IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA CASPAR, GLENNA DEJONG, CLINT McCORMACK, BRYAN REAMER, FRANK COLASONTI, JR., JAMES BARCLAY RYDER, SAMANTHA WOLF, MARTHA RUTLEDGE, JAMES ANTEAU, JARED HADDOCK, KELLY CALLISON, ANNE CALLISON, BIANCA RACINE, CARRIE MILLER, MARTIN CONTRERAS, and KEITH ORR,

Plaintiffs,

vs.

RICK SNYDER, in his official capacity as Governor of the State of Michigan, MAURA CORRIGAN, in her official capacity as Director of the Michigan Department of Human Services, PHIL STODDARD, in his official capacity as Director of the Michigan Office of Retirement Services, and JAMES HAVEMAN, in his official capacity as Director of the Michigan Department of Community Health,

Defendants.
_____/

Case No. 14-cv-11499

Hon. Mark A. Goldsmith

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Marsha Caspar, Glenna DeJong, Clint McCormack, Bryan Reamer, Frank Colasonti, Jr., James Barclay Ryder, Samantha Wolf, Martha Rutledge, James Anteau, Jared Haddock, Kelly Callison, Anne Callison, Bianca Racine, Carrie Miller, Martin Contreras, and Keith Orr, by counsel, hereby submit this Motion for Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65. For the reasons set forth in the accompanying Brief, Plaintiffs respectfully request that the Court order Defendants to recognize their marriages, because their failure to do so violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and will cause Plaintiffs irreparable harm. Undersigned counsel Andrew Nickelhoff certifies that he personally spoke to opposing counsel, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief; opposing counsel expressly denied concurrence.

Respectfully submitted,

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Dated: May 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the ECF system on this 29th day of May, 2014 which will send notice of this filing to all registered parties via electronic transmission.

SACHS WALDMAN, P.C.

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BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

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ATTACHMENT:

Evans v. Utah, __ F. Supp. 2d __, 2014 WL 2048343 (D. Utah May 19, 2014)

CONCISE STATEMENT OF THE ISSUES PRESENTED

Does Defendants' suspension of Plaintiffs' marriages violate the Due Process Clause of the United States Constitution to the extent that it strips recognition from existing valid in-state marriages?

Does Defendants' suspension of Plaintiffs' marriages violate the Equal Protection Clause of the United States Constitution to the extent it withdraws the recognition and benefits of marriage from same-sex couples who legally married in Michigan but no other couples?

Are Plaintiffs' entitled to a preliminary injunction against Defendants' suspension of their marriages, where they suffer ongoing and irreparable harm from that suspension?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Evans v. Utah, __ F. Supp. 2d __, 2014 WL 2048343 (D. Utah May 19, 2014)(attached)

Johnson v. Bredesen, 624 F.3d 742, 755 (6th Cir. 2010)

Liberty Coins, LLC v. Goodman, __ F.3d __, 2014 WL 1357041 (6th Cir. Apr. 8, 2014)

INTRODUCTION

Plaintiffs are eight same-sex couples who were legally married in Michigan on March 22, 2014. Their marriages took place after the U.S. District Court in *DeBoer v. Snyder* struck down Michigan's ban on marriage for same-sex couples, and before the Sixth Circuit stayed that injunction pending appeal. Even though these marriages were legal under Michigan law, the Governor has unilaterally decided to suspend Plaintiffs' valid marriages. That decision put these couples in legal limbo and is preventing them from accessing critical protections for themselves and their children. It is also unconstitutional.

Under virtually identical factual circumstances, a federal court in Utah recently held that stripping recognition from existing in-state marriages violates the Fourteenth Amendment. *Evans v. Utah*, __ F. Supp. 2d __, 2014 WL 2048343 (D. Utah May 19, 2014)(attached hereto). The plaintiffs in *Evans* legally married after a federal court struck down Utah's marriage bans as unconstitutional, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), but before the district court's injunction was stayed pending appeal. Like Michigan in this case, Utah then declared it would place recognition of those marriages "on hold." At the outset of its decision, the *Evans* court noted:

> [T]his case is not about whether the due process clause should allow for same-sex marriage in Utah or whether the *Kitchen* decision from this District was correct. That legal analysis is separate and distinct from the issues before this court and is currently on appeal to the

> Tenth Circuit Court of Appeals. This case deals only with whether Utah's marriage bans preclude the State of Utah from recognizing the same-sex marriages that already occurred in Utah between December 20, 2013, and January 6, 2014.

Evans, 2014 WL 2048343, at *7. The court then held that "[t]he State's decision to retroactively apply its marriage bans and place Plaintiffs' marriages 'on hold' infringes upon fundamental constitutional protections for the marriage relationship." *Id.* at *16.

The same is true here. When Plaintiffs legally married under Michigan law, they acquired fundamental rights in their marriages protected by the Due Process Clause of the Fourteenth Amendment. Whether or not Michigan can constitutionally prohibit same-sex couples from marrying, which is the question currently on appeal in *DeBoer*, the Due Process and Equal Protection Clauses prohibit the state from stripping recognition from marriages of same-sex couples that were legal and valid in Michigan when entered into. As the court did in *Evans*, this Court should enter a preliminary injunction requiring state authorities to recognize Plaintiffs' marriages.

BACKGROUND

Same-Sex Couples, Including Plaintiffs, Marry After Michigan's Marriage Ban Is Struck Down

Michigan revised its marriage laws in 1996 to bar same-sex couples from marrying by amending Mich. Comp. Laws § 551.2 to provide that "marriage is a

civil contract between a man and a woman" and adding Mich. Comp. Laws § 551.1, which provides that "[a] marriage contracted between individuals of the same sex is invalid in this state." In 2004, Michigan amended its state constitution to prohibit marriages by same-sex couples. *See* Mich. Const. Art. I, § 25.

In January, 2012, April DeBoer and Jayne Rowse, a same-sex couple, filed suit in the Eastern District of Michigan, challenging the constitutionality of Michigan's Marriage Amendment under the U.S. Constitution's Equal Protection and Due Process Clauses. *DeBoer v. Snyder*, E. D. Mich. No. 2:12-cv-10285 (Friedman, J.). On March 21, 2014, following a bench trial, Judge Friedman issued an opinion holding that the Marriage Amendment "impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause because the provision does not advance any conceivable legitimate state interest." *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014). The court enjoined enforcement of the Marriage Amendment and its implementing statutes. *Id.* at 775. The court did not stay its judgment.

Plaintiffs Marsha Caspar and Glenna DeJong have been in a committed relationship for 27 years. They have long wanted to marry as a way to publicly express their love and devotion to one another. They considered moving to a state that allows marriage for same-sex couples, but decided instead to remain in Michigan and wait for the day they could wed at home. (Exh. A: Caspar Dec. ¶¶ 2,

5.) When they heard about the *DeBoer* decision on March 21, 2014, they rushed to the Ingham County Clerk's office early the following morning to exchange vows. They were first in line. On March 22, 2014, Plaintiffs Caspar and DeJong became the first same-sex couple in Michigan to exercise their newly recognized right to be married. (*Id*. ¶ 8.)

Along with approximately 300 other same-sex couples, the remaining plaintiff couples were also legally married that day. In accordance with Michigan law,[1] each plaintiff couple applied for and received the requisite marriage licenses from duly authorized state officials. Each plaintiff couple then immediately performed the official ritual of marriage—exchanging solemn declarations of marriage before two witnesses and a celebrant as required by law. And each plaintiff couple received official records documenting their marriage. *See* Mich. Comp. Laws § 551.18 ("The original certificates and records of marriage made by the person solemnizing the marriage as prescribed in this chapter, and the record

[1] Michigan law requires the observation of two specific formalities before the state will clothe the parties' consent to marriage with the approbation of law. First, "all parties intending to be married" must "obtain a marriage license from the county clerk" and "deliver the said license to the clergyman or magistrate who is to officiate, before the marriage can be performed." Mich. Comp. Laws § 551.101; *see also* Mich. Comp. Laws § 551.2 (requiring license). Second, the parties must then "solemnly declare, in the presence of the person solemnizing the marriage and [at least two] attending witnesses, that they take each other as [spouses]." Mich. Comp. Laws § 551.9; *see also* Mich. Comp. Laws § 551.2 (requiring solemnization); Mich. Comp. Laws § 551.7 (enumerating persons authorized to solemnize marriage).

thereof made by the county clerk, or a copy of such record duly certified by such clerk, shall be received in all courts and places, as presumptive evidence of the fact of the marriage.").

Late in the afternoon of March 22, 2014, the Sixth Circuit entered an order temporarily staying the judgment in *DeBoer*. Once the stay order was entered, county clerks in Michigan stopped issuing marriage licenses to same-sex couples. On March 25, 2014, a Sixth Circuit panel continued the stay of the judgment in *DeBoer* pending final disposition of the appeal. 2014 U.S. App. LEXIS 7259.

Michigan Concedes the Validity of the Marriages But Refuses to Recognize Them

On March 26, 2014, Governor Rick Snyder's office issued the following written statement:

> After comprehensive legal review of state law and all recent court rulings, we have concluded that same-sex couples were legally married at county clerk offices in the time period between U.S. District Judge Friedman's ruling and the 6th U.S. Circuit Court of Appeals temporary stay of that ruling. . . . The couples with certificates of marriage from Michigan courthouses last Saturday were legally married and the marriage was valid when entered into.

During a press conference later that day, Governor Snyder reaffirmed this position. As he put it, "in respect to the marriages themselves, the 300 marriages on that Saturday, we believe those are legal marriages and valid marriages. The opinion had come down. There had not been a stay in place. So with respect to the

marriage events on that day, those were done in a legal process and were legally done." (Videotaped remarks of Rick Snyder, March 26, 2014 Press Conference) [2]

The Governor simultaneously proclaimed in his written public statement, however, that "the rights tied to" these valid marriages "are suspended until the stay is lifted or Judge Friedman's decision is upheld on appeal." (Written statement of Governor Rick Snyder) As the Governor explained during his subsequent press conference, "the State of Michigan will not recognize the fact that they're married" and "won't recognize the benefits of that marriage" until the removal of the stay or the affirmance of the *DeBoer* judgment. (Videotaped remarks of Rick Snyder, March 26, 2014 Press Conference)

Marsha Caspar, Glenna DeJong and the other Plaintiffs brought this action soon thereafter in order to remedy Michigan's refusal to grant full legal recognition to marriages that the State otherwise has recognized as valid.

Plaintiffs Have Been Injured by Michigan's Refusal To Recognize Their Marriages.

Defendants' refusal to recognize these marriages is inflicting serious and ongoing harms on Plaintiffs. Some of them are prevented from securing health

[2] The Governor's written statement is posted on his official website at: www.michigan.gov/snyder/0,4668,7-277-57577-324717--,00.html. The same web page contains a video tape of the Governor's remarks at the March 26, 2014 press conference. Paragraph 37 of the Complaint (Dockt. No. 1) sets forth in full a transcription prepared by Plaintiffs of Governor Snyder's remarks at the press conference, which to the best of Plaintiffs' knowledge accurately reflects the Governor's recorded remarks.

insurance. Plaintiff Marsha Caspar, for example, would like to add her spouse Glenna DeJong to her employer-provided health insurance plan. (Exh. A: Caspar Dec. ¶ 14.) Plaintiff DeJong's self-paid individual coverage costs a lot more and covers fewer expenses. (Exh. B: DeJong Dec. ¶¶ 15-16.) But Caspar's employer is not willing to extend spousal coverage until the uncertainty surrounding the couple's marital status is resolved. (Exh. A: Caspar Dec. ¶ 14.) Plaintiffs Anne and Kelly Callison are in a similar situation. After they were married, Anne contacted her school district employer to add Kelly to her health insurance policy. Anne was told that Defendants' refusal to recognize her marriage made this impossible, which has left Kelly on a private individual policy that costs $300 per month and that does not cover prescription drugs, dental or vision. (Exh. C: Anne Callison Dec. ¶¶ 11-12.) Plaintiff Samantha Wolf likewise requested her employer to cover her spouse Martha Rutledge. Martha suffers from the effects of traumatic injuries she suffered in a traffic accident; her medical coverage is expensive and inferior to Samantha's employer-based coverage. Samantha's state employer told her that the Governor's announcement prevented Martha from being added to her policy as a spouse. (Exh. D: Samantha Wolf Dec. ¶¶ 9-10; Exh. E: Martha Rutledge Dec. ¶¶ 4, 9-12.)

Other Plaintiffs may be prevented from exercising basic familial rights in the event of serious illness or death. Plaintiff Caspar suffers from a serious

autoimmune disease that affects her mobility and kidney function and has previously caused her to be hospitalized. (Exh. A: Caspar Dec. ¶ 12.) While Caspar and DeJong each have a Durable Power of Attorney that would allow them to be involved in decisions about the other's medical care, they are worried and concerned that their wishes might be ignored while the State refuses to recognize their marriage. (Exh. A: Caspar Dec. ¶ 13; Exh. B: DeJong Dec. ¶¶ 13-14.) Plaintiff Frank Colasonti is retired from his job as a high school guidance counselor and receives a pension from the Michigan Public School Employees Retirement System (MPSERS). MPSERS offers a survivor pension benefit that is available only to legally married retirees and that *must* be elected within one year after the marriage. (Exh. F: Colasonti Dec. ¶ 15.) Mr. Colasonti has been told that MPSERS will not make the survivor benefit available to him because of Defendant Snyder's stated position. (*Id*. ¶ 16.) Mr. Colasonti's spouse, James Barclay Ryder—with whom he has been in a committed relationship for 26 years—is 12 years younger than Mr. Colasonti. (Exh. F: Colasonti Dec. ¶ 2; Exh. G: Ryder Dec. ¶ 2.) If Mr. Colasonti dies before his marriage is recognized by the State of Michigan, or even if his marriage is not recognized for longer than the one year period for electing a surviving spouse benefit, the terms of his benefits package prevent any pension benefit from being made available to his surviving spouse. (Exh. F: Colasonti Dec. ¶ 16)

Other Plaintiffs are seriously injured by the inability to establish the legal rights of married parents with respect to their children. Plaintiffs Clint McCormack and Bryan Reamer care for 13 children, 6 of whom they jointly adopted from the foster care system in New Jersey, where such adoption is permitted, and 4 of whom were adopted by Bryan alone in states that do not permit adoptions by unmarried couples. (Exh. H: McCormack Dec. ¶¶ 2, 7; Exh. I: Reamer Dec. ¶¶ 2, 3, 4.) The 3 other children were removed from the custody of their biological parents and placed in Clint and Bryan's care by the Michigan Department of Human Services (MDHS). It is likely that the custodial rights of the biological parents will be terminated, after which Plaintiffs McCormack and Reamer wish to jointly adopt the three foster children, who suffer from a number of health problems ranging from sickle cell anemia to fetal alcohol syndrome. (*Id.* ¶ 6.) Plaintiff McCormack also would like to adopt his spouse's four legal children "so that these children will have the legal protection of both their parents." (*Id.* ¶ 12.) As he explains:

> It is important for Bryan and I that we jointly adopt our children so that we are both recognized as their legal parents. That way, if something happens to one parent, the other parent will not be a legal stranger to his child. Stability is a huge issue for our children and I believe that our children should not have to suffer the stigma, humiliation and emotional confusion of having only one legally recognized parent in a two-parent family. When our fifteen year old son discovered that both of his dads were not legally recognized as his parents he was emotionally devastated.

(Exh. H: McCormack Dec. ¶¶ 9, 10.) Plaintiffs McCormack and Reamer understand that based on Governor Snyder's refusal to accord their marriage legal status, they will not be able to proceed with the adoptions. (Exh. H: McCormack Dec. ¶¶ 11, 12; Exh. I: Reamer Dec. ¶¶ 8, 9.)

Finally, each Plaintiff experiences grievous dignitary injury in having their marriages relegated to second-tier status. Plaintiffs Marsha Caspar and Glenna DeJong hoped and waited for many years to marry, and they were ecstatic when their aspirations came to fruition. Following Defendant Snyder's announcement that their marriage would not be given legal recognition, they were humiliated, hurt and confused. (Exh. A: Caspar Dec. ¶¶ 5-11; Exh. B: DeJong Dec. ¶¶ 5-11.) As Plaintiff Marsha Caspar put it, "The Governor was treating our marriage as a 'skim milk marriage,' to quote Supreme Court Justice Ruth Bader Ginsburg." (Exh. A: Caspar Dec. ¶ 10.) Plaintiff Anne Callison states: "I found Governor Snyder's statement . . . to be crushing. How could something so special—our marriage, something that is legal, be viewed as meaningless by my own State?" (Exh. C: Anne Callison Dec. ¶ 10.) Other plaintiffs experienced similar reactions to the precipitous drop from the exaltation at realizing their goal of legal marriage to the painful realization that Michigan would deny recognition of their legal unions.[3]

[3] Exh. J: Kelly Callison Dec. ¶12; Exh. E: Martha Rutledge Dec. ¶ 8; Exh. D: Samantha Wolf Dec. ¶ 8; Exh. K: James Anteau Dec. ¶ 9; Exh. L: Jared Haddock

ARGUMENT

I. THERE IS A STRONG LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THEIR DUE PROCESS AND EQUAL PROTECTION CLAIMS.

When a court considers a motion for a preliminary injunction, it must balance four factors:

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction.

City of Pontiac Retired Employees Ass'n. v. Schimmel, __ F.3d __, 2014 WL 1758913, at *2 (6th Cir. May 5, 2014) (*en banc*) (quotations omitted). "Each of these factors should be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Liberty Coins, LLC v. Goodman*, __ F.3d __, 2014 WL 1357041, at *5 (6th Cir. Apr. 8, 2014) (quotations and alterations omitted). Moreover, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quotations omitted). Here, all four factors weigh in Plaintiffs' favor.

Dec. ¶ 8; Exh. M: Martin Contreras Dec. ¶8; Exh. N: Keith Orr Dec. ¶ 8; Exh. O: Carrie Miller Dec. ¶ 8; Exh. P: Bianca Racine Dec. ¶10.

A. THE SUSPENSION OF PLAINTIFFS' VALID IN-STATE MARRIAGES VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHT TO REMAIN MARRIED.

1. Plaintiffs Were Legally Married Under Michigan Law.

Like the district court in Utah, the *DeBoer* district court entered a sweeping, categorical, and immediately effective injunction:

> IT IS FURTHER ORDERED AND ADJUDGED that defendants are hereby permanently enjoined from enforcing the Michigan Marriage Amendment and its implementing statutes, as they conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Exh. Q: *DeBoer v. Snyder*, No. 2:12-cv-10285, Judgment, Dockt. # 152, Pg. ID 3975 (E.D. Mich. Mar. 21, 2014) By its terms, this order had immediate and indefinite effect, with the relevant Michigan state authorities "[t]hereby" being "permanently enjoined" from discriminating against same-sex couples in the recognition and protection of marriage rights. *See Howat v. State of Kansas*, 258 U.S. 181, 189-90 (1922) ("An injunction duly issuing out of a court . . . must be obeyed . . . however erroneous the action of the court may be."). During the time that the *DeBoer* injunction was in effect, Michigan's marriage bans were thus "legal nullities." *Evans*, 2014 WL 2048343, at *9.

As recounted in the statement of facts, while the *DeBoer* injunction was in effect, Plaintiffs legally married under then-current Michigan law. As Governor Snyder conceded: "There had not been a stay in place. So with respect to the

marriage events on that day, those were done in a legal process and were legally done." (Videotaped remarks of Rick Snyder, March 26, 2014 Press Conference) *See also* Fed R. Civ. P. 62(a) ("[U]nless the court orders otherwise, the following are *not* stayed after being entered, even if an appeal is taken: (1) an interlocutory or final judgment in an action for an injunction . . . .") (emphasis added). Nor does the stay subsequently entered by the Sixth Circuit retroactively undermine the legality of marriages entered into while the injunction was still in effect. Like the stay entered in *Kitchen*, the stay in *DeBoer* says nothing about "the legal status of the marriages that had already taken place." *Evans*, 2014 WL 2048343, at *11.

Even if *DeBoer* is ultimately overturned on appeal, that decision will have no effect on marriages, like Plaintiffs', that have already been completed. As the *Evans* court noted, "there are several instances in which courts recognize that actions taken in reliance on an injunction cannot be reversed." *Id.* at *14 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981) (injunctions have legal effects that will be "irrevocably carried out" and cannot be unwound if the injunction is subsequently overturned on appeal)); *see also Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1919) (permanently prohibiting enforcement of penalties accrued during the pendency of a temporary injunction, even if the underlying legal basis for the penalties was ultimately approved); *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 754 (11th Cir. 2009) ("In

the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree") (quotations and alterations omitted).

2. When They Married, Plaintiffs Acquired Fundamental Rights in Their Marital Relationship Protected by the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution extends special protection to those rights so deeply rooted in our Nation's history and tradition as to be viewed as fundamental elements of Anglo-American constitutional identity. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Central among these rights are those associated with the marital relationship. *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) (recognizing "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude"). The Supreme Court has called marriage "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (placing marriage at the core of a suite of fundamental rights that include the right "to establish a home," to "bring up children," and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons").

The solemn bond of Plaintiffs' marriage commitments thus represents one of the most inviolable interests known to our constitutional system. *Skinner v. Oklahoma ex rel. Williamson*. 316 U.S. 535, 541 (1942) (describing marriage as "one of the basic civil rights of man"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (characterizing marriage as "fundamental to our very existence and survival"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing marriage as "an association for as noble a purpose as any involved in our prior decisions . . . [and] intimate to the degree of being sacred").

Any effort to destroy this sacrosanct relation between individuals whose union has been legally solemnized before their government and fellow citizens implicates the Constitution's most fundamental protections for family integrity. *Lehr v. Robertson*, 463 U.S. 248, 258 (1983) ("[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."). As the *Evans* court explained: "Plaintiffs solemnized legally valid marriages under Utah law as it existed at the time of such solemnization. At that time, the State granted Plaintiffs all the substantive due process and liberty protections of any other marriage." *Evans*, 2014 WL 2048343, at *8.

Here too, Plaintiffs' marriages were valid under Michigan law as it existed at the time of their marriages were performed. As such, Plaintiffs acquired the

constitutional protections that attach to marriage as recognized by a century of Supreme Court jurisprudence.

3. By Retroactively Invalidating Plaintiffs' Marriages That Were Legal When Entered Into, the State Is Violating Plaintiffs' Fundamental Due Process Right to Remain Married.

"The policy of the civilized world[] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). This well-established and uncontroversial tradition is both particularized and precise: Any change to the rules governing marriage must exempt all *existing* and previously valid in-state marriages from its otherwise applicable restrictions, even where the state's revised marriage rules would preclude entry into a *new* marriage of the type at issue. *See*, Exh. R: Brief for Professors of Family Law as Amicus Curiae Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48, 2009 WL 491806, at *7 (Cal. filed Jan 16, 2009) ("[A]s far as amici know, no court has ever held that a marriage validly entered into in one state was later rendered invalid and unrecognizable in that same state by a change in that state's laws regarding qualifications for marriage."). *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (holding that it violates due process to strip "married same-sex couples of the duties and responsibilities that are an essential part of married life"); *Evans*, 2014 WL 2048343, at *8 (similar).

Anglo-American tradition has long protected this fundamental right in at least three ways. First, legislative enactments altering the criteria for marriage eligibility have often exempted existing marriages in explicit terms.[4] Second, the judiciary has regularly relied on the "venerable" presumption against retroactivity, *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985), to construe otherwise-silent statutes as including an implicit exemption for existing in-state marriages.[5] *See also Franks v. White Pine Copper Division*, 375 N.W.2d 715, 730 (1985)

[4] *E.g.*, 23 Pa. Cons. Stat. 1103 (2004); Oh. R.C. 3105.12(B)(2) (1991); Ind. Code 31-11-8-5 (1958); S.D. Cod. Laws Ann. § 25-1-29 (1959); Miss. Code Ann. § 93-1-15 (1956); Minn. Code Ann. § 517.01 (1941); Mich. Comp. Laws Ann. § 551.2 (1957); Ill. Stat Ann. Ch. 750, ¶ 5/214 (1905); Ga. Code Ann 19-3-1.1 (1997); Fla. Stat. Ann. § 741.211 (1968); Alaska Stat. § 25.05.311 (1964); Mont. Rev. Code §§ 5702, 5703 (1935).

[5] *See Atkinson v. Atkinson*, 203 N.Y.S. 49, 52 (N.Y. App. Div. 1924) ("It cannot be held that the Legislature intended that a marriage performed in accordance with the law existing at the time of performance can be declared void because of a subsequent change in the statute."); *In re Ragan's Estate*, 62 N.W.2d 121, 121-122 (Neb. 1954) (similar); *Hatfield v. United States*, 127 F.2d 575 (2d Cir. 1942) (similar); *In re Sanders' Estate*, 131 Misc. 266, 227 N.Y.S. 543 (Sur. 1928) (similar); *Voke v. Platt*, 48 Misc. 273, 274, 227 N.Y.S. 543, 726 (Sup. Ct. 1905) (similar); *PNC Bank Corp. v. W.C.A.B. (Stamos)*, 831 A.2d 1269 (Pa. Commw. Ct. 2003) (similar); *Stackhouse v. Stackhouse*, 2004 PA Super 427, 862 A.2d 102, 107 (Pa. Super. Ct. 2004) (similar); *Gilels v. Gilels*, 159 Misc. 31, 287 N.Y.S. 5 (Sup. Ct. 1935) (similar); *Weisberg v. Weisberg*, 112 A.D. 231, 98 N.Y.S. 260 (1906) (similar); *Tufts v. Tufts*, 30 P. 309 (Utah 1892) (similar). *Cf. Succession of Yoist*, 61 So. 384 (La. 1913) (anti-miscegenation statute does not apply retroactively); *Wells v. Allen*, 177 P. 180 (Cal. Ct. App. 1918) (giving legal effect to a common law marriage "which was a valid marriage in this state at the time these parties assumed that relation").

("[S]tatutes are presumed to operate prospectively unless the contrary intent is clearly manifested").[6]

Third, in the rare cases where an exemption could not be identified by ordinary statutory construction, courts have preserved existing marriages either by employing constitutional avoidance or by invalidating the statutory restriction directly. *See Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (constitutional amendment declaring that only marriage between a man and a woman "is valid or recognized" cannot be applied retroactively to strip recognition from marriages of same-sex couples that had already taken place); *Cook v. Cook*, 104 P.3d 857 (Ariz. Ct. App. 2005) (statute declaring that marriages between cousins from other jurisdictions are no longer recognized in Arizona could not be applied to marriages that were already recognized in Arizona before the statute was passed); *Callahan v. Callahan*, 15 S.E. 727, 728 (S.C. 1892) ("The relation of husband and wife, in law, subsisted between Green and Martha . . . vested rights spring therefrom, which could not be taken away by the subsequent legislation."); *Cavanaugh v. Valentine*, 41 N.Y.S.2d 896, 898 (N.Y. Sup. Ct. 1943) ("As marriage is a contract protected

[6] Even Michigan's ban on marriage by same-sex couples has been construed not to dissolve a marriage that was valid in Michigan when entered into. *See In re Burnett Estate*, 834 N.W.2d 93, 99-100 (Mich. Ct. App. 2013) ("[A]lthough defendant underwent gender reassignment surgery in 2003, that does not alter the undisputed fact that when the marriage contract was entered into, plaintiff was a woman and defendant was a man. . . . We . . . reject [the] argument that [defendant's] alleged postoperative status somehow magically dissolved what was otherwise a valid marriage.").

against impairment of its obligations by the United States Constitution . . . the prohibitory legislative action referred to above affected only those common law marriages attempted following the placing of the legislative ban upon them.").

This longstanding, consistent, and specific practice demonstrates a deeply rooted Anglo-American tradition of protecting marriages from retroactive invalidation by the state in which they were validly and legally solemnized. *McDonald v. City of Illinois*, 561 U.S. 742, 3038-44 (2010) (relying on careful analysis of statutory enactments by the political branches to identify a fundamental right); *Lawrence v. Texas*, 539 U.S. 558, 568-72 (2003) (similar). Defendants' decision to suspend indefinitely Plaintiffs' marriages—which were concededly valid when solemnized in Michigan—thus violates the Due Process Clause. To be clear, now that the district court's decision in *DeBoer* has been stayed, Michigan is not obligated to license or recognize any *new* marriages of same-sex couples. But under basic principles of due process, Michigan may not "suspend" Plaintiffs' *already existing* marriages that were legal and recognized in this State when entered into.

Accordingly, and consistent with the ruling of the *Evans* court in Utah, this Court should enter preliminary injunctive relief requiring Defendants to provide Plaintiffs with the recognition and benefits due to all legally married couples in Michigan.

B. DEFENDANTS' WITHDRAWAL OF THE RECOGNITION AND BENEFITS OF MARRIAGE FROM SAME-SEX COUPLES WHO LEGALLY MARRIED IN MICHIGAN BUT NO OTHER COUPLES IS A DISCRIMINATORY RESTRICTION OF A FUNDAMENTAL RIGHT AND VIOLATES THE EQUAL PROTECTION CLAUSE.

By treating the marriages of same-sex couples who were legally married in Michigan differently from the marriages of different-sex couples who were legally married in Michigan, Defendants are also violating Plaintiffs' rights to equal protection of its laws. The policy suspending Plaintiffs' marriages expressly applies only to "same-sex couples [who] were legally married" in Michigan. (Governor's written statement of March 26, 2014) For such couples, the Governor has stated that "the State of Michigan will not recognize the fact that they're married because they're of the same sex." (Governor Snyder's remarks at March 26, 2014 press conference, set forth in Complaint, Dockt. No. 1, ¶ 37, p. 10) By contrast, Defendants recognize the marriages of all different-sex couples legally solemnized in Michigan. This is patent discrimination between same-sex and different-sex couples who were legally married in Michigan.

In order to find the State's discrimination against Plaintiffs' marriages a violation of the Equal Protection Clause, it is not necessary to decide whether government discrimination based on sexual orientation is unconstitutional as a general matter. Nor need the court determine whether it is unconstitutional for a state to deny new marriage licenses to same-sex couples while granting them to

different-sex couples in the future. Instead, Plaintiffs' equal protection claim rests on a narrow and long-established principle: state action that discriminates among classes of people and burdens a fundamental right are presumptively unconstitutional and subject to strict scrutiny. *Johnson v. Bredesen*, 624 F.3d 742, 755 (6th Cir. 2010) ("Those laws that burden a fundamental right . . . will be 'subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest.'") (internal quotation marks omitted); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973) (same).

In this case, the presumption of unconstitutionality that applies to such discriminatory restrictions of fundamental rights is further heightened by the fact that the state has stripped from a class of people a fundamental right that it *had previously conferred upon them*. This type of claim was most recently addressed by the Ninth Circuit in *Perry v. Brown*, 671 F.3d 1052 (2012) (striking down a new provision of California's state constitution that eliminated the previously established right of same sex couples to marry). Although the judgment in *Perry* was subsequently vacated on jurisdictional grounds, *see Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the reasoning of the *Perry* opinion remains persuasive. Reviewing equal protection cases such as *Romer v. Evans*, 517 U.S. 620 (1996), and *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Ninth Circuit noted that a state's decision to strip existing rights from a particular class of

people is likely to violate the Equal Protection Clause even if discrimination against that class is not a traditional form of suspect classification. "In both *Romer* and *Moreno*, the constitutional violation that the Supreme Court identified was not the failure to confer a right or benefit in the first place . . . . Rather, what the Supreme Court forbade in each case was the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens." *Perry*, 671 F.3d at 1084.

The Supreme Court's subsequent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), confirms that Defendants' discrimination against Plaintiffs' legal Michigan marriages violates their rights to equal protection under law. In *Windsor*, the Court held that federal law, by denying recognition and benefits to marriages of same-sex couples that were legal under state law while granting recognition and benefits to similarly-situated different-sex couples, violated the equal protection guarantee of the Fifth Amendment. *Windsor*, 133 S. Ct. at 2695-96 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State."). The Constitution does not allow the government "to identify a subset of state-sanctioned marriages and make them unequal," the Court ruled, or "to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2695.

The district court in *Evans* had no difficulty concluding that *Windsor*'s logic applied with full force to the plaintiffs in Utah, because they—like Plaintiffs in this case—were legally married under their state's laws:

> As in *Windsor*, the State's decision to put same-sex marriages on hold "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." Similarly, the "principal effect" of the State's actions "is to identify a subset of state-sanctioned marriages and make them unequal."

Evans, 2014 WL 2048343, at *8 (quoting *Windsor*).

That is precisely what has happened here. Governor Snyder's proclamation, and the other Defendants' implementation of his decree, denies 300 same-sex couples the equal protection of Michigan's laws recognizing the validity and rights attached to marriages that were legally and validly performed in this state. By "depriv[ing] some couples married under the laws of [this] State, but not other couples, of both rights and responsibilities," and by "identify[ing] a subset of" its own "state-sanctioned marriages and mak[ing] them unequal," *Windsor*, 133 S. Ct. at 2694, Defendants do precisely what the courts in *Romer*, *Perry*, and *Windsor* forbid.

As with Plaintiffs' due process claim, Plaintiffs' equal protection claim is not tied to the outcome in *DeBoer*. Even if the district court's judgment in *DeBoer* is ultimately reversed, the State violates equal protection here by treating the marriages of 300 same-sex couples, legal under Michigan law when they were

entered into, differently from the marriages of different-sex couples who also married in Michigan in accordance with the laws of this state. In other words, even if the *DeBoer* stay is never lifted and Michigan never again licenses the marriage of a same-sex couple, its refusal to treat Plaintiffs' marriages on equal footing with other marriages legally and validly performed in Michigan violates the Equal Protection Clause and must be enjoined.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF DEFENDANTS FAIL TO RECOGNIZE THEIR MARRIAGES.

Defendants' violation of Plaintiffs' constitutional rights is alone sufficient to show irreparable harm under prevailing Sixth Circuit law. *See Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) ("[I]f . . . a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Bassett v. Snyder*, 951 F.Supp.2d 939, 970 (2013) (same).

Plaintiffs are irreparably harmed by the State's refusal to recognize their marriages in other ways as well. As the *Evans* court recognized, a state's refusal to recognize the marriages of same-sex couples "place[s] [same-sex couples] and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights

associated with marriage." *Evans*, 2014 WL 2048343, at *16.[7] Plaintiffs here are left in precisely the same legal limbo with respect to adoptions,[8] health insurance,[9] medical decisions,[10] pension benefits,[11] and veteran benefits.[12]

Even if the refusal to recognize their marriages would not cost Plaintiffs a single cent, they face the ongoing indignity of having their marriages placed under

[7] *See also Windsor*, 133 S. Ct. at 2694-96 (cataloguing injuries from the federal marriage recognition ban, including denial of government healthcare benefits; denial of protections for domestic-support obligations; imposition of complicated procedures for joint tax filings; denial of joint burial in veterans' cemeteries; denial of protection under criminal statutes; increases to the costs of health care; denial or reduction of Social Security benefits available to surviving spouses; and others); *Bassett v. Snyder*, 951 F.Supp.2d 939, 970-71 (2013) (explaining the irreparable harm that can be inflicted by the inability to secure adequate health insurance).

[8] *E.g.*, Exh. H: McCormack Dec. ¶¶ 2, 7, 9-12; Exh. I: Reamer Dec. ¶¶ 2-4, 6, 12.

[9] The loss or denial of medical insurance coverage is not a remote or even a purely pecuniary injury. Health problems often arise unpredictably and without warning, and the level of insurance coverage can make the difference between adequate and inadequate treatment. For this reason courts have found the loss or reduction of medical insurance to satisfy the irreparable harm factor for issuance of a preliminary injunction. E.g., *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 415-416 (E.D. Mich. 1994), *aff'd*, 73 F.3d 648 (6th Cir. 1996) (threatened reduction of medical coverage would subject retirees to irreparable injury of added expenses, emotional distress and possibly foregone treatment); *Communications Workers of America v. Nynex Corp.*, 898 F.2d 887, 891 (2d Cir. 1990) (threat of irreparable harm to employees from termination of medical benefits justified preliminary injunction).

[10] *E.g.*, Exh. A: Caspar Dec. ¶¶ 12-13; Exh. B: DeJong Dec. ¶¶ 13-14.

[11] *E.g.*, Exh. F: Colasonti Dec. ¶ 15.

[12] *E.g.*, Exh. O: Miller Dec. ¶ 10; Exh. P: Racine Dec. ¶¶ 11-14.

an indefinite cloud of stigma and uncertainty. Like the same-sex couples who married in Utah, "[t]hese legal uncertainties and lost rights cause harm [to Plaintiffs] each day that the marriage is not recognized." *Evans*, 2014 WL 2048343, at *16*; see also Windsor*, 133 S. Ct. at 2694 (noting that federal marriage ban "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. . . . The differentiation demeans the couple. . . [a]nd it humiliates tens of thousands of children now being raised by same-sex couples."); *see also id.* 2694 (affirming that marital "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person"). No retroactive remedy can make up for the indignity of this state-sponsored debasement.

III. GRANTING AN INJUNCTION WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS.

"[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001). In fact, where "there is a likelihood that [a law] will be found unconstitutional," it is "questionable whether the [State] has any 'valid' interest in enforcing [it]." *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987); *see also ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) ("[I]f the moving party establishes a likelihood of

success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional.").

That presumption in favor of enjoining the enforcement of unconstitutional laws is amply borne out in this case, where the balance of harms decisively tips in favor of Plaintiffs. Neither Defendants nor anyone else will suffer harm—much less substantial harm—from continuing to recognize Plaintiffs' marriages. Addressing the same question, the *Evans* court wrote:

> Although the State has a general interest in representing the wishes of its voters, that interest does not outweigh the harms Plaintiffs face by having their constitutional rights violated. Plaintiffs face significant irreparable harms to themselves and their families—inability to inherit, inability to adopt, loss of custody, lost benefits. The State, however, has demonstrated no real harm in continuing to recognize Plaintiffs' legally-entered marriages. The State's harm . . . with respect to continuing to issue same-sex marriage licenses is not the same as the harm associated with recognizing previously-entered same-sex marriages that were valid at the time they were solemnized.

Evans, 2014 WL 2048343, at *16. The State of Utah was not harmed by "an inability to apply the marriage bans retroactively" since "[t]he State's interest is in applying the current law" by "stop[ping] any additional marriages from occurring." *Id.* at *17. The same is true where the State of Michigan has no interest in refusing to recognize Plaintiffs' valid marriages, so long as it can prohibit additional marriages from taking place during the pendency of the *DeBoer* litigation. *See also Strauss*, 207 P.3d at 122 ("[A] retroactive application of Proposition 8 is not

essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively . . . .").

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION.

It is "always in the public interest to prevent the violation of a party's constitutional rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998). Since Defendants' actions violate Plaintiffs' constitutional rights, an injunction would thus be in the public's interest. Again, this was recognized by the *Evans* court in its analysis of the public interest factor:

> [T]he public is well served by having certainty about the status of Plaintiffs' marriages. That certainty not only benefits Plaintiffs and their families but State agencies, employers, and other third parties who may be involved in situations involving issues such as benefits, employment, inheritance, child custody, and child care.

Evans, 2014 WL 2048343, at *17. The same is true here, where the public interest in stability, security, and sanctity of long-term family commitments would be served by protecting Plaintiffs' rights in their existing marriages, particularly since so many other interests (including those of third parties) turn on the existence of those rights.

CONCLUSION

For all these reasons, Plaintiffs request that the court enter a preliminary injunction requiring Defendants to immediately recognize the marriages of same-sex couples, including Plaintiffs, that were licensed and solemnized after the district court's injunction was entered on March 21, 2014, and before the Sixth Circuit's stay was issued on March 22, 2014, and to afford all such couples, including Plaintiffs, with all of the benefits, rights, privileges, protections and responsibilities given to all married couples under Michigan law.

Respectfully submitted,

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Dated: May 29, 2014 Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the ECF system on this 29th day of May, 2014 which will send notice of this filing to all registered parties via electronic transmission.

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Jonell EVANS, Stacia Ireland, Marina Gomberg, Elenor Heyborne, Matthew Barraza, Tony Milner, Donald Johnson, and Karl Fritz Shultz, Plaintiffs,
v.
State of UTAH, Governor Gary Herbert, Attorney General Sean Reyes, Defendants.

No. 2:14CV55DAK. | Signed May 19, 2014.

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Opinion

MEMORANDUM DECISION AND ORDER

DALE A. KIMBALL, District Judge.

***1** This matter is before the court on Plaintiffs JoNell Evans, Stacia Ireland, Marina Gomberg, Elenor Heyborne, Matthew Barraza, Tony Milner, Donald Johnson, and Karl Fritz Shultz's Motion for Preliminary Injunction, Plaintiffs' Motion to Certify Questions of Utah State Law to the Utah Supreme Court, and Defendants State of Utah, Governor Gary Herbert, and Attorney General Sean Reyes' (collectively, "the State") Motion to Certify Questions of Utah State Law to the Utah Supreme Court. The court held a hearing on Plaintiffs' Motions on March 12, 2014. [1] At the hearing, Plaintiffs were represented by Erik Strindberg, Joshua A. Block, and John Mejia, and the State was represented by Joni J. Jones, Kyle J. Kaiser, and Parker Douglas. After carefully considering the parties' arguments, as well as the law and facts relevant to the motions, the court enters the following Memorandum Decision and Order.

FACTUAL BACKGROUND

The present lawsuit is brought by four same-sex couples who were married in Utah between December 20, 2013, and January 6, 2014. Plaintiffs allege deprivations of their property and liberty interests under Utah and federal law resulting from the State of Utah's failure to recognize their marriages.

A. *Kitchen v. Herbert* Case

On December 20, 2013, United States District Judge Robert J. Shelby issued a ruling in *Kitchen v. Herbert*, 2:13cv217RJS, 2013 WL 6834634 (D.Utah Dec.23, 2013), enjoining the State of Utah from enforcing its statutory and constitutional bans on same-sex marriages (collectively, "marriage bans"). [2] The State did not request a stay of the ruling in the event that it lost, and the court's decision did not *sua sponte* stay the ruling pending appeal. After learning of the adverse ruling, the State then requested a stay from the district court, which Judge Shelby denied on December 23, 2013. The Tenth Circuit denied the State's subsequent request for a stay on December 24, 2013. The State moved for a stay with the United States Supreme Court on December 31, 2013, and the Supreme Court granted a stay on January 6, 2014 ("Stay Order").

B. State's Response to *Kitchen* Decision

After the *Kitchen* decision was issued on December 20, 2013, some county clerks began issuing marriage licenses to same-sex couples that same day. On December 24, 2013, Governor Herbert's office sent an email to his cabinet, stating: "Where no conflicting laws exist you should conduct business in compliance with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court." Also on that day, a spokesperson for the Utah Attorney General's Office publicly stated that county clerks who did not issue licenses could be held in contempt of court.

Between December 20, 2013 and January 6, 2014, the State of Utah issued marriage licenses to over 1,300 same-sex couples. While it is not known how many of those couples

granted licenses solemnized their marriages before January 6, 2014, news reports put the number at over 1,000.

***2** The United States Supreme Court's January 6, 2014 Stay Order did not address the legal status of the marriages entered into by same-sex couples in Utah between December 20, 2013, and January 6, 2014, as a result of the *Kitchen* decision. The Supreme Court's Stay Order stated:

> 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.

Also on January 6, 2014, after the Supreme Court's Stay Order, Utah Attorney General Sean Reyes issued the following statement: "Utah's Office of Attorney General is carefully evaluating the legal status of the marriages that were performed since the District Court's decision and will not rush to a decision that impacts Utah citizens so personally."

Two days later, Governor Herbert's chief of staff sent an email to the Governor's cabinet informing them of the Supreme Court's stay and stating that "[b]ased on counsel from the Attorney General's Office regarding the Supreme Court decision, state recognition of same-sex marital status is ON HOLD until further notice." The email stated that the cabinet members should "understand this position is not intended to comment on the legal status of those same-sex marriages—that is for the courts to decide. The intent of this communication is to direct state agency compliance with current laws that prohibit the state from recognizing same-sex marriages." Furthermore, the email instructed that "[w]herever individuals are in the process of availing themselves of state services related to same-sex martial status, that process is on hold and will stay exactly in that position until a final court decision is issued."

The next day, Attorney General Reyes issued a letter to county attorneys and county clerks to provide "legal clarification about whether or not to mail or otherwise provide marriage certificates to persons of the same sex whose marriage ceremonies took place between December 20, 2013, and January 6, 2014, prior to the issuance of the stay by the U.S. Supreme Court." Attorney General Reyes continued that "although the State of Utah cannot currently legally recognize marriages other than those between a man and a woman, marriages between persons of the same sex were recognized in the State of Utah between the dates of December 20, 2013 until the stay on January 6, 2014. Based on our analysis of Utah law, the marriages were recognized at the time the ceremony was completed." He explained that "the act of completing and providing a marriage certificate for all couples whose marriage was performed prior to the morning of January 6, 2014, is administrative and consistent with Utah law" and "would allow, for instance, same-sex couples who solemnized their marriage prior to the stay to have proper documentation in states that recognize same-sex marriage."

***3** Furthermore, Attorney General Reyes stated that the State of Utah would not challenge the validity of those marriages for the purposes of recognition by the federal government or other states. But, "the validity of the marriages in question must ultimately be decided by the legal appeals process presently working its way through the courts."

On January 15, 2014, the Utah State Tax Commission issued a notice stating that samesex couples "may file a joint return if they [were] married as of the close of the tax year" for 2013 because "[a]s of December 31, 2013, the Supreme Court had not yet issued its stay of the District Court's injunction." The notice further stated: "This notice is limited to the 2013 tax year. Filing information for future years will be provided as court rulings and other information become available."

C. Plaintiffs' Responses to *Kitchen* Decision

Plaintiffs Marina Gomberg and Elenor Heyborne obtained their marriage license and solemnized their marriage on December 20, 2013. They had been in a relationship for nine years and had previously performed a commitment ceremony in May 2009, even though the State of Utah did not recognize the union. They have been contemplating having a baby but are worried about protecting their family because the State of Utah will only allow one of them to be a legal parent to any children that they raise together. Gomberg and Heyborne do not want to move to another state to have their marriage recognized.

Plaintiffs Matthew Barraza and Tony Milner also obtained their marriage license and solemnized their marriage on December 20, 2013. They had been in a committed relationship for nearly 11 years. In 2010, Barraza and Milner traveled to Washington, D.C., and got married. However, Utah law prevented any recognition of their marriage in Utah. In 2009, Barraza adopted a son, J., who is now four years old. Under Utah law, Milner was not allowed to be an adoptive parent to J. even though he and Barraza are jointly rasing J.

On December 26, 2013, Barraza and Milner initiated court proceedings for Milner to adopt their son. The court scheduled a hearing date for January 10, 2014. On January 9, 2014, the court informed them that the court had decided to stay the adoption proceedings to consider whether the Utah Attorney General's Office should be notified of the proceedings and allowed to intervene. The court held a hearing on January 29, 2014, and ruled that the Attorney General's Office should be given notice. The Attorney General's Office declined to intervene but filed a brief stating that the court should stay the proceedings until the Tenth Circuit decided the appeal in *Kitchen.* On March 26, 2014, the state court judge, the Honorable Andrew H. Stone, rejected the Attorney General's arguments and ordered that Milner should be allowed to adopt J.

On April 1, 2014, Milner and Barraza's attorney went to the Utah Department of Health, Office of Vital Records, to obtain a new birth certificate for J. based on Judge Stone's Decree of Adoption. Although he presented a court-certified decree of adoption and report of adoption, which are the only records needed under Utah law and regulation to create a new birth certificate based on adoption, the registrar refused to issue a new birth certificate. The registrar asked for a copy of Barraza and Milner's marriage certificate, even though a marriage certificate is not usually required, and contacted the Utah Attorney General's Office. Two attorneys from the Utah Attorney General's Office instructed the registrar not to issue the amended birth certificate for J.

***4** On April 7, 2014, the Utah Department of Health served Milner and Barraza with a Petition for Emergency Extraordinary Relief, which it had filed in the Utah Supreme Court. In that Petition, the Department of Health requests a court order relieving it from recognizing Judge Stone's decree of adoption because it recognizes Milner and Barraza's same-sex marriage. On May 7, 2014, Judge Stone issued an order for the Attorney General and other state officials to show cause why they should not be held in contempt for refusing to comply with the court's order to issue an amended birth certificate. On May 16, 2014, the Utah Supreme Court issued an order staying enforcement of the state court orders and stating that a briefing schedule on the writ would be set.

Plaintiffs JoNell Evans and Stacia Ireland also obtained a marriage license and solemnized their marriage on December 20, 2013. Evans and Ireland had been in a relationship for 13 years. In 2007, they had a religious marriage ceremony at the Unitarian Church in Salt Lake City, but the marriage was not recognized by the State of Utah.

Evans and Ireland have tried to obtain rights through the use of medical powers of attorney because Ireland has had serious health issues recently. In 2010, Ireland suffered a heart attack. With the power of attorney, Evans was allowed to stay with Ireland during her treatment but did not feel as though she was given the same rights as a spouse. On January 1, 2014, Evans again had to rush Ireland to the hospital emergency room because Ireland was experiencing severe chest pains. Unlike her previous experience, Evans was afforded all courtesies and rights given to the married spouse of a patient. Now that the State no longer recognizes their marriage, Evans does not know how she will be treated if there is another medical situation.

Plaintiffs Donald Johnson and Karl Fritz Shultz got their marriage license and solemnized their marriage on December 23, 2013, after waiting in line for approximately eight hours. Johnson and Shultz have been in a relationship for over 21 years. Johnson first proposed to Shultz the Sunday after Thanksgiving in 1992, and the couple had continued to celebrate that day as their anniversary. Johnson researched insurance coverage for himself and Shutlz and discovered that they could save approximately $8,000.00 each year on health insurance. They will lose that savings without state recognition of their marriage.

LEGAL ANALYSIS

Plaintiffs' Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction requiring the State to continue recognizing the marriages Plaintiffs entered into pursuant to valid Utah marriage licenses between December 20, 2013, and January 6, 2014. The State continues to recognize Plaintiffs' marriages for purposes of joint state tax filings for 2013 and already-issued state documents with marriage-related name changes. However, for all other purposes, the State is applying its marriage bans retroactively to Plaintiffs' marriages. Plaintiffs seek an injunction requiring the State to continue recognizing their marriages as having all the protections and responsibilities given to all married couples under Utah law.

I. Preliminary Injunction Standard

***5** Preliminary injunctive relief is appropriate if the moving party establishes: "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *Roda Drilling Co. v. Siegal,* 552 F.3d 1203, 1208 (10th Cir.2009). Because a preliminary injunction is an extraordinary remedy, the "right to relief must be clear and unequivocal." *SCFC LLC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1098 (10th Cir.1991).

In the Tenth Circuit, certain types of injunctions are disfavored: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant to all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. University of Colo.,* 427 F.3d 1253, 1259 (10th Cir.2005) (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 977 (10th Cir.2004). "Such disfavored injunctions 'must be more closely scrutinized to assure that the exigencies of that case support the granting of a remedy that is extraordinary even in the normal course.' " *Id.* "Movants seeking such an injunction are not entitled to rely on this Circuit's modified-likelihood-of-success-on-the-merits standard." *O Centro,* 389 F.3d at 976. The moving party must make "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Awad v. Ziriax,* 670 F.3d 111, 1125 (10th Cir.2012).

The status quo for purposes of a preliminary injunction is "the 'last peaceable uncontested status existing between the parties before the dispute developed.' " *Schrier,* 427 F.3d at 1260. In this case, the last peaceable uncontested status between the parties was when the State recognized Plaintiffs' marriages. Therefore, the requested preliminary injunction does not disturb the status quo.

However, the State argues that Plaintiffs' requested preliminary injunction is a disfavored injunction because it is mandatory rather than prohibitory. An injunction is mandatory if it will "affirmatively require the nonmovant to act in a particular way, and as a result ... place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *Id.* at 1261. The Tenth Circuit has recognized that "[t]here is no doubt that determining whether an injunction is mandatory as opposed to prohibitory can be vexing." *O Centro,* 389 F.3d at 1006. " 'In many instances, this distinction is more semantical than substantive. For to order a party to refrain from performing a given act is to limit his ability to perform any alternative act; similarly, an order to perform in a particular manner may be tantamount to a proscription against performing in any other.' " *Id.* (citation omitted).

***6** In this case, the court could characterize Plaintiffs' requested injunction as prohibiting the State from enforcing its marriage bans against couples who already have vested marriage rights or affirmatively requiring the State to recognize Plaintiffs' vested marriage rights. In large part, it is a matter of semantics rather than substance. Preventing the State from applying its marriage bans retroactively is the same thing as requiring the State to recognize marriages that were entered into when such marriages were legal.

As to the second element of a mandatory injunction, however, there is no evidence to suggest that this court would be required to supervise the State if the court granted Plaintiffs' requested injunction. The State's position is that it is required by Utah law to apply Utah's marriage bans to all same-sex marriages until a court decides the issue. The Directive that went to Governor Herbert's cabinet stated that the "legal status" of the same-sex marriages that took place before the Supreme Court stay was "for the courts to decide." And Attorney General Reyes recognized that the validity of the marriages in question must ultimately be decided by the legal process. Based on the State's compliance with the injunction in *Kitchen* prior to the Supreme Court's Stay Order, there is

no basis for assuming that the State would need supervision in implementing an order from this court recognizing the same-sex marriages.

Neither party raised the issue of whether this is an injunction that would provide Plaintiffs with all the relief they could receive from a trial on the merits. Plaintiffs seek declaratory and injunctive relief that their marriages continue to be valid under Utah and federal law. However, Plaintiffs have pleaded a cause of action for the deprivation of property and liberty interests in violation of the United States Constitution under 42 U.S.C. § 1983. A determination that the State has deprived Plaintiffs of their constitutional rights could, therefore, result in at least nominal damages at trial. [3]

The court concludes, therefore, that the requested injunction is not a disfavored injunction which would require the clear and unequivocal standard to apply to the likelihood of success on the merits element. Based on this court's analysis, the preliminary injunction does not alter the status quo, is not mandatory, and does not afford Plaintiff all the relief that could be awarded at trial. However, to the extent that the requested injunction could be construed as a mandatory injunction, the court will analyze the likelihood of success on the merits under the clear and unequivocal standard.

II. Merits

Because the court is applying the heightened standard to Plaintiffs' request for a preliminary injunction, the court will address the likelihood of success on the merits first and then each element in turn.

A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on their state and federal claims because they became vested in the rights attendant to their valid marriages at the time those marriages were solemnized and the State is required, under the state and federal due process clauses, to continue recognizing their marriages despite the fact that Utah's same-sex marriage bans went back into effect on January 6, 2014. In their Complaint, Plaintiffs bring causes of action for violations of their due process and liberty interests under the Utah and United States Constitutions. Article I, Section 7 of the Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." The Fourteenth Amendment to the United States Constitution guarantees that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

***7** The Utah Supreme Court has recognized that "the standards for state and federal constitutional claims are different because they are based on different constitutional language and different interpretive law." *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 477 (Utah 2011). While the language may be similar, the Utah Supreme Court has explained that federal standards do not "foreclose [its] ability to decide in the future that [its] state constitutional provisions afford more rights than the federal Constitution." *Id.* at 478 (concluding that conduct that did not give rise to a federal constitutional violation could still give rise to a state constitutional violation). Recognizing that the Utah Supreme Court has the prerogative to find that the state due process clause affords more protections, the court will analyze the issue under only federal due process standards.

As an initial matter, the court notes that this case is not about whether the due process clause should allow for same-sex marriage in Utah or whether the *Kitchen* decision from this District was correct. That legal analysis is separate and distinct from the issues before this court and is currently on appeal to the Tenth Circuit Court of Appeals. This case deals only with whether Utah's marriage bans preclude the State of Utah from recognizing the same-sex marriages that already occurred in Utah between December 20, 2013, and January 6, 2014.

Plaintiffs bring their federal violation of due process and liberty interests claim under 42 U.S.C. § 1983. While Section 1983 "does not provide any substantive rights" of its own, it provides "a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *Baker v. Mccollan*, 443 U.S. 137, 144, 99 S.Ct. 2689, 61 L.Ed.2d 433 n .3 (1979).

"To state a claim for a violation of due process, plaintiff must first establish that it has a protected property interest and, second, that defendants' actions violated that interest." *Crown*

Point I, LLC v. Intermountain Rural Elec. Ass'n, 319 F.3d 1211, 1216 (10th Cir.2003). "The Supreme Court defines 'property' in the context of the Fourteenth Amendment's Due Process Clause as a 'legitimate claim of entitlement' to some benefit." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir.2000) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). These claims of entitlement generally "arise from independent sources such as state statutes, local ordinances, established rules, or mutually explicit understandings." *Dickeson v. Quarberg*, 844 F.2d 1435, 1437 (10thCir.1988). In assessing a due process claim, the Tenth Circuit has recognized that "a liberty interest can either inhere in the Due Process Clause or it may be created by state law." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir.2012).

1. Interest Inherent in the Due Process

***8** In finding a liberty interest inherent in the Due Process Clause, the Tenth Circuit explained that "[t]here can be no doubt that 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' " *Id.* at 1215 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974)). "As the Court declared in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the liberty guaranteed by the Due Process Clause 'denotes not merely freedom from bodily restraint but also the right of the individual ... to marry, establish a home and bring up children." *Id.*

In *Windsor*, the United States Supreme Court struck down the federal Defense of Marriage Act because it was "unconstitutional as a deprivation of the liberty of the person protected by" the Due Process Clause. *Id.* In prior cases, the court has also found that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

In this case, Plaintiffs solemnized legally valid marriages under Utah law as it existed at the time of such solemnization. At that time, the State granted Plaintiffs all the substantive due process and liberty protections of any other marriage. The *Windsor* Court held that divesting "married same-sex couples of the duties and responsibilities that are an essential part of married life" violates due process. *United States v. Windsor*, —— U.S. ——, ——, 133 S.Ct. 2675, 2695, 186 L.Ed.2d 808 (2013).

As in *Windsor*, the State's decision to put same-sex marriages on hold, "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2694. Similarly, the "principal effect" of the State's actions "is to identify a subset of state-sanctioned marriages and make them unequal." The court, therefore, concludes that under Tenth Circuit law, Plaintiffs have demonstrated a liberty interest that inheres in the Due Process Clause.

2. Interest Created by State Law

Plaintiffs have also asserted that they have a state property interest in their valid marriages under Utah state law. The only state court to look at an issue similar to the one before this court is the California Supreme Court in *Strauss v. Horton*, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (Cal.2009). The *Strauss* court addressed the continuing validity of the same-sex marriages that occurred after the California Supreme Court decision allowing same-sex marriage under the California Constitution and the passage of Proposition 8, which amended the California Constitution to preclude samesex marriages. *Id.* at 119–22. The *Strauss* court began its analysis by recognizing the presumption against finding an enactment to have retroactive effect and examining the language of Proposition 8 to determine whether the amendment could be applied retroactively. *Id.* at 120–21. The court concluded that Proposition 8 did not apply retroactively. *Id.*

***9** In making its determination on retroactivity, the court also acknowledged that its "determination that Proposition 8 cannot properly be interpreted to apply retroactively to invalidate lawful marriages of same-sex couples that were performed prior to the adoption of Proposition 8 is additionally supported by our recognition that a contrary resolution of the retroactivity issue would pose a serious potential conflict with the state constitutional due process clause." *Id.* at 121.

The *Strauss* court explained that its "past cases establish that retroactive application of a new measure may conflict with constitutional principles 'if it deprives a person of a vested right without due process of law.' " *Id.* (citations omitted).

"In determining whether a retroactive law contravenes the due process clause," the court must "consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." *Id.*

Applying these principles to whether the same-sex marriages entered into prior to Proposition 8 should remain valid, the *Strauss* court concluded that applying Proposition 8 retroactively "would create a serious conflict between the new constitutional provision and the protections afforded by the state due process clause." *Id.* at 122. The court reasoned that the same-sex couples "acquired vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances." *Id.* Furthermore, the couples' reliance was "entirely legitimate," and "retroactive application of the initiative would disrupt thousands of actions taken in reliance on the [prior court ruling] by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families, and potentially undermining the ability of citizens to plan their lives according to the law as it has been determined by this state's highest court." *Id.* "By contrast, a retroactive application of Proposition 8 is not essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively and by having the traditional definition of marriage enshrined in the state Constitution where it can be altered only by a majority of California voters." *Id.*

In this case, the State seeks to apply its marriage bans retroactively to Plaintiff's previously-entered marriages. The marriage bans were legal nullities at the time Plaintiffs were married. However, once the Supreme Court entered its Stay Order, the State asserts that the marriage bans went back into effect.

***10** Like California, Utah law has a strong presumption against retroactive application of laws. "Constitutions, as well as statutes, should operate prospectively only unless the words employed show a clear intention that they should have a retroactive effect." *Shupe v. Wasatch Elec. Co.*, 546 P.2d 896, 898 (Utah 1976). The presumption against retroactive application of changes in the law is deeply rooted in principles of fairness and due process. The United States Supreme Court has explained that "the presumption against retroactive legislation ... embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.*

Because retroactive application of a law is highly disfavored, "a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of parties ." *Thomas v. Color Country Mgmt.*, 84 P.3d 1201, 1210 (Utah 2004) (Durham, C.J., concurring). Utah's presumption against retroactivity can be overcome only by "explicit statements that the statute should be applied retroactively or by clear and unavoidable implication that the statute operates on events already past." *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997).

In this case, Utah's statutory and constitutional provisions do not explicitly state that they apply retroactively. Utah Code Section 30–1–2 states that marriages "between persons of the same sex" "are prohibited and declared void." Utah Code Ann. § 30–1–2(5). Utah Code Section 30–1–4.1 provides: "It is the policy of this state to recognize as marriage only the legal union of a man and a woman;" and "this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties [to same-sex couples] that are substantially equivalent to those provided under Utah law to a man and woman because they are married." *Id.* § 30–1–4.1(1)(a), (b). Article I, Section 29 to the Utah Constitution provides: "(1) Marriage consists of only the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

The use of the present tense in these same-sex marriage bans indicates that the bans do not apply retroactively. In *Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108, the Utah

Supreme Court stated: "It simply cannot be said that the use of the present tense communicates a clear and unavoidable implication that the statute operates on events already past. If anything, use of the present tense implies an intent that the statute apply to the present, as of its effective date, and continuing forward." *Id.* at ¶ 7.

***11** The *Waddoup* court's analysis is consistent with the *Strauss* court's conclusion that Proposition 8's use of the present tense did not retroactively apply to prior marriages because "a measure written in the present tense ('is valid or recognized') does not clearly demonstrate that the measure is intended to apply retroactively." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 120. The *Waddoup's* decision is further consistent with other courts concluding that statutes stating that a marriage "is prohibited and void" does not apply retroactively. *See Cook v. Cook,* 209 Ariz. 487, 104 P.3d 857, 865 n. 2 (Ariz.Ct.App.2005) (finding "[m]arriage ... between first cousins is prohibited and void" does not apply retroactively); *Succession of Yoist,* 132 La. 309, 61 So. 384, 385 (La.1913) (statute declaring, "Marriages between white persons and persons of color are prohibited, and the celebration of such marriages is forbidden, and such celebration carries with it no effect, and is mull and void," does not apply retroactively).

Thus, the use of present and future tenses in Utah's marriage bans does not provide a "clear and unavoidable" implication that they "operate on events already past." *Waddoups,* 2013 UT at ¶ 7, 297 P.3d 599. The court concludes that, under Utah law, nothing in the language of Utah's marriage bans indicates or implies that the bans should or can apply retroactively.

Moreover, nothing in the United States Supreme Court's Stay Order speaks to the legal status of the marriages that had already taken place or whether Utah's marriage bans would have retroactive effect when they were put back in place. While the State asserts that the Stay Order placed the marriage bans back into effect as of December 20, 2013, the State cites to no language in the Stay Order that would support that assertion. In addition, the State has not presented any case law indicating that a Stay Order has that effect.

The State argues that application of Utah's previously existing marriage bans after the Supreme Court's Stay Order is not retroactive application of the bans because the laws were enacted long before Plaintiffs entered into their marriages. However, this argument completely ignores the change in the law that occurred. The marriage bans became legal nullities when the *Kitchen* decision was issued and were not reinstated until the Stay Order. In addition, the State's argument fails to recognize that Utah law defines a retroactive application of a law as an application that " 'takes away or impairs vested rights acquired under existing laws ... in respect to transactions or considerations already past.' " *Payne By and Through Payne v. Myers,* 743 P.2d 186, 190 (Utah 1987). Under this definition, the State's application of the marriage bans to place Plaintiffs' marriages "on hold," necessarily "takes away or impairs vested rights acquired under existing law."

When discussing the due process concerns implicated in a retroactive application of Proposition 8, the *Strauss* court had clear California precedents to rely upon that identified the state's recognition of vested rights in marriage. 93 Cal.Rptr.3d 591, 207 P.3d at 121. In this case, however, the State disputes whether Plaintiffs have vested rights in their marriages under Utah law.

***12** Under Utah law, a marriage becomes valid on the date of solemnization. *See Walters v. Walters,* 812 P.2d 64, 68 (Utah Ct.App.1991); *State v. Giles,* 966 P.2d 872, 877 (Utah Ct.App.1998) (marriage valid from date of solemnization, even if officiant does not return certificate to county clerk). There is no dispute in this case that Plaintiffs' marriages were valid under the law as it existed at the time they were solemnized. In *Miller v. USAA Cas. Ins. Co.,* 44 P.3d 663, 674 (Utah 2002), the Utah Supreme Court recognized that the due process protection in the Utah Constitution "is not confined to mere tangible property but extends to every species of vested rights." And, as early as 1892, the Utah Supreme Court recognized the fundamental vested rights associated with marriage. *Tufts v. Tufts,* 8 Utah 142, 30 P. 309, 310 (Utah 1892).

In *Tufts v. Tufts,* the court addressed the retroactive application of divorce laws and stated that the rights and liabilities of spouses "grew out of a contract governing the marriage relation which existed at the time" the alleged conduct occurred. *Id.* The court relied on precedent stating that "[w]hen a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect

it, or any action for its enforcement. It has then become a vested right, which stands independent of the statute." *Id.* The court also stated that the rights and liabilities of spouses are "sacred" and, "while the relation is based upon contract," "it is a contract that differs from all others, and is the basis of civilized society." *Id.* at 310–11.

In this case, Plaintiffs' marriages were authorized by law at the time they occurred. The marriages were solemnized and valid under the existing law so that nothing remained to be done. No separate step can or must be taken after solemnization for the rights of a marriage to vest. Moreover, Plaintiffs began to exercise the rights associated with such valid marriages prior to the entry of the Supreme Court's Stay Order. As in *Tufts*, therefore, the change in the law does not affect the vested rights associated with those marriages. The vested rights in Plaintiffs' validlyentered marriages stand independent of the change in the law. For over a hundred years, the *Tufts* decision has never been called into question because it states a fundamental principle of basic fairness.

This application of Utah law is consistent with the *Strauss* court's recognition that the "same-sex couples who married after the [court's] decision in the Marriage Cases ... and before Proposition 8 was adopted, acquired vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real property, and inheritances." 93 Cal.Rptr.3d 591, 207 P.3d at 121. Moreover, the State has failed to cite any law from any jurisdiction supporting the proposition that rights in a valid marriage do not vest immediately upon valid solemnization of the marriage.

***13** Plainly, to deprive Plaintiffs of the vested rights in their validly-entered marriages raises the same due process concerns that were addressed in *Strauss.* The State argues that Plaintiffs in this case do not have a property interest in their marriages because their right to marry was based on a non-final district court opinion instead of a decision by the state's highest court as in *Strauss.* To make this argument, however, the State cites to cases involving non-final consent decrees that are factually distinct from a final district court judgment and that are wholly irrelevant to the issue before this court.

While a factual difference exists between this case and *Strauss*, the court finds no basis for legally distinguishing between the final judgment in *Kitchen* and the California Supreme Court's decision in its marriage cases. Both decisions allowed for same-sex couples to marry legally. "[A]n appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effects." *Hovey v. McDonald,* 109 U.S. 150, 161, 3 S.Ct. 136, 27 L.Ed. 888 (1883). "The general rule is that the judgment of a district court becomes effective and enforceable as soon as it is entered; there is no suspended effect pending appeal unless a stay is entered." *In re Copper Antitrust Litig.,* 436 F.3d 782, 793 (7th Cir.2006).

The State's arguments as to Plaintiffs' reliance on the final judgment in *Kitchen* also ignore the fact that Plaintiffs are claiming a vested right in their validly-entered legal marriages. Plaintiffs are not claiming they have a vested right in the continuation of the *Kitchen* injunction or judgment. Plaintiffs contend that their rights vested upon the solemnization of their valid marriages and that their validly-entered marriages do not rely on the continuation or reinstatement of the *Kitchen* injunction. Thus Plaintiffs seek recognition of their marriages separate and apart from the ultimate outcome of the *Kitchen* appeals.

Plaintiffs' claims, therefore, are factually and legally distinguishable from the cases the State cites applying the "vested rights doctrine." *See Axel Johnson, Inc. v. Arthur Andersen & Co. .,* 6 F.3d 78 (2d Cir.1993); *Casiano–Montanez v. State Ins. Fund Corp.,* 707 F.3d 124 (1stCir.2013). In those cases, the plaintiffs were relying on rights fixed by a district court judgment, whereas, Plaintiffs, in this case, are relying on the validity of their marriage licenses. The State, in this case, issued and recognized Plaintiffs' marriage licenses, which became valid under Utah law when the marriages were solemnized. The State did not issue provisionally-valid marriage licenses. Moreover, Plaintiffs' vested rights in their legally recognized marriages are not dependent on the ultimate outcome in *Kitchen.* Whether or not *Kitchen* is ultimately upheld, the district court's injunction was controlling law and Utah's marriage bans were a legal nullity until the Supreme Court issued the Stay Order on January 6, 2014. *See Howat v. State of Kansas,* 258 U.S. 181, 189–90, 42 S.Ct. 277, 66 L.Ed. 550 (1922) ("An injunction duly issuing out of a court ... must be obeyed ... however erroneous the action of the court may be.").

***14** The State further argues that Plaintiffs' marriages can be declared legal nullities if the *Kitchen* decision is

overturned because the law has recognized instances when traditional marriages thought to be valid are later declared legal nullities. However, the instances in which courts have declared such marriages void involve mistakes of fact. In *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah Ct.App.1991), the wife discovered that she had not completed a previous divorce at the time of her subsequent marriage. In the present case, the marriages were valid under the law at the time they were solemnized and there is no alleged mistake of fact. Therefore, the comparison is inapposite. Cases involving marriages that were invalid at their inception are not helpful or relevant. This case is also distinguishable from cases where county clerks spontaneously started issuing same-sex marriage licenses without any court order or basis in state law. Unlike the cases before this court, those cases were also invalid at their inception.

The more analogous case is presented in *Cook v. Cook*, where the court recognized that refusing to recognize an out-of-state marriage that had previously been recognized within the state would violate constitutional due process guarantees. 209 Ariz. 487, 104 P.3d 857, 866 (Ariz.App.2005). In *Cook*, the statutory scheme in place when the couple moved to the state expressly allowed the marriage, but a subsequent amendment made such a marriage void. *Id.* The court refused to find all such marriages in the state on the date of the amendment void because the couples in the state with such marriages already had constitutionally vested rights in their marriages. *Id* .

The State believes that all the actions taken in response to the final judgment in *Kitchen* can be considered a nullity if the decision is ultimately overturned. However, there are several instances in which courts recognize that actions taken in reliance on an injunction cannot be reversed. *See University of Texas v. Camenisch*, 451 U.S. 390, 398, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) (injunctions have legal effects that will be "irrevocably carried out" and cannot be unwound if the injunction is subsequently overturned on appeal); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247 (10th Cir.2001) (recognizing certain types of injunctions "once complied with, cannot be undone"). Moreover, a person who disobeys a district court injunction that has not been stayed may be punished with contempt even if the underlying injunction is subsequently reversed. *Walker v. City of Birmingham*, 388 U.S. 307, 314, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967).

The State further fails to recognize that Plaintiffs are claiming a violation of substantive due process rights, not merely procedural due process rights. Plaintiffs allege that they have substantive vested rights in their marriages-such as, the right to family integrity, the right to the custody and care of children of that marriage-that the State cannot take away regardless of the procedures the State uses. Once Plaintiffs solemnized a legally valid marriage between December 20, 2013, and January 6, 2014, Plaintiffs obtained all the substantive due process and liberty protections of any other marriage.

***15** As stated above, the Supreme Court recently held that divesting "married same-sex couples of the duties and responsibilities that are an essential part of married life" violates due process. *United States v. Windsor*, ––– U.S. ––––, ––––, 133 S.Ct. 2675, 2695, 186 L.Ed.2d 808 (2013). The State's decision to put same-sex marriages on hold, "deprive[s] some couples married under the laws of their State, but not other couples, of both rights and responsibilities." *Id.* at 2694.

Prior Supreme Court cases also establish that there "is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude." *Zablocki v. Redhail*, 434 U.S. 374, 397 n. 1, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (Powell, J., concurring). [4] The State has not attempted to argue that they have a constitutionally adequate justification for overcoming Plaintiffs' due process and liberty interests. *Lawrence v. Texas*, 539 U.S. 558, 593, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (Ordinarily, "the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.") The State has not provided the court with a compelling state interest for divesting Plaintiffs of the substantive rights Plaintiffs obtained in their marriages. The State asserts merely that Plaintiffs improperly relied on the ruling of a United States District Court. The State's argument, however, fails to acknowledge that the State also relied on the *Kitchen* decision. The State notified its county clerks that they were required to issue marriage licenses. The State now seems to be claiming that while it reasonably required its county clerks to act in response to the *Kitchen* decision, Plaintiffs unreasonably acted on that same decision. However, the court

has already discussed the operative effect of a district court injunction. That operative effect applies to all parties equally.

Even though the Supreme Court's Stay Order put Utah's marriage bans back in place, to retroactively apply the bans to existing marriages, the State must demonstrate some state interest in divesting Plaintiffs of their already vested marriage rights. The State has failed to do so. Although the State has an interest in applying state law, that interest is only in applying the controlling law at the time. In *Strauss*, the court found that a retroactive application of Proposition 8 was "not essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively and by having the traditional definition of marriage enshrined in the state Constitution." 93 Cal.Rptr.3d 591, 207 P.3d at 122. In comparison, "a retroactive application of the initiative would disrupt thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families, and potentially undermining the ability of citizens to plan their lives according to the law as it has been determined." *Id.*

***16** As in *Strauss*, this court concludes that the State has not demonstrated a state interest that would overcome Plaintiffs' vested marriage rights. The State's decision to retroactively apply its marriage bans and place Plaintiffs' marriages "on hold" infringes upon fundamental constitutional protections for the marriage relationship. Therefore, Plaintiffs have demonstrated a clear and unequivocal likelihood of success on the merits of their deprivation of federal due process claim under 42 U.S.C. § 1983.

B. Irreparable Harm

Under Tenth Circuit law, "[t]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir.2003). The State argues that the court should not find irreparable harm because, even though Plaintiffs have the option of living in a state that would recognize their marriage, Plaintiffs have chosen to live in Utah for years without enjoying the rights of marriage. This argument ignores the changes in the law that occurred and the fact that Plaintiffs' situations were materially altered when they became validly married in the State of Utah.

The Tenth Circuit recognizes that " '[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.' " *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir.2012). As stated above, Plaintiffs have demonstrated a likelihood of success on the merits that the State is violating their due process and liberty interests by refusing to recognize their validly-entered marriages. The State has placed Plaintiffs and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights associated with marriage. These legal uncertainties and lost rights cause harm each day that the marriage is not recognized. The court concludes that these circumstances meet the irreparable harm standard under Tenth Circuit precedents.

C. Balance of Harms

"[I]f the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir.2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir.2013). In this case, the laws themselves may not be unconstitutional, but the State's retroactive application of the marriage bans likely violates Plaintiffs' constitutional rights. The State has no legitimate interest in depriving Plaintiffs of their constitutional rights.

Although the State has a general interest in representing the wishes of its voters, that interest does not outweigh the harms Plaintiffs face by having their constitutional rights violated. Plaintiffs face significant irreparable harms to themselves and their families-inability to inherit, inability to adopt, loss of custody, lost benefits. The State, however, has demonstrated no real harm in continuing to recognize Plaintiffs' legally-entered marriages. The State's harm in the *Kitchen* litigation with respect to continuing to issue same-sex marriage licenses is not the same as the harm associated with recognizing previously-entered same-sex marriages that were valid at the

time they were solemnized. The only relevant harm in this case is the harm that results from requiring the State to recognize Plaintiffs' marriages.

***17** The State asserts that it is harmed by not being able to enforce the marriage bans retroactively. But the court has already discussed the constitutional concerns associated with a retroactive application of the marriage bans and finds no harm to the State based on an inability to apply the marriage bans retroactively. The State's marriage bans are currently in place and can stop any additional marriages from occurring. The State's interest is in applying the current law. The court, therefore, concludes that the balance of harms weighs decidedly in Plaintiffs' favor and supports the court's issuance of a preliminary injunction.

D. Public Interest

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132. In this case, the court agrees with Plaintiffs that the public is well served by having certainty about the status of Plaintiffs' marriages. That certainty not only benefits Plaintiffs and there families but State agencies, employers, and other third parties who may be involved in situations involving issues such as benefits, employment, inheritance, child custody, and child care.

For the foregoing reasons, the court concludes that Plaintiffs have met the clear and unequivocal standard for obtaining a preliminary injunction during the pendency of this litigation. Plaintiffs have demonstrated that they are likely to succeed on the merits of their federal due process claims, that they will be irreparably harmed if a preliminary injunction does not issue, that the balance of harms weighs in their favor, and that the injunction is in the public interest. Accordingly, Plaintiffs' motion for a preliminary injunction is granted and the court will enter a preliminary injunction preventing the State from enforcing its marriage bans with respect to the same-sex marriages that occurred in Utah between December 20, 2013, and January 6, 2014.

The State's Request for Stay Pending Appeal

In the event that the court decided to grant Plaintiffs' motion for a preliminary injunction, the State requested that the court stay the injunction pending appeal. Rule 62(c) provides that "[w]hile an appeal is pending from an interlocutory order ... that grants ... an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Rule 8(a)(1) of the Federal Rules of Appellate Procedure provides that a party must ordinarily first move in the district court to obtain a stay of the judgment or order of a district court pending appeal. Fed. R.App. P. 8(a)(1).

The purpose of a stay is to preserve the status quo pending appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir.1996). The court has already determined that the status quo in this case is the State recognizing Plaintiffs' marriages. Therefore, the State's request would alter the status quo.

***18** The court considers the following four factors when considering a motion to stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). "With respect to the four stay factors, where the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed." *F.T.C. v. Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir.2003) (citations omitted). If the State "can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon*, 79 F.3d at 1020 (quoting *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.), *cert. denied*, 516 U.S. 974, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995).

Based on the court's analysis above, this court believes that its decision is correct and that Plaintiffs, not the State, have demonstrated a clear likelihood of success on the merits. Also, the court has already weighed and balanced the harms involved in issuing its preliminary injunction. Plaintiffs have demonstrated existing clear and irreparable harms if an injunction is not in place. As discussed above, the balance of harms is necessarily tied to the merits of the decision because harm to Plaintiffs' constitutional rights are given significantly more weight than the State's harm in not being able to apply its marriage bans retroactively to legally-entered marriages. The irreparable nature of Plaintiffs harms involve fundamental rights such as the ability to adopt, the ability to inherit, child care and custody issues, and other basic rights that would otherwise remain in legal limbo. For these reasons, the court cannot conclude that the harm to the State outweighs the harm to Plaintiffs during pendency of the appeal. The need for certainty also weighs heavily in determining the public interest. Recognition of Plaintiffs' marriages impacts extended families, employers, hospitals, schools, and many other third parties. The court, therefore, concludes that the State has not met its burden of establishing the factors required for a stay pending appeal.

In its discretion, however, the court grants the State a limited 21–day stay during which it may pursue an emergency motion to stay with the Tenth Circuit. The court recognizes the irreparable harms facing Plaintiffs every day. However, the court finds some benefit in allowing the Tenth Circuit's to review whether to stay the injunction prior to implementation of the injunction. Therefore, notwithstanding the many factors weighing against a stay, the court, in its discretion, grants the State a temporary 21–day stay.

Motion to Certify Questions of State Law

***19** In addition to their Motion for a Preliminary Injunction, Plaintiffs also ask the court to certify questions of law to the Utah Supreme Court. Specifically, Plaintiffs ask the court to certify two specific questions: (1) Under Utah law, do same-sex couples who were legally married between December 20, 2013, and January 6, 2014, have vested rights in their marriages which are protected under Article I, Section 7 of the Utah Constitution?; and (2) Once the State of Utah recognized the marriages of same-sex couples entered into between December 20, 2013, and January 6, 2014, could it apply Utah's marriage bans to withdraw that recognition?

The State opposed Plaintiffs' motion to certify but has now brought its own Motion to Certify, asking the court to certify the following question: Do same-sex couples who received marriage licenses, and whose marriages were solemnized, between December 20, 2013 and January 6, 2014, have vested property rights in their marriages which now require recognition under present Utah law?

The State opposed Plaintiffs' motion to certify on the grounds that the answers to Plaintiffs' proposed questions were clear and the questions were vague and unhelpful to the court. However, after briefing and argument on Plaintiffs' motion to certify, the State alleges that circumstances changed when some district court judges in Utah's state courts began ruling that Plaintiffs had vested rights in their marriages.

Rule 41(a) of the Utah Rules of Appellate Procedure provides that "the Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court ... if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain." Utah R.App. P. 41(a). The certification order must state (1) the "question of law to be answered," (2) "that the question certified is a controlling issue of law in a proceeding pending before the certifying court," and (3) "that there appears to be no controlling Utah law." *Id.* 41(c).

The parties' requests to certify come to this court in a fairly unusual procedural posture. Claiming that the heart of Plaintiffs' claims is whether the State's failure to recognize their marriages violates the Due Process Clause of the Fourteenth Amendment, the State removed Plaintiffs' case from state court to federal court. The State then opposed Plaintiffs' motion to certify question to the state court. Now, based on rulings favorable to Plaintiffs in state district courts, the State argues that this court should certify the vested right question to the Utah Supreme Court "to ensure consistency and fairness."

As demonstrated by the parties' competing motions, both parties in this case seek a determination from the Utah Supreme Court as to whether Plaintiffs have vested rights in their marriages under Utah law. In determining Plaintiffs' federal due process claim, this court concluded that Plaintiffs

have liberty interests inherent in the Due Process Clause and created by state law. Therefore, the vested rights issue is an important issue of law in this case, but it does not appear to be essential to Plaintiffs' federal due process claim. However, with respect to the final requirement for certification—that there is no controlling Utah law—this court concluded that, under Utah state law, Plaintiffs clearly and unequivocally demonstrated that they have vested rights in their legally-entered marriages and their vested marriage rights are protected by the federal due process clause regardless of the ultimate outcome of the *Kitchen* case.

***20** The State asserts that this court should certify the vested rights question to the Utah Supreme Court because state district court judges in several adoption cases have ruled that Plaintiffs' have vested marriage rights and the State has sought review of those decisions through a writ to the Utah Supreme Court. Although the Utah Supreme Court has granted a stay of the adoption decrees while it considers the issue, the court's decision to have the issue briefed makes no comment on the merits of the writs. As Plaintiffs' asserted in their oppositions, there may be procedural grounds for dismissal or denial of the writs that would preclude the Utah Supreme Court from reaching the merits of the issue.

The State asserts that this court could have determined the state law enmeshed with the federal due process challenge but for the state adoption rulings. This court, however, is not aware of any case in the Utah state courts that have been favorable to the State's position. At most, some district courts have chosen to stay the adoption cases pending a decision on the validity of the marriages. Several state rulings consistent with this court's determination that Plaintiffs have vested rights in their marriages does not provide a basis for concluding that the issue of state law is uncertain.

Finally, if the court is to consider fairness as the State requests, the court notes that the State chose this forum by removing the action from state court. Unlike Plaintiffs who seek certification in order to obtain favorable rulings from both courts, the State seeks to begin the process anew in a different forum from the one it chose. The court agrees with Plaintiffs that the State's late-filed motion to certify, asserting a nearly identical question to those posed by Plaintiffs, appears to be a delay tactic. [5]

Utah law clearly provides that rights in a valid marriage vest immediately upon solemnization. There is no further action required to be taken or that could be taken by either party to create the vested right. There is no basis under Utah law for finding that Plaintiffs in this case were required to take steps beyond solemnization in order to obtain vested rights when such steps are not required for other marriages. Because Utah law is clear and not ultimately controlling of the case before this court, the court concludes that there is no basis for certifying the state law questions to the Utah Supreme Court. Accordingly, the parties' motions to certify state law questions are denied.

CONCLUSION

Based on the above reasoning, Plaintiffs Motion for Preliminary Injunction [Docket No. 8] is GRANTED; Plaintiffs' Motion to Certify Questions of Utah State Law to the Utah Supreme Court [Docket No. 10] is DENIED; and Defendants' Motion to Certify Questions of Utah State Law to the Utah Supreme Court [Docket No. 34] is DENIED. The following Preliminary Injunction Order is temporarily stayed for twenty-one (21) days to allow the State to seek an emergency stay pending appeal from the Tenth Circuit.

PRELIMINARY INJUNCTION ORDER

***21** The court issues the following Preliminary Injunction against Defendants:

Defendants State of Utah, Governor Gary Herbert and Attorney General Sean Reyes are prohibited from applying Utah's marriage bans retroactively to the same-sex marriages that were entered pursuant to Utah marriage licenses issued and solemnized between December 20, 2013, and January 6, 2014. Accordingly, Defendants State of Utah, Governor Gary Herbert and Attorney General Sean Reyes shall immediately recognize the marriages by same-sex couples entered pursuant to Utah marriage licenses issued and solemnized between December 20, 2013, and January 6, 2014, and afford these same-sex marriages all the protections, benefits, and responsibilities given to all marriages under Utah law.

Footnotes

1 The State's Motion to Certify Questions of Utah State Law was not filed until after the hearing was held. The motion is fully briefed, and the court concludes that a separate hearing on the motion is unnecessary.

2 In 1977, the Utah Legislature amended Utah Code Section 30–1–2 to state "[t]he following marriages are prohibited and declared void": [marriages] "between persons of the same sex." Utah Code Ann. § 30–1–2(5). In 2004, the Utah Legislature added Utah Code Section 30–1–4.1, which provides: "It is the policy of this state to recognize as marriage only the legal union of a man and a woman;" and "this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties [to same-sex couples] that are substantially equivalent to those provided under Utah law to a man and woman because they are married." *Id.* § 30–1–4.1(1)(a), (b). In the November 2004 general election, Utah voters passed Amendment 3, which added Article I, Section 29 to the Utah Constitution, effective January 1, 2005, which provides: "(1) Marriage consists of only the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

3 Plaintiffs allege financial damages due to a deprivation of rights, such as Johnson and Shutlz's $8,000.00 yearly loss for insurance premiums. Plaintiffs, however, do not specifically request monetary damages in their Prayer for Relief. Rather, Plaintiffs state only "any other relief the court deems just and proper."

4 Utah courts have also recognized "[t]he rights inherent in family relationships-husband-wife, parent-child, and sibling-are the most obvious examples of rights" protected by the Constitution. *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982).

5 The State includes a footnote in its motion to certify stating that the factors warranting the application of the *Colorado River* abstention doctrine apply in this case. *See Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). However, this case and the current state proceedings are not parallel actions. *See Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir.1994) ("[A] federal court must first determine whether the state and federal proceedings are parallel."). The state actions were instituted as adoption proceedings and are before the Utah Supreme Court on emergency writs. The case before this court is a deprivation of due process and liberty interest under state and federal due process. Only one couple in the adoption proceedings overlap with the Plaintiffs in this case. Also, significantly, the rights and remedies at issue in this case are far broader than those at issue in the state court proceedings. Moreover, the only reason both cases are not in State court is because the State removed this case from State court. It strikes the court as procedural gamesmanship for the State to remove a case to federal court and then ask the court in the forum the State chose to abstain from acting. "The decision whether to defer to the state courts is necessarily left to the discretion of the district court in the first instance." *Id.* at 1081. Such discretion must be exercised "in light of 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.' " *Id.* (citations omitted). Because these cases are not parallel actions, the court has no discretion to abstain and must exercise its obligation to hear and decide the case presented to it.