UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually; MOUDI SBEITY, individually; KAREN ARCHER, individually; KATE CALL, individually; LAURIE WOOD, individually; and KODY PARTRIDGE, individually, Plaintiffs-Appellees, v. GARY R. HERBERT, in his official capacity of Governor of Utah; and BRIAN L. TARBET, in his official capacity as Acting Attorney General of Utah, Defendants-Appellants.	No. 13-4178

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

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

INTRODUCTION

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

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

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

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

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

I. SUPREME COURT PRECEDENTS SUPPORT THE DISTRICT COURT'S DECISION AND APPELLANTS CANNOT SHOW A STRONG LIKELIHOOD OF SUCCESS ON APPEAL

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

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

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

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

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

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

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

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

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

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

Id. at 179 (citations omitted).

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

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

---

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

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

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

C. Appellees Are Likely To Prevail on the Merits

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

IV. THE PUBLIC INTEREST WILL BE HARMED BY A STAY

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (citations and quotations omitted); *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994) ("While the public has an interest in the will of the voters being carried out ... the public has a more profound and long-term interest in upholding an individual's constitutional rights.").

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

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

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

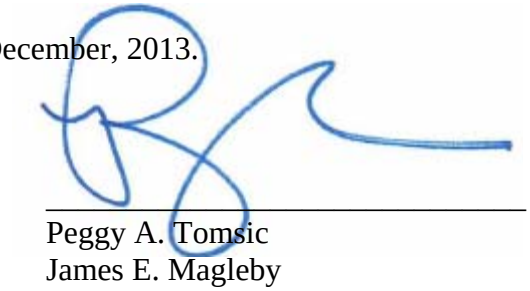
Order at 46.

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

CONCLUSION

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

DATED this 23rd day of December, 2013.



Peggy A. Tomsic
James E. Magleby
Jennifer Fraser Parrish

Attorneys for Plaintiffs-Appellees

MAGLEBY & GREENWOOD, P.C.
170 South Main Street, Suite 850
Salt Lake City, Utah 84101

CERTIFICATE OF SERVICE

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

Philip S. Lott
phillott@utah.gov
Stanford E. Purser
spurser@utah.gov
UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah84114-0856

Attorneys for Defendants-Appellants Gary R. Herbert and Brian L. Tarbet

Ralph Chamness
rchamness@slco.org
Darcy Goddard
dgoddard@slco.org
SALT LAKE COUNTY DISTRICT ATTORNEYS
2001 South State Street, S3500
Salt Lake City, Utah 84190-1210

Attorneys for Defendant Sherrie Swensen

Jennifer Fraser Parrish

Attorney for Plaintiffs-Appellees

MAGLEBY & GREENWOOD, P.C.
170 South Main Street, Suite 850
Salt Lake City, Utah 84101