Nos. 14-35420, 14-35421

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.,
Plaintiffs-Appellees,
v.

C.L. "BUTCH" OTTER, et al.,
Defendants,
and

STATE OF IDAHO, et al.,
Defendant-Intervenor-Appellant.

On Appeal from the United States District Court for the District of Idaho
No. 1:13-cv-00482-CWD (The Honorable Candy W. Dale)

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO MOTION OF DEFENDANTS-APPELLANTS FOR STAY PENDING APPEAL

DEBORAH A. FERGUSON
THE LAW OFFICE OF DEBORAH A. FERGUSON, PLLC
202 N. 9TH STREET, SUITE 401 C
BOISE, IDAHO 83702
TELEPHONE: (208) 484-2253

SHANNON P. MINTER
CHRISTOPHER F. STOLL
NATIONAL CENTER FOR LESBIAN RIGHTS
870 MARKET STREET, SUITE 370
SAN FRANCISCO, CA 94102
TELEPHONE: (415) 392-6257

CRAIG HARRISON DURHAM
DURHAM LAW OFFICE, PLLC
910 W. MAIN STREET, SUITE 328
BOISE, IDAHO 83702
TELEPHONE: (208) 345-5183

Counsel for Plaintiffs-Appellees

INTRODUCTION

Plaintiffs-Appellees Susan Latta and Traci Ehlers, Lori Watsen and Sharene Watsen, Shelia Robertson and Andrea Altmayer, and Amber Beierle and Rachel Robertson ("Plaintiffs") respectfully oppose the emergency motions for stay pending appeal filed by Defendant-Appellant Idaho Governor C.L. "Butch" Otter, Defendant-Appellant Ada County Recorder Christopher Rich, and Defendant-Appellant-Intervenor State of Idaho (collectively, "Defendants").

"A stay is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009). A party seeking the extraordinary relief of a stay must satisfy a four-factor test, which requires, among other things, a "strong showing that [the stay applicant] is likely to succeed on the merits" and a showing that "the applicant will be irreparably injured absent a stay." *Id.* at 434. Moreover, with respect to irreparable harm, the applicant "must show that there is a reason *specific to his or her case*, as opposed to a reason that would apply equally well to . . . all cases" why denial of a stay will irreparably harm the applicant. *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (emphasis added). Defendants cannot meet this standard.

This Court should reject Defendants' suggestion that the Supreme Court's entry of a stay in *Herbert v. Kitchen* 134 S. Ct. 893 (Jan. 6, 2014), compels a stay here. The district court decision in *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), invalidating Utah's ban on marriage by same-sex couples, was the first

reported decision of any court to address a marriage equality claim in the wake of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). While the district court's reasoning was clearly correct, at the time it was decided, it stood virtually alone as federal authority; accordingly, the stay application had to be measured against a limited jurisprudence of a single case. Since that decision, however, an unbroken wave of federal and state courts in every corner of the nation—including Arkansas, Illinois, Indiana, Kentucky, Michigan, New Mexico, New Jersey, Ohio, Oklahoma, Tennessee, Texas, and Virginia—have come to the same conclusion: in the wake of *Windsor*, marriage equality is a constitutional imperative. Not a single court in the nation has found to the contrary.

In light of that extraordinary consensus, the stay application in this case, and this Court's assessment of the merits, must be measured against a substantial body of doctrine that is consistent and uniform in supporting the correctness of the District Court's judgment. That body of uniform case law—virtually non-existent in *Kitchen*—differentiates this case and strongly supports the denial of a stay.

Defendants cite other post-*Windsor* cases granting stays, but those decisions have not performed an independent analysis of the required test. Instead, they simply cite the Supreme Court's ruling in *Kitchen*, with little or no examination of the relevant factors. For example, in *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014), the panel issued a stay without analyzing the factors because it could

find "no apparent basis to distinguish this case" from *Kitchen*. *Id*. at 1. The dissent, however, noted that Michigan "ha[d] not made the requisite showing" and that, although the Supreme Court issued a stay in *Herbert v. Kitchen*, "it did so without a statement of reasons, and therefore the order provides little guidance." *Id*. at 3-4. *See also*, *e.g*., *Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (relying on the Supreme Court's ruling in *Kitchen* without any analysis of the relevant factors and despite recognizing that, unlike the expedited proceedings in *Kitchen*, "it may be years before the appeals process is completed"); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (relying solely on ruling in *Kitchen* with no analysis of factors); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (same).

Whatever merit rote reliance on *Kitchen* may have had in earlier cases, there is now a compelling basis for performing a substantive analysis of the required factors, including the required balancing of harms. As the District Court correctly found in denying the Governor's request for a stay, those factors provide no basis for granting a stay in this case, where the irreparable harms to same-sex couples and their children are so serious, and Defendants are unable to articulate any concrete way in which permitting same-sex couples to marry or recognizing their existing marriages would be detrimental to the State or its residents, much less cause irreparable harm.

ARGUMENT

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken,* 556 U.S. at 433-34). In determining whether the moving party has met that exacting burden, courts consider "(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." *Nken,* 556 U.S. at 434 (citation and internal quotation marks omitted).

The first two of these factors are the most critical. *See id.* "Regarding the first factor, *Nken* held that it is not enough that the likelihood of success on the merits is 'better than negligible' or that there is a 'mere possibility of relief.'" *Lair,* 697 F.3d at 1204 (citation omitted). "[I]n order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits." *Leiva-Perez,* 640 F.3d at 968. Regarding the second factor, "*Nken* held that if the petitioner has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Id.* at 965. A stay applicant's "burden with regard to irreparable harm is higher than it is on the likelihood of success prong, as she must show that

an irreparable injury is the *more probable or likely outcome*." *Id.* at 968 (emphasis added). Moreover, in demonstrating that irreparable harm is likely, the applicant may not rely on generalities, but must show "a reason specific to his or her case, as opposed to a reason that would apply equally well to . . . all cases" why denial of a stay would result in irreparable harm. *Id.* at 969.

Here, Defendants cannot carry their burden, and indeed cannot satisfy *any* of the four *Nken* factors.

I. DEFENDANTS CANNOT MAKE A "STRONG SHOWING" THAT THEY ARE LIKELY TO PREVAIL IN THEIR APPEAL.

Defendants cannot show they are likely to succeed on the merits of their appeal. The District Court correctly concluded that, in light of *Windsor* and this Court's precedents, the Fourteenth Amendment requires the State of Idaho to afford equal treatment and respect to the marriages of same-sex couples validly entered into in other states, as well as to allow otherwise qualified same-sex couples to marry within the state. Since the decision in *Windsor* last summer, every federal district court to consider the issue has concluded that state laws similar to those challenged here violate due process or equal protection.[1]

[1] *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 1000 (S.D. Ohio 2013); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb 12, 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014); *Lee v.*

In *Windsor*, the Supreme Court held that Section 3 of the federal Defense of Marriage Act ("DOMA") violated "basic due process and equal protection principles." 133 S. Ct. at 2693. In so holding, the Court explained that Section 3 "interfere[d] with the equal dignity" of the lawful marriages of same-sex couples by treating those marriages as if they did not exist for purposes of federal law. *Id.* The Court found the statute to be invalid, "for no legitimate purpose overcomes the purpose and effect to disparage and injure" those couples. *Id*. at 2696.

Idaho's refusal to respect the existing marriages of same-sex couples or to allow same-sex couples to marry within the state deprives those couples of due process and equal protection for reasons similar to those that led the Supreme Court in *Windsor* to conclude that the federal government's refusal to respect the valid marriages of same-sex couples infringed those same constitutional guarantees. Like Section 3, Idaho's laws "deny its gay and lesbian citizens the fundamental right to marry and relegate their families to a stigmatized, second-class status without sufficient reason for doing so." *Latta v. Otter*, 2014 WL 1909999, *1 (D. Idaho May 13, 2014).

Orr, No. 13-CV-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *28 (W.D. Tex. Feb. 26, 2014); *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, *6 (M.D. Tenn. Mar. 14, 2014); *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *17 (E.D. Mich. Mar. 21, 2014); *Baskin v. Bogan*, No. 1:14-CV-00355-RLY, 2014 WL 1814064, *4 (S.D. Ind. May 8, 2014).

.

As this Court has held, "*Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014).

In light of *Windsor* and *SmithKline,* Defendants cannot make a "strong showing" that they will prevail on appeal in seeking to defend measures that overtly and purposefully seek to disadvantage a particular group based on a classification that triggers heightened scrutiny. The very premise of heightened equal protection scrutiny is that laws that facially classify on certain bases are "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler v. Doe*, 457 U.S. 202, n.14 (1982), and that such laws are "presumptively invalid," *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). Indeed, following the decision in *SmithKline,* the state defendants in another appeal pending before this Court, a challenge to Nevada's laws barring same-sex couples from marriage, withdrew their brief and concluded that, under Circuit precedent, there is no reasonable basis upon which to defend state laws prohibiting marriage for same-

sex couples. Motion for Leave to Withdraw Brief, *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Feb. 10, 2014) (Dkt. 171).

Defendants' motions offer no reason for this Court to conclude that Idaho will be able to overcome that heavy burden and justify its use of sexual orientation to treat families differently.

A. Idaho's Marriage Ban Violates The Equal Protection Clause.

Plaintiffs are highly likely to succeed on their claims that Idaho's marriage ban violates their right to equal protection of the laws, particularly in light of *SmithKline*'s holding that laws that discriminate against gay and lesbian persons are subject to heightened equal protection scrutiny.

1. Binding Precedent Establishes That The Marriage Ban Requires Application Of Heightened Scrutiny Because It Discriminates On The Basis Of Sexual Orientation And Gender.

In *SmithKline*, this Court unambiguously held that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." 740 F.3d at 481. As the District Court correctly concluded, Defendants' attempts to distinguish that binding precedent are unpersuasive. The holding in *SmithKline* is "unqualified" and "establishes a broadly applicable equal protection principle that is not limited to the jury selection context." *Latta*, 2014 WL 1909999, at *17. Nor is *SmithKline*'s holding limited to "instances of proven

animus or irrational stereotyping," but on its face applies to all instances of governmental discrimination based on sexual orientation. *Id.*

Heightened scrutiny also applies because Idaho's marriage laws embody a gender-based classification that warrants heightened review. It is undisputed that each of the Plaintiffs in this case, all women, would be permitted to marry their female partners if they were men, but are prohibited from doing so solely because they are women. This is gender discrimination.

Carefully examining the relevant heightened scrutiny analysis required in this case, the District Court accurately summarized the relevant considerations:

> Based on *Windsor,* and as explained in *SmithKline*, four principles guide the Court's equal protection analysis. The Court (1) looks to the Defendants to justify Idaho's Marriage Laws, (2) must consider the Laws' actual purposes, (3) need not accept hypothetical, post hoc justifications for the Laws, and (4) must decide whether the Defendants' proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them.

Latta, 2014 WL 1909999, at *18. As the District Court concluded, Idaho's exclusion of same-sex couples from marriage cannot survive any faithful application of these principles. Indeed, the marriage ban cannot withstand any level of constitutional review.

2. The Marriage Ban Fails Cannot Survive Any Level Of Scrutiny, Let Alone Heightened Scrutiny.

Regardless of the applicable level of scrutiny, Plaintiffs 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 Idaho's discriminatory marriage laws and any conceivable legitimate aim of government.

There is no rational connection between barring same-sex couples from marriage and the promotion of a "child-centric" marriage culture, "responsible procreation" by opposite-sex couples, or any other justification relating to parenting or child welfare. To the extent the protections of marriage encourage opposite-sex couples to marry before having children, those incentives existed before Idaho's exclusionary laws were enacted, and they would continue to exist if those laws were struck down. *See 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"). Further, Defendants' "child welfare rationales disregard the welfare of children with same-sex parents" even though "[t]hese benefits are

equally advantageous for children . . . in families headed by same-sex and different-sex couples." *Latta*, WL 190999, at *24. Likewise, there is no rational connection between any other governmental interest advanced by Defendants and the exclusion of same-sex couples from marriage. *See id*. at *25-28.

B. Idaho's Marriage Ban Violates The Due Process Clause.

Plaintiffs are likely to succeed on their claim that Idaho's marriage ban 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).

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 Defendants—that Plaintiffs seek not the same right to marry as others, but a new right to "same-sex marriage"—repeats the analytical 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. Plaintiffs 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 Idaho 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.

C. *Baker v. Nelson* Does Not Control This Case.

Defendants 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. 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) (internal citations omitted).

"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. Every federal court to consider a constitutional challenge to a state marriage ban after *Windsor* has correctly concluded that *Baker* does not control such claims, in light of the many significant developments in the Supreme Court's equal protection and due process case law in the four decades since *Baker* was decided. Defendants have offered no reason to believe this Court will reach a different conclusion.

II. DEFENDANTS HAVE FAILED TO ESTABLISH THAT THEY WILL LIKELY SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY.

Defendants have offered no evidence that they will suffer any harm, much less *irreparable* harm, if the District Court's injunction remains in effect while this

appeal is pending. They do not identify any burden to the State of Idaho or its agencies or political subdivisions that would arise if the state is required to recognize same-sex couples' existing marriages while this appeal is pending. Nor have they made the required showing, based on facts specific to this case, that such harm to the state is not only *probable*, *see Leiva-Perez*, 640 F.3d at 968, but *irreparable—i.e.*, that any claimed injury to the state is incapable of being remedied at a later date if a stay is not granted and the District Court decision is ultimately reversed. *See, e.g., Humane Soc'y of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (holding that "the lethal taking of the California sea lions is, by definition, irreparable"). Because a specific showing of irreparable injury *to the applicant* is a threshold requirement for every stay application, Defendants' complete failure to show irreparable harm to them means that "a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Leiva-Perez*, 640 F.3d at 965.

Defendants argue that irreparable harm exists because "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). The state's reliance on such categorical pronouncements rather than a specific showing of actual harm is precisely what the Supreme Court held in *Nken* is insufficient to satisfy the requirements for a stay pending appeal. As this Court has held, "*Nken* emphasized

the individualized nature of the irreparable harm inquiry" and requires that a stay applicant provide "a reason *specific to his or her case*, as opposed to a reason that would apply equally well to . . . all cases" why a stay would result in irreparable harm. *Leiva-Perez*, 640 F.3d at 969.

In addition, *Coalition for Economic Equity* was a case in which this Court had *already found the challenged state measure to be constitutional* and the plaintiffs were seeking a stay of this Court's mandate pending the filing of a petition for certiorari. *See* 122 F.3d at 719. In this case, by contrast, the District Court has held that Idaho's exclusionary marriage laws are unconstitutional. If Defendants' position were correct, then *every* district court order enjoining enforcement of a state statute on constitutional grounds would always warrant a stay pending appeal. Not only is that plainly not the law, but it would unduly tip the scale in favor of the government, and against the constitutional rights of citizens, in any case challenging a government enactment.

Defendants also complain that in the absence of a stay, the issuance of marriage licenses to same-sex couples would result in confusion and uncertainty. But the irreparable harm justifying a stay must be a harm that *Defendants* would suffer, not a purported harm to Plaintiffs or to third parties not before the Court. There is no uncertainty or confusion from the state's perspective; county recorders may simply continue to issue marriage licenses as they do in the regular course of

their business. Moreover, any supposed harms that might come to third parties if same-sex couples are permitted to marry while appeals are pending are entirely reparable through ordinary legal means. In contrast, it is certain that Plaintiffs and other same-sex couples will suffer continuing irreparable harm if a stay is granted. The notion that Plaintiffs and other same-sex couples will somehow be harmed by being able to exercise the freedom to marry profoundly misconstrues the significance of the practical and dignitary rights at stake.

Notably, moreover, Defendants address only the issuance of marriage licenses; they do not address the devastating impact of staying the District Court's order on the married Plaintiffs and other married same-sex couples. Defendants' assertion that enforcing the District Court's order while appeals are pending will generate "confusion" entirely disregards the reality for these married couples—who must face the daily uncertainty and confusion of being respected as legally married for some purposes and in some states, but not in others. If a stay is issued, married same-sex couples in Idaho will once again be forced to navigate a complex, bewildering, and ever-shifting terrain of uncertainty as to whether they will be respected as a legally married couple by particular federal agencies, private employers, businesses, and particular state and local governmental actors. For such couples, the notion that maintaining this untenable and chaotic "status quo" will somehow insulate them from uncertainty and confusion has no basis in

reality. Regardless of the ultimate outcome of any appeal, having certainty in the interim would provide stability for these couples; and even in the worst case scenario for such couples, in which anti-recognition laws were ultimately upheld and enforced again, no irreparable harm to them or others would flow from having their legal marriages recognized in the interim. At a minimum, the Court should not stay the District Court's order as applied to the married Plaintiffs in this case, who have demonstrated specific irreparable harms. *Cf. Henry v. Himes*, No. 1:14-cv-129 (S.D. Ohio May 16, 2014) (declining to stay order as applied to legally married plaintiffs).

III. THE HARM PLAINTIFFS WILL SUFFER IF A STAY IS GRANTED FAR OUTWEIGHS ANY HARM TO DEFENDANTS FROM COMPLYING WITH THE DISTRICT COURT'S INJUNCTION

When a party seeks a stay pending appeal, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). Here, while Defendants have not shown that the State of Idaho would suffer any harm in the absence of a stay, the challenged laws cause serious, continuing, and irreparable harm to Plaintiffs and other same-sex couples—and to their children—each day they remain in effect.

The District Court found that the challenged measures violate the fundamental constitutional rights of due process and equal protection. Under well-

settled law, any deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Nelson v. NASA*, 530 F.3d 865, 872-73 (9th Cir. 2008).

In addition, staying the order would injure Plaintiffs and their children by exposing them to irreparable and continuing insecurity, vulnerability, and stigma. As the District Court recognized, "[a] multitude of legal benefits and responsibilities flow from a valid civil marriage contract." *Latta*, WL 190999, at *2. "From the deathbed to the tax form, property rights to parental rights, the witness stand to the probate court, the legal status of 'spouse' provides unique and undeniably important protections." *Id*.

Indeed, the very purpose of marriage, in large part, is to provide security in the face of anticipated and unanticipated hardships and crises—*e.g.*, in the face of death, aging, illness, accidents, incapacity, and the vicissitudes of life. Same-sex couples who wish to marry are subjected to irreparable harm every day they are forced to live without the security that marriage provides. That harm is not speculative, but immediate and real. These couples are presently harmed in facing the events of their lives in the coming days, weeks, months or years without being able to plan or approach the future with the certainty and stability marriage is intended to afford. Moreover, many of the protections marriage provides—such as the right to receive social security benefits as a surviving spouse—hinge directly

on the length of the marriage. Therefore, by preventing couples who wish to marry now from doing so, a stay would have irreparable consequences for many couples who will be denied benefits or receive significantly diminished protections as a direct result of that delay.

A stay would also inflict irreparable injury on Plaintiffs and other same-sex couples, by exposing them, and their children, to continuing stigma. As the Supreme Court recognized in *Windsor,* discrimination against same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects" and "humiliates" their children, making 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." *Windsor*, 133 S.Ct. at 2694. The consequences of such harms can never be undone.

IV. THE PUBLIC INTEREST STRONGLY WEIGHS AGAINST A STAY.

For many of the same reasons, the final factor—the public interest—also weighs strongly against a stay pending appeal. The enforcement of constitutional rights is always in the public interest because "all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

Moreover, the public is harmed when families and children are deprived of the benefits and stability that that marriage provides. "In this most glaring regard,

Idaho's Marriage Laws fail to advance the State's interest because they withhold legal, financial, and social benefits from the very group they purportedly protect—children." *Latta*, WL 1909999, at *24.

The public has no interest in enforcing unconstitutional laws or in relegating same-sex couples and their families to a permanent second-class status and perpetual state of financial and legal vulnerability.

V. IN THE ALTERNATIVE, THIS APPEAL SHOULD BE EXPEDITED.

Defendants have failed to meet their burden of proving that a stay is warranted. If the Court issues a stay, however, Plaintiffs respectfully request that this Court expedite this appeal. Expedited treatment is necessary because, if a stay is granted, Plaintiffs will continue to suffer the irreparable harms described above for as long as this appeal remains pending. If a stay is granted, Plaintiffs request that this Court order that Defendant's opening brief be filed by June 9, 2014; that Plaintiffs' answering brief be filed by July 7, 2014; and that the reply brief, if any, be filed by July 21, 2014. Plaintiffs further respectfully request that oral argument be scheduled as soon as possible following completion of briefing.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion for a stay pending appeal.

Dated: May 15, 2014

Respectfully submitted,

By: /s/ Deborah A. Ferguson

Deborah A. Ferguson
The Law Office of Deborah A. Ferguson, PLLC
202 N. 9th Street, Suite 401 C
Boise, Idaho 83702
Telephone: (208) 484-2253

Craig Harrison Durham
Durham Law Office, PLLC
910 W. Main Street, Suite 328
Boise, Idaho 83702
Telephone: (208) 345-5183

Shannon P. Minter
Christopher F. Stoll
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
Telephone: (415) 392-6257

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 15, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Deborah A. Ferguson