th day of May, 2014.

Suzanne R. Anderson
Notary Public
Residing at Boise, ID
My Commission Expires: 7-30-18

SUZANNE R. ANDERSON NOTARY PUBLIC STATE OF IDAHO

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 6, 2014

Mr. Monte Neil Stewart
Belnap Stewart Taylor & Morris, PLLC
12500 W. Explorer Drive
Suite 100
Boise, ID 83713

Re: Gary R. Herbert, Governor of Utah, et al.
v. Derek Kitchen, et al.
No. 13A687

Dear Mr. Stewart:

The Court today entered the enclosed order in the above-case.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

By

Danny Bickell
Staff Attorney

EXHIBIT
1

(ORDER LIST: 571 U.S.)

MONDAY, JANUARY 6, 2014

ORDER IN PENDING CASE

13A687 HERBERT, GOV. OF UT, ET AL. V. KITCHEN, DEREK, ET AL.

The application for stay presented to Justice Sotomayor and by her referred to the Court is granted. The permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13-cv-217, on December 20, 2013, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.

Los Angeles Times | ARTICLE COLLECTIONS

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Michigan's same-sex marriage ban to stay in place for now, court says

March 25, 2014 | By Paresh Dave

Michigan's ban on same-sex marriage will remain in place while the state fights a federal judge's ruling that declared the ban unconstitutional, an appeals court decided Tuesday.

A three-judge panel of the U.S. 6th Circuit Court of Appeals stayed U.S. District Judge Bernard Friedman's ruling on a vote of 2 to 1.

DOCUMENT: Read the appeals court's order

The plaintiffs in the case, a lesbian couple, had asked the appeals court to lift the ban during the appeals.

"There are times when maintaining the status quo makes sense," attorneys for April DeBoer and Jayne Rowse said in a court document filed Tuesday. "There are also times when maintaining the status quo is merely a kinder label for perpetuating discrimination that should no longer be tolerated."

Michigan Atty. Gen. Bill Schuette argued that a stay was necessary because same-sex marriages completed in the interim – such as the hundreds performed Saturday – are of questionable legal status and won't be recognized by state officials. He cited other gay marriage cases in which federal courts, including the U.S. Supreme Court, have issued stays during appeals.

Friedman overturned Michigan's decade-old, voter-approved same-sex marriage ban Friday, ruling it unconstitutional because it denied equal protection to gays and lesbians.

Some Michigan counties began issuing marriage licenses to same-sex couples early Saturday morning until the appeals court temporarily stayed Friedman's ruling. According to a court filing, 323 licenses were issued. Tuesday's ruling extended the stay pending the appeals process.

Gay rights group Equality Michigan said nearly 300 gay couples wed before the appeals court intervened.

Michigan Gov. Rick Snyder said Sunday that the state would not recognize the gay marriages for now. The ACLU of Michigan said it would sue the state over that issue.

Circuit Judge John Rogers and Chief District Judge Karen Caldwell voted in favor of the indefinite stay.

"There is no apparent basis to distinguish this case or to balance the equities any differently than the Supreme Court did" in January when the high court suspended a ruling that overturned Utah's gay marriage ban pending appeal, the judges wrote in an order released Tuesday evening.

Circuit Judge Helene White dissented, saying the Supreme Court's order in the Utah case "provides little guidance" since the justices didn't explain their rationale.

DeBoer and Rowse were not among those who married Saturday, saying they would wait for the appeals process to run its course.

Attorneys for Michigan have until May 7 to explain to the appeals court why Friedman's ruling should be reversed. The plaintiffs will have a month to reply.

Oakland County Clerk Lisa Brown, whose office processed more than a third of the same-sex marriage licenses Saturday, said couples started lining up as early as 6 a.m. They waited for hours knowing that the window to marry could be closed by the appeals court any second, she said in a court filing.

Brown is named as a defendant alongside the state in the original lawsuit, but she has supported gay marriage.

"I will continue to be forced to discriminate against couples and their families with the respect to my duties as Oakland County clerk if a stay continues," she said in an affidavit.

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