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(825)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DEREK KITCHEN, INDIVIDUALLY;
MOUDI SBEITY, INDIVIDUALLY;
KAREN ARCHER, INDIVIDUALLY;
KATE CALL, INDIVIDUALLY;
LAURIE WOOD, INDIVIDUALLY; AND
KODY PARTRIDGE, INDIVIDUALLY.

CASE NO. 2:13-CV-217

PLAINTIFFS,

VS.

GARY R. HERBERT, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF UTAH;
JOHN SWALLOW, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF
UTAH; AND SHERRIE SWENSEN, IN HER
OFFICIAL CAPACITY AS CLERK OF
SALT LAKE COUNTY,

SALT LAKE CITY, UTAH
DECEMBER 23, 2013

DEFENDANTS.

DEFENDANTS' MOTION TO STAY PENDING APPEAL
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES:

FOR THE PLAINTIFFS:

MAGLEBY & GREENWOOD
BY: JENNIFER F. PARRISH, ESQ.
PEGGY A. TOMSIC, ESQ.
170 SOUTH MAIN STREET, SUITE 850
SALT LAKE CITY, UTAH 84101
(801) 359-9000

FOR DEFENDANTS HERBERT AND SWALLOW:

OFFICE OF THE UTAH ATTORNEY GENERAL
BY: BRIAN TARBET, ESQ.
PHILIP S. LOTT, ESQ.
STEVE WALKENHORST, ESQ.
160 EAST 300 SOUTH, SIXTH FLOOR
P.O. BOX 140856
SALT LAKE CITY, UTAH 84114
(801) 366-0100

FOR DEFENDANT SWENSEN:

SALT LAKE COUNTY DISTRICT ATTORNEY
BY: RALPH E. CHAMNESS, ESQ.
DARCY M. GODDARD, ESQ.
2001 SOUTH STATE STREET, ROOM S3700
SALT LAKE CITY, UTAH 84190
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COURT REPORTER:

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350 SOUTH MAIN STREET, #242
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P-R-O-C-E-E-D-I-N-G-S

(9:20 A.M.)

THE COURT: GOOD MORNING. LET ME TRY THAT AGAIN.
THERE WE GO. GOOD MORNING, EVERYONE. WE'LL GO ON THE RECORD
IN CASE NUMBER 2:13-CV-217. THIS IS KITCHEN, ET AL. VERSUS
HERBERT AND THE STATE OF UTAH, ET AL.

COUNSEL, WHY DON'T YOU TAKE A MOMENT AND MAKE YOUR
APPEARANCES, IF YOU WOULD, PLEASE.

MR. MAGLEBY: YOUR HONOR, PEGGY TOMSIC AND JENNIFER
FRASER PARRISH ON BEHALF OF THE PLAINTIFFS. I WOULD ASK THAT
THE COURT EXCUSE MR. MAGLEBY. HE IS OUT OF THE COUNTRY.

THE COURT: OF COURSE, THANK YOU.

MR. LOTT: YOUR HONOR, PHIL LOTT. TOGETHER WITH ME
HERE IS ACTING ATTORNEY GENERAL BRIAN TARBET, AND ALSO STEVE
WALKENHORST FROM THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF
THE STATE DEFENDANTS.

THE COURT: THANK YOU.

MS. GODDARD: AND DARCY GODDARD AND RALPH CHAMNESS
ON BEHALF OF CO-DEFENDANT SALT LAKE COUNTY.

THE COURT: THANK YOU. GOOD MORNING TO ALL OF YOU.

THIS IS THE TIME SET FOR HEARING ON THE STATE DEFENDANTS'
MOTION FOR A STAY PENDING APPEAL. MY APOLOGIES TO KEEP -- FOR
KEEPING ALL OF YOU THIS MORNING. WE WERE NOTIFIED JUST BEFORE
WE WERE ABOUT TO COME OUT THAT THE TENTH CIRCUIT WAS ISSUING
AN ORDER IN RESPONSE TO A MOTION I THINK THE STATE RENEWED I

1 THINK AT 1:00 O'CLOCK THIS MORNING. WE RECEIVED THE 10TH
2 CIRCUIT'S WRITTEN RULING MOMENTS AGO. I JUST WANTED TO ENSURE
3 WE HAD AN OPPORTUNITY TO REVIEW IT BEFORE WE CAME OUT SO THAT
4 I WASN'T DOING SOMETHING IN VIOLATION OF THE TENTH CIRCUIT'S
5 DIRECTIVES.

6 COUNSEL, A COPY OF THAT ORDER WAS PROVIDED TO BOTH OF
7 YOU, IS THAT CORRECT?

8 MR. LOTT: YES.

9 MS. TOMSIC: YES, YOUR HONOR.

10 THE COURT: ALL RIGHT. WELL, MR. LOTT, I'VE
11 REVIEWED THE SUBMISSIONS ON BEHALF OF ALL THE PARTIES. IT'S
12 THE STATE'S MOTION. THE FLOOR IS YOURS.

13 MR. LOTT: THANK YOU.

14 THE COURT: THANK YOU.

15 MR. LOTT: MAY IT PLEASE THE COURT. THIS COURT'S
16 DECISION IS NOT THE FINAL WORD ON WHETHER UTAH'S MARRIAGE LAWS
17 ARE CONSTITUTIONAL. IT HAS ALWAYS BEEN UNDERSTOOD THAT BOTH
18 SIDES INTENDED TO APPEAL ONCE THE DECISION WAS ENTERED IN THIS
19 CASE. HERE THE COURT HAS DECIDED TO IMPOSE ITS OWN VIEW OF
20 MARRIAGE ON UTAH REGARDLESS OF THE FACT THAT THE PEOPLE OF
21 UTAH HAVE DEMOCRATICALLY CHOSEN THE TRADITIONAL MAN/WOMAN
22 DEFINITION OF MARRIAGE.

23 CONSIDERING HOW IMPORTANT AND HOW HOTLY CONTESTED THE
24 DEFINITION OF MARRIAGE IS, AND THE FACT THAT NEITHER THE TENTH
25 CIRCUIT COURT OF APPEALS OR THE SUPREME COURT HAS ISSUED A

1 FINAL RULING ON THIS ISSUE, THE NEED FOR A STAY IS READILY
2 APPARENT. UTAH SHOULD BE ALLOWED TO FOLLOW ITS DEMOCRATICALLY
3 CHOSEN DEFINITION OF MARRIAGE UNTIL AN APPELLATE COURT OF LAST
4 RESORT HAS DECLARED OTHERWISE.

5 THE STATE DEFENDANTS ARE ENTITLED TO HAVE THIS COURT --
6 THIS COURT'S DECISION REVIEWED BY A HIGHER COURT BEFORE IT
7 GOES INTO EFFECT. A MORE ORDERLY APPROACH THAN THE CURRENT
8 FRENZY IS TO MAINTAIN THE STATUS QUO WHILE HIGHER COURTS
9 REVIEW THE DECISION. NOT ALLOWING THE STAY PREJUDICES THE
10 STATE'S RIGHT TO HAVE APPELLATE REVIEW BEFORE THIS COURT'S
11 DECISION GOES INTO EFFECT.

12 THE COURT: WHAT IS THE STATUS QUO NOW, MR. LOTT?
13 THE STATE -- THERE WAS NO MOTION AND NO REQUEST BY EITHER
14 PARTY IN ADVANCE OF THE COURT'S RULING IN THIS CASE THAT THE
15 RULING WOULD EVER BE STAYED PENDING AN APPEAL. IT WAS CLEAR
16 THAT MY RULING WAS GOING TO BE APPEALED. HAVING NO MOTION
17 BEFORE ME, THERE WAS NOTHING FOR THE COURT TO ADDRESS.

18 IN THE INTERIM, OF COURSE, PEOPLE BEGAN ACTING IN
19 RELIANCE ON THE COURT'S ORDER. THE QUESTION IS WE NOW HAVE IN
20 FRONT OF US A MOTION FOR STAY AND WE'RE ADDRESSING IT, BUT
21 WHAT IS -- WHAT IS THE STATUS QUO?

22 MR. LOTT: WELL, TYPICALLY OUR -- OUR VIEW AND
23 UNDERSTANDING IN A CASE LIKE THIS, TYPICALLY A CASE WOULD STAY
24 SUA SPONTE BEFORE ENTERING AN ORDER THAT'S GOING TO GO INTO
25 EFFECT. AND WE WERE FRANKLY SURPRISED BOTH WHEN THE ORAL

1 REQUEST THAT WAS MADE LAST WEEK WHEN THE STATE WAS NOTIFIED OF
2 THE RULING WAS NOT CONSIDERED, AND THAT WE DO HAVE A WINDOW OF
3 PERIOD -- A WINDOW OF TIME HERE THAT HAS RESULTED.

4 THE COURT: WELL, LET'S -- SO LET'S BE -- LET'S MAKE
5 SURE OUR RECORD ABOUT THAT IS COMPLETE SO THAT BOTH PARTIES
6 HAVE THE BENEFIT OF THAT IN YOUR APPEAL PROCESS. AND SO WE
7 WERE -- WE WERE CONTACTED BY YOUR OFFICE ABOUT ROUGHLY TWO OR
8 THREE HOURS AFTER THE ORDER ISSUED, I BELIEVE, AND WERE ASKED
9 ABOUT -- I THOUGHT WITH TWO QUESTIONS THAT SOUNDED PROCEDURAL,
10 AND FOR THAT REASON WE DIDN'T HAVE A COURT REPORTER ON HAND.
11 I WASN'T NOTIFIED THAT THE STATE WAS INTENDING TO MAKE ANY
12 MOTION AT THAT TIME. WE WERE ASKED WHETHER THE COURT INTENDED
13 TO ISSUE A SUA SPONTE STAY, WHICH OF COURSE I WASN'T
14 CONTEMPLATING AND NEITHER PARTY HAD REQUESTED ANYTHING AT THAT
15 POINT.

16 AND I NOTIFIED THE STATE AND THE PLAINTIFFS, WE ENSURED
17 BOTH PARTIES WERE ON THE LINE, NOTIFIED EVERYONE THAT WE WOULD
18 TAKE UP IN URGENT FASHION ANY MOTION THAT ANYONE WISHED TO
19 FILE BUT THAT WE WOULD REQUIRE IT BE IN WRITING SO THAT IT
20 IDENTIFIED THE RELIEF SOUGHT, THE BASIS FOR THAT RELIEF, AND
21 THE STANDARD THAT APPLIES, AND AFFORD THE PLAINTIFFS AN
22 OPPORTUNITY TO RESPOND IN EXPEDITED FASHION. I DON'T KNOW IF
23 YOU WISH TO ADD ANYTHING MORE TO COMPLETE THE RECORD ON THAT
24 ISSUE BEFORE WE FINISH TODAY, AND I'LL ALLOW MS. TOMSIC TO AS
25 WELL IF SHE'D LIKE.

1 BUT IN THE COURT'S VIEW, WE'RE HERE NOW ADDRESSING THE
2 COURT'S STAY. WE HAVE A COMPLICATED STATE OF AFFAIRS. WE
3 HAVE PEOPLE STANDING IN CLERKS' OFFICES RIGHT NOW. WE HAVE
4 THE TENTH CIRCUIT WAITING TO SEE HOW THIS COURT RULES. AND I
5 GUESS THE QUESTION IN MY MIND IS HOW DO WE PROCEED?

6 MR. LOTT: WE'RE HERE TO CONVINCING THE COURT TO ENTER
7 STAY.

8 THE COURT: IF I CONCLUDE, APPLYING THE FACTORS THAT
9 I'M REQUIRED TO ANALYZE IN DETERMINING WHETHER THE STAY SHOULD
10 ISSUE, AND I DETERMINE THAT THE STATE HASN'T SATISFIED ITS
11 BURDEN AS THE MOVING PARTY, IS THERE SOME INTERMEDIATE LEVEL
12 OF RELIEF THAT THE STATE REQUESTS THAT I ENTER?

13 MR. LOTT: YES.

14 THE COURT: WHAT IS THAT?

15 MR. LOTT: IN OUR REPLY MEMORANDUM, THE COURT
16 PROBABLY NOTICED AT THE END, WE'VE REQUESTED AS AN ALTERNATIVE
17 IF THE COURT DOES NOT ENTER A STAY, A PERMANENT STAY, THAT THE
18 COURT ENTER AT LEAST A STAY UNTIL THE TENTH CIRCUIT COURT OF
19 APPEALS MAKES A FINAL DECISION ON THE MOTION BEFORE IT. THE
20 MOTION THAT WAS BEFORE THE TENTH CIRCUIT TO THIS POINT IN TIME
21 WAS AN EMERGENCY MOTION REQUESTING A STAY PENDING THIS COURT'S
22 RULING. THAT'S BEEN DENIED, AS WE'RE AWARE NOW, WITHOUT
23 PREJUDICE, AND THE STATE IS GOING TO REFILE AFTER THIS HEARING
24 TODAY DEPENDING ON WHAT THE COURT'S DECISION IS.

25 SO AS AN ALTERNATIVE RELIEF, IF THE COURT DECIDES NOT TO

1 ISSUE A PERMANENT STAY PENDING APPEAL, THE ALTERNATIVE REQUEST
2 IS THAT THE COURT AT LEAST GRANT A STAY UNTIL THE TENTH
3 CIRCUIT DECIDES. AND THERE IS PRECEDENCE FOR THAT. JUDGE
4 WALKER IN THE PROPOSITION 8 PERRY CASE GRANTED THAT RELIEF.

5 AS THE COURT HAS NOTED, THERE IS A CLOUD OF UNCERTAINTY
6 OVER SAME-SEX MARRIAGES THAT HAVE CURRENTLY TAKEN PLACE. THE
7 COURT CAN STOP THIS CHAOTIC SITUATION FROM CONTINUING BY
8 PLACE -- BY STAYING ITS ORDER PENDING APPEAL.

9 NO ONE WINS, NOT UTAH, NOT THE PLAINTIFFS, NOR ANY
10 SAME-SEX COUPLES IF UTAH'S MARRIAGE LAWS ARE CHANGED BACK AND
11 FORTH DURING THE PENDENCY OF THIS PROCEEDING, DEPENDING ON
12 WHICH COURT IS REVIEWING THE QUESTION. ON SUCH AN IMPORTANT
13 SOCIAL ISSUE, THE STATUS QUO SHOULD REMAIN INTACT OF -- OF A
14 STAY BEING IN PLACE UNTIL -- UNTIL THERE'S BEEN APPELLATE
15 REVIEW.

16 THERE'S GREAT IRONY IN THE FACT THAT THE -- TO BE ALLOWED
17 TO BECOME A STATE UTAH WAS COMPELLED BY THE FEDERAL GOVERNMENT
18 TO ADOPT A DEFINITION OF MARRIAGE AS BEING A UNION OF ONE MAN
19 AND ONE WOMAN, AND NOW THE FEDERAL DISTRICT COURT HAS IMPOSED
20 UPON UTAH TO ABANDON THAT TRADITIONAL DEFINITION AND HAS
21 ORDERED UTAH TO CHANGE ITS DEFINITION OF MARRIAGE TO INCLUDE
22 SAME-SEX MARRIAGE.

23 THE COURT DECISION REACHES CONCLUSIONS UNPRECEDENTED IN
24 THE TENTH CIRCUIT AND SUPREME COURT. NEITHER THE TENTH
25 CIRCUIT NOR THE SUPREME COURT HAS EVER HELD THAT THE STATE IS

1 CONSTITUTIONALLY PROHIBITED FROM DEFINING MARRIAGE AS ONLY THE
2 UNION BETWEEN A MAN AND A WOMAN. NEITHER THE TENTH CIRCUIT
3 NOR THE SUPREME COURT HAS EVER HELD THAT THE FUNDAMENTAL RIGHT
4 TO MARRY INCLUDES SAME-SEX MARRIAGE. NEITHER THE TENTH
5 CIRCUIT OR THE SUPREME COURT HAS EVER HELD THAT A
6 TRADITIONAL -- THE TRADITIONAL DEFINITION OF MARRIAGE SOMEHOW
7 CONSTITUTES GENDER DISCRIMINATION. AND NEITHER THE TENTH
8 CIRCUIT NOR THE SUPREME COURT HAS EVER HELD THAT TRADITIONAL
9 MAN/WOMAN MARRIAGE IS IRRATIONAL, DISCRIMINATORY OR
10 UNCONSTITUTIONAL.

11 IN FACT THE TWO MOST RECENT FEDERAL DISTRICT COURTS THAT
12 HAVE CONSIDERED AND RULED ON THE CONSTITUTIONALITY OF THE
13 STATE'S LAWS LIMITING MARRIAGE TO THE LEGAL UNION BETWEEN A
14 MAN AND A WOMAN, BOTH IN THE NINTH CIRCUIT, HAVE REACHED A
15 DIFFERENT CONCLUSION THAN THIS COURT HAS REACHED. THOSE ARE
16 THE JACKSON CASE FROM HAWAII AND THE SEVCICK CASE FROM NEVADA.

17 MOREOVER, THE ONLY FEDERAL CIRCUIT COURT TO SQUARELY RULE
18 ON THIS ISSUE, THE EIGHTH CIRCUIT, HAS UPHELD THE
19 CONSTITUTIONALITY OF THE TRADITIONAL DEFINITION OF MARRIAGE.
20 THAT'S THE BRUNING CASE.

21 AND THOSE DECISIONS DO NOT STAND ALONE. AS CITED IN THE
22 STATE DEFENDANTS' COURT PLEADINGS, MANY OTHER COURTS HAVE
23 CONCLUDED THAT THE OPPOSITE-SEX DEFINITION OF MARRIAGE
24 RATIONALLY SERVES SOCIETY'S INTERESTS IN REGULATING SEXUAL
25 RELATIONSHIPS BETWEEN MEN AND WOMEN SO THAT THE UNIQUE

1 PROCREATIVE CAPACITY OF THOSE RELATIONSHIPS BENEFITS RATHER
2 THAN HARMS SOCIETY.

3 INSTEAD OF CONSIDERING AND BASING ITS DECISION ON THE
4 MAJORITY OPINION IN THE WINDSOR CASE, THE DISTRICT COURT
5 QUOTES AND CITES AS CONCLUSIVE AUTHORITY THE CYNICAL
6 OBSERVATION AND DISSENT OF JUSTICE SCALIA OF WHAT THE SUPREME
7 COURT'S VIEW WOULD BE IF CONSIDERING STATE MARRIAGE LAWS. THE
8 DISTRICT COURT'S APPROACH IS IN EFFECT TO JUMP THE GUN AND TO
9 JOIN JUSTICE SCALIA IN SPECULATING ABOUT WHAT THE SUPREME
10 COURT WOULD DO BEFORE IT HAS ACTUALLY RULED ON THIS ISSUE.

11 THE COURT: WELL, THAT'S WHAT I WAS CALLED TO DO IN
12 THIS CASE, WAS I NOT, TO DETERMINE AS BEST I COULD WHAT
13 GUIDANCE THE SUPREME COURT WAS PROVIDING ON THIS ISSUE? AND
14 WHILE I WISH I WASN'T THE FIRST COURT IN THE NATION TO WEIGH
15 IN ON THAT AFTER THE WINDSOR DECISION, ISN'T THE -- ISN'T THE
16 DISSENTING VIEW MAYBE THE -- MAYBE THE BEST PLACE TO LOOK TO
17 SEE WHAT THE PEOPLE ON THE LOSING SIDE OF THAT PROPOSITION
18 BEFORE THE SUPREME COURT THOUGHT THE EFFECT OF THE COURT'S
19 RULING WAS?

20 IT'S NOT CLEAR, OF COURSE, IN THE WINDSOR DECISION, AS
21 WE'VE DISCUSSED AT ORAL ARGUMENT. THE WINDSOR COURT DIDN'T
22 ANSWER THIS QUESTION. SO WE'RE FORCED TO READ THE TEA LEAVES
23 AND DO THE BEST WE CAN WITH THAT DECISION. THE STATE CLEARLY
24 DISAGREES. BUT MY -- MY DECISION DOESN'T REST ON THE MINORITY
25 OPINION OF JUSTICE SCALIA OR THE DISSENTS IN THE WINDSOR CASE.

1 IT'S NOT A BAD PLACE TO LOOK TO SEE WHAT THE SUPREME COURT
2 JUSTICES THEMSELVES THINK OF THE DECISION THOUGH, IS IT?

3 MR. LOTT: THE STATE IS RESPECTFULLY TRYING TO POINT
4 OUT THE LIKELIHOOD OF SUCCESS ON APPEAL.

5 THE COURT: OKAY, VERY GOOD, THANK YOU. GO AHEAD.

6 MR. LOTT: THE DISTRICT COURT CONCEDES IN ITS
7 OPINION THAT, QUOTE, THE COURT'S ROLE IS TO NOT DEFINE
8 MARRIAGE, AN EXERCISE THAT WOULD BE IMPROPER GIVEN THE STATE'S
9 PRIMARY AUTHORITY IN THIS REALM. AND THAT'S IN THE OPINION AT
10 PAGE 16, THE COURT'S DECISION AT PAGE 16. AND THEN THE COURT
11 PROCEEDS TO DO EXACTLY THAT, TO REDEFINE MARRIAGE IN SUCH A
12 BROAD WAY TO ENCOMPASS SAME-SEX MARRIAGE.

13 THE DISTRICT COURT CITES TO AND APPLIES SUPREME COURT
14 PRECEDENT RECOGNIZING THE FUNDAMENTAL RIGHT TO MARRY --
15 RECOGNIZING A FUNDAMENTAL RIGHT TO MARRY IN CASES THAT
16 UNIVERSALLY INVOLVE MARRIAGE BETWEEN A MAN AND A WOMAN AS
17 THOUGH THE GENDER OF THE SPOUSE IS IRRELEVANT. THE COURT
18 CONCLUDES, QUOTE, THE PLAINTIFFS HERE DO NOT SEEK A NEW RIGHT
19 TO SAME-SEX MARRIAGE, BUT INSTEAD ASK THE COURT TO HOLD THAT
20 THE STATE CANNOT PROHIBIT THEM FROM EXERCISING THEIR EXISTING
21 RIGHT TO MARRY ON ACCOUNT OF THE SEX OF THEIR CHOSEN PARTNER,
22 AT PAGE 28 OF THE DECISION.

23 BY REFUSING TO RECOGNIZE THE TRADITIONAL MAN/WOMAN
24 MARRIAGE, THAT TRADITIONAL MAN/WOMAN MARRIAGE IS MATERIALLY
25 DIFFERENT FROM SAME-SEX MARRIAGE, THE COURT SIDESTEPS THE

1 HOLDING OF THE WASHINGTON V. GLUCKSBERG CASE THAT SETS FORTH
2 THE ESTABLISHED METHOD OF SUBSTANTIVE DUE PROCESS ANALYSIS.

3 THE COURT STATES, QUOTE, BECAUSE THE RIGHT TO MARRY HAS
4 ALREADY BEEN ESTABLISHED AS A FUNDAMENTAL RIGHT, THE COURT
5 FINDS THAT THE GLUCKSBERG ANALYSIS IS INAPPLICABLE HERE, AT
6 PAGE 29.

7 IN THE DISTRICT COURT'S VIEW, TRADITION AND HISTORY ARE
8 INSUFFICIENT REASONS TO DENY FUNDAMENTAL RIGHTS TO AN
9 INDIVIDUAL. THE COURT'S REFUSAL TO CONSIDER HISTORY AND
10 TRADITION, HOWEVER, GO FAR BEYOND WHAT EVEN THE LAWRENCE CASE
11 CONTEMPLATED. THERE IN THE LAWRENCE CASE THE COURT STATED, WE
12 THINK OUR LAWS AND TRADITIONS OF THE PAST HALF-CENTURY ARE OF
13 THE MOST RELEVANCE HERE.

14 THE RELEVANT HISTORY AND TRADITION REGARDING SAME-SEX
15 MARRIAGE IS MUCH SHORTER THAN THAT, MUCH SHORTER THAN THE PAST
16 HALF-CENTURY. NO STATE PERMITTED SAME-SEX MARRIAGE UNTIL
17 2003. EVEN ABROAD, NO FOREIGN NATION ALLOWED SAME-SEX
18 MARRIAGE UNTIL THE NETHERLANDS IN 2000. IN THE LAST TEN YEARS
19 OF THIS NATION'S 237 YEAR HISTORY, ONLY A MINORITY OF STATES
20 HAVE PERMITTED SAME-SEX MARRIAGE, AND NEARLY ALL OF THOSE HAVE
21 DONE SO BY THE DEMOCRATIC PROCESS RATHER THAN BY JUDICIAL
22 DECREE.

23 THE DISTRICT COURT IN THE STATE'S OPINION HAS FAILED TO
24 EXERCISE THE UTMOST CARE THAT'S REQUIRED BY THE GLUCKSBERG
25 ANALYSIS. THE DISTRICT COURT'S DECISION PLACES THE MATTER

1 OUTSIDE THE ARENA OF PUBLIC DEBATE AND LEGISLATIVE ACTION AND
2 CONSTITUTES POLICY PREFERENCE OF THE COURT. THE DISTRICT
3 COURT'S DECISION IS A FUNDAMENTAL SHIFT AWAY FROM SOCIETY'S
4 UNDERSTANDING OF WHAT MARRIAGE IS AND OVERRIDES THE DEMOCRATIC
5 VOICE OF THE PEOPLE OF UTAH.

6 THE DISTRICT COURT ALSO HELD THAT MAN/WOMAN -- THE
7 MAN/WOMAN DEFINITION OF MARRIAGE IS GENDER DISCRIMINATION, AND
8 THE STATE OBVIOUSLY DISAGREES WITH THAT CONCLUSION.

9 THE COURT ALSO WRONGLY CONCLUDED THAT UTAH'S MARRIAGE
10 LAWS DO NOT EVEN SATISFY THE MINIMAL REQUIREMENTS OF A
11 RATIONAL BASIS TEST. NUMEROUS STATE AND FEDERAL COURT'S AT
12 THE TRIAL AND APPELLATE COURT LEVELS HAVE REACHED THE OPPOSITE
13 CONCLUSION. THESE COURTS HAVE FOUND THAT THE TRADITIONAL
14 DEFINITION OF MARRIAGE IS RATIONALLY RELATED TO LEGITIMACY AND
15 INTEREST, AND EVEN THAT MAN/WOMAN MARRIAGE PROMOTES THE
16 STATE'S COMPELLING INTEREST IN THE CARE AND WELL-BEING OF
17 CHILDREN BY FACILITATING RESPONSIBLE PROCREATION AND THE IDEAL
18 MODE OF CHILD REARING.

19 THE VERY FACT THAT SO MANY OTHER COURTS HAVE FOUND THE
20 TRADITIONAL DEFINITION OF MARRIAGE TO SATISFY RATIONAL BASIS
21 REVIEW IS REASON ENOUGH TO CONCLUDE THAT THE STATE DEFENDANTS
22 HAVE SUFFICIENT LIKELIHOOD OF SUCCESS ON APPEAL TO WARRANT
23 STAY PENDING APPEAL.

24 THE STATE ALSO BELIEVES THE COURT DID NOT PROPERLY FRAME
25 THE ISSUE BEFORE IT. THE SUPREME COURT HAS HELD THAT A

1 CLASSIFICATION SUBJECT TO RATIONAL BASIS REVIEW WILL BE UPHELD
2 WHEN THE INCLUSION OF ONE GROUP PROMOTES A LEGITIMATE
3 GOVERNMENTAL PURPOSE AND THE ADDITION OF OTHER GROUPS WOULD
4 NOT. THAT'S THE JOHNSON V. ROBISON CASE.

5 AND AS THE FEDERAL DISTRICT COURT IN THE HAWAII JACKSON
6 CASE EXPLAINED, THE STATE IS NOT REQUIRED TO SHOW THAT DENYING
7 MARRIAGE TO SAME-SEX COUPLES IS NECESSARY TO PROMOTE THE
8 STATE'S INTEREST OR THAT SAME-SEX COUPLES WILL SUFFER NO HARM
9 BY AN OPPOSITE-SEX DEFINITION OF MARRIAGE. RATHER, THE
10 RELEVANT QUESTION IS WHETHER AN OPPOSITE-SEX DEFINITION OF
11 MARRIAGE FURTHERS A LEGITIMATE INTEREST THAT WOULD NOT BE
12 FURTHERED, OR FURTHERED TO THE SAME DEGREE, BY ALLOWING
13 SAME-SEX COUPLES TO MARRY.

14 THE DISTRICT COURT'S DECISION CONSTITUTES A FUNDAMENTAL
15 SHIFT AWAY FROM SOCIETY'S UNDERSTANDING OF WHAT MARRIAGE IS.
16 FOR OVER 100 YEARS UTAH HAS ALWAYS ADHERED TO A DEFINITION OF
17 MARRIAGE AS THE UNION OF A MAN AND A WOMAN AND HAS NEVER
18 RECOGNIZED A MARRIAGE OF ANY OTHER KIND. AND UTAH DOES NOT
19 STAND ALONE, A MAJORITY OF STATES ADHERE TO THE SAME
20 DEFINITION OF MARRIAGE.

21 AS THE SUPREME COURT RECOGNIZED IN GLUCKSBERG, EXTENDING
22 CONSTITUTIONAL PROTECTION TO AN ASSERTED RIGHT OR LIBERTY
23 INTEREST TO A GREAT EXTENT PLACES THE MATTER OUTSIDE THE ARENA
24 OF PUBLIC DEBATE AND LEGISLATIVE ACTION. THE DISTRICT COURT'S
25 DECISION HAS TAKEN THE IMPORTANT PUBLIC POLICY QUESTION OF

1 SAME-SEX MARRIAGE AWAY FROM THE PEOPLE OF UTAH AND AS SUCH
2 CONSTITUTES A THREAT OF IRREPARABLE HARM TO THE DEMOCRATIC
3 PROCESS IN UTAH.

4 WE CITED TO THE COURT THE CASE OF COALITION FOR ECONOMIC
5 EQUITY VERSUS WILSON, WHICH HELD IT IS CLEAR THAT A STATE
6 SUFFERS IRREPARABLE INJURY WHENEVER AN ENACTMENT OF ITS PEOPLE
7 IS ENJOINED.

8 THE COURT: IS THERE ALSO IRREPARABLE HARM WHEN
9 CITIZENS ARE DEPRIVED CONSTITUTIONAL RIGHTS? I MEAN I
10 UNDERSTAND THE STATE BELIEVES THAT I INCORRECTLY CONCLUDED
11 THAT THERE'S A FUNDAMENTAL RIGHT TO MARRY, AND WE WON'T KNOW
12 UNTIL ANOTHER COURT ABOVE ME SOUNDS IN ON THAT ISSUE. BUT
13 HAVING CONCLUDED THAT THAT'S A CONSTITUTIONAL RIGHT THAT ALL
14 OF THE CITIZENS OF THE STATE ENJOY, IS THERE IRREPARABLE HARM
15 TO CITIZENS WHEN WE DISALLOW THEM FROM ENJOYING A
16 CONSTITUTIONAL RIGHT?

17 MR. LOTT: AS A GENERAL PROPOSITION I WOULD AGREE,
18 BUT AS THE COURT KNOWS, THE STATE DISAGREES WHETHER THERE'S A
19 CONSTITUTIONAL RIGHT TO SAME-SEX MARRIAGE.

20 THE CASE CITED ALSO --

21 THE COURT: HOW DO WE -- HOW DO WE RESOLVE THAT
22 QUESTION IN YOUR MIND? HAVING CONCLUDED THAT THERE ARE
23 CONSTITUTIONAL RIGHTS AT ISSUE HERE, AND THAT THOSE RIGHTS ARE
24 BEING DEPRIVED -- SOME CITIZENS OF THE STATE ARE BEING
25 DEPRIVED OF THE ENJOYMENT OF THOSE RIGHTS, AND THEN THE

1 STATE'S INTEREST IN, AS YOU FRAMED IT, ALLOWING THE STATE TO
2 MAKE THESE POLICY CONSIDERATIONS THROUGH THE VOICE OF THE
3 ELECTORATE, HOW DO WE BALANCE THOSE HARMS IN YOUR VIEW IN
4 DETERMINING WHETHER A STAY SHOULD ISSUE?

5 MR. LOTT: WE'VE POINTED OUT TO THE COURT THAT FROM
6 OUR PERSPECTIVE THE HARM TO THE PLAINTIFFS AND ALSO TO
7 SAME-SEX COUPLES THAT WISH TO MARRY IF ANYTHING WOULD BE
8 DELAYED. THE APPELLATE COURT IS GOING TO REVIEW THIS COURT'S
9 DECISION, AND IF THE APPEAL IS UPHELD, IT PUTS THOSE THAT HAVE
10 ENTERED INTO A MARRIAGE INTO AN UNCOMFORTABLE SITUATION WHERE
11 THEIR MARRIAGES MOST LIKELY WOULD BE VOID. AND THE WAY TO
12 AVOID THAT SITUATION FROM OCCURRING TO THE BENEFIT OF EVERYONE
13 IS TO ENTER A STAY.

14 THE COURT: IT'S THE STATE'S POSITION THAT IF MY
15 RULING IS REVERSED ON APPEAL, THAT ANY MARRIAGE -- ANY
16 MARRIAGE LICENSES THAT ISSUED IN THE INTERIM WOULD BE VOID; IS
17 THAT RIGHT?

18 MR. LOTT: THAT'S CORRECT.

19 THE COURT: SO THEN WHAT IS THE HARM TO THE STATE?
20 WHAT IS THE IRREPARABLE INJURY TO THE STATE IF THE EFFECT OF A
21 REVERSAL IS THAT THERE WERE NO VALID MARRIAGES PERFORMED?

22 MR. LOTT: WELL, THE STATE IS CONCERNED WITH ALL OF
23 ITS CITIZENS, NOT ONLY THOSE THAT -- THAT DO NOT WANT TO HAVE
24 SAME-SEX MARRIAGE. IT ALSO INCLUDES AN INTEREST TO THOSE THAT
25 WANT SAME-SEX MARRIAGE, AND THERE'S A CONCERN FOR THOSE

1 CITIZENS OF THE STATE AS WELL. THAT'S -- THAT'S APART FROM
2 THE CONCERN THE STATE HAS IN HAVING ITS DEMOCRATIC VOICE
3 RECOGNIZED.

4 I WAS GOING TO QUOTE JUSTICE RENQUIST. HE STATED, IT
5 ALSO SEEMS TO ME THAT ANYTIME A STATE IS ENJOINED BY A COURT
6 FROM EFFECTUATING STATUTES ENACTED BY REPRESENTATIVES OF ITS
7 PEOPLE, IT SUFFERS A FORM OF IRREPARABLE INJURY.

8 THE STATE, AS WE POINTED OUT, ALSO FACES ADMINISTRATIVE
9 BURDENS DURING THIS PERIOD OF UNCERTAINTY. AND ALSO ACTIONS
10 THAT WOULD BE TAKEN IN RELIANCE OF MARRIAGE BY THIRD PARTIES,
11 BY EMPLOYERS, CREDITORS, OTHERS, ALSO ARE GOING TO BE
12 IMPACTED. THE PUBLIC ALSO HAS AN INTEREST IN CERTAINTY AND IN
13 ORDER AND IN AVOIDING UNNECESSARY EXPENDITURES.

14 WE HAVE ALSO IN OUR REPLY THAT WE FILED THIS MORNING HAVE
15 ADDRESSED THE -- THE THREE CASES THAT THE PLAINTIFFS CITE POST
16 WINDSOR, AND WE HAVE DISTINGUISHED THOSE CASES. THE NEW
17 JERSEY CASE, OF COURSE, WAS BASED UPON NEW JERSEY STATE LAW.
18 IT'S A CASE THAT ARISES FROM NEW JERSEY STATE COURTS APPLYING
19 THEIR STANDARDS FOR A STAY, WHICH ARE NOT THE SAME AS IN
20 FEDERAL COURT.

21 AND THE NEW MEXICO CASE INVOLVES A STATE WHERE THERE IS
22 NO LAW EITHER PROHIBITING OR GRANTING THE RIGHT OF SAME-SEX
23 MARRIAGE, SO IT'S AN ENTIRELY DIFFERENT SITUATION. AND THE
24 CASE FROM ILLINOIS INVOLVES A STATE STATUTE THAT HAS ALREADY
25 ADOPTED SAME-SEX MARRIAGE, AND A COUPLE FILING THE MOTION

1 SIMPLY WANTED TO MARRY BEFORE THE STATUTE WENT INTO EFFECT,
2 WHICH IS VERY DIFFERENT FROM THE SITUATION WE FACE HERE.

3 THE MOST APPLICABLE EXAMPLE THAT WE WOULD URGE THE COURT
4 TO FOLLOW IS THAT OF THE NINTH CIRCUIT AND THE DISTRICT COURT
5 IN PERRY V. BROWN PROPOSITION 8 CASE. JUDGE WALKER GRANTED A
6 STAY PENDING A DECISION FROM THE NINTH CIRCUIT AS TO WHETHER
7 THEY WERE GOING TO GRANT A STAY, AND THE NINTH CIRCUIT DID
8 GRANT A STAY IN THAT CASE, IN THE PROPOSITION 8 LITIGATION.
9 SO WE WOULD URGE THE COURT TO FOLLOW THAT EXAMPLE.

10 THANK YOU, YOUR HONOR.

11 THE COURT: THANK YOU, MR. LOTT. WE'LL HEAR AGAIN
12 FROM YOU BEFORE WE CONCLUDE.

13 MS. TOMSIC.

14 MS. TOMSIC: GOOD MORNING, YOUR HONOR.

15 THE COURT: GOOD MORNING.

16 MS. TOMSIC: YOUR HONOR, FUNDAMENTALLY THE STATE IS
17 ASKING YOU TO LOOK BACKWARD AND TO NOT -- DENY PLAINTIFFS'
18 MOTION FOR SUMMARY JUDGMENT AND TO GRANT THEIR MOTION ON
19 EXACTLY THE SAME MERIT GROUNDS THAT THEY ARGUED IN TENS OF
20 PAGES OF BRIEFING DURING ALMOST FOUR HOURS OF ORAL ARGUMENT
21 THAT THIS COURT SOUNDLY AND DEFINITELY REJECTED IN A
22 WELL-REASONED FOUNDATIONALLY SUPPORTED DECISION.

23 THERE IS NOT A SINGLE ISSUE FROM A LEGAL STANDPOINT THAT
24 THE STATE HAS RAISED, EITHER IN ITS WRITTEN PAPERS BEFORE THIS
25 COURT OR IN THE ORAL ARGUMENT THAT HAS NOW BEEN MADE BEFORE

1 YOUR HONOR, THAT WOULD JUSTIFY THIS COURT FINDING THAT THERE
2 IS NOT ONLY A LIKELIHOOD OF YOUR HONOR BEING REVERSED ON
3 APPEAL, BUT THE STANDARD IN THIS DISTRICT REQUIRES THE STATE
4 TO SHOW, MAKE A STRONG SHOWING -- IT IS NOT JUST A SHOWING, AS
5 IT IS IN A PRELIMINARY INJUNCTION, IT IS A STRONG SHOWING.
6 AND THERE IS GOOD REASON FOR THAT REQUIREMENT, YOUR HONOR.

7 THE REASON THAT REQUIREMENT EXISTS, AND PARTICULARLY IN A
8 SITUATION LIKE THIS CASE, IS THAT WE HAVE A DECISION FROM YOUR
9 HONOR THAT IS NOT A PRELIMINARY INJUNCTION. WE HAVE A
10 DECISION FROM THIS COURT THAT ACTUALLY SORT OF FLOWED OUT OF
11 THE STATE ASKING THIS COURT TO DECIDE THE ISSUE ON SUMMARY
12 JUDGMENT. IT IS A DECISION THAT IS PREDICATED ON BOTH SIDES
13 HAVING AN AMPLE OPPORTUNITY TO PUT THEIR BEST FOOT FORWARD, TO
14 PUT THEIR BEST ARGUMENTS, THEIR BEST UNDISPUTED FACTS, THEIR
15 BEST LEGAL AUTHORITIES, AND WE DID THAT, YOUR HONOR.

16 STARTING ON OCTOBER 22ND -- OR EXCUSE ME -- 11TH OF THIS
17 YEAR WE PROVIDED YOUR HONOR MAYBE WITH WE COULD CALL IT A
18 MOUNTAIN OF PAPER, WHERE EACH SIDE HAD A FULL OPPORTUNITY TO
19 ADVISE YOUR HONOR OF HOW WE BELIEVED YOU SHOULD RULE. AND
20 THEN ON NOVEMBER 22ND WE INUNDATED YOU WITH FURTHER PAGES
21 EXPLAINING WHY THE OTHER SIDE'S POSITION WAS FUNDAMENTALLY
22 WRONG AS A MATTER OF LAW. AND THEN YOUR HONOR GAVE US AMPLE
23 TIME. YOU SAID THIS IS AN IMPORTANT ISSUE. I AM GIVING BOTH
24 SIDES ALL THE TIME THEY NEED IN ORAL ARGUMENT TO HELP ME MAKE
25 THE RIGHT DECISION.

1 AFTER THAT PROCESS, WHERE YOU HAVE A PERMANENT
2 DECISION -- OR INJUNCTION DECLARING WHAT THE LAW IN UTAH IS, A
3 COURT REQUIRES MORE THAN SIMPLY A REARGUMENT OF THE POSITIONS
4 THAT WERE REJECTED AND DENIED IN THE FIRST PLACE. IF THAT
5 WERE NOT TRUE, EVERY TIME A COURT ISSUES AN ORDER, A
6 PRELIMINARY INJUNCTION OR A PERMANENT INJUNCTION, THE STATE
7 COULD SIMPLY MEET THAT MANDATORY REQUIREMENT BY REARGUING THE
8 SAME POSITIONS AND SAYING, GOSH, YOUR HONOR, YOU GOT IT WRONG
9 THE FIRST TIME. YOU BETTER AGREE WITH US NOW. WELL, THAT'S
10 NOT THE STANDARD AND THE STATE HASN'T MET IT.

11 AND WHAT'S IMPORTANT, YOUR HONOR, IS WHAT YOU'VE HEARD IN
12 THEIR PAPERS, AND WHAT YOU HEARD MR. LOTT SAY IN THIS CASE IS,
13 GEE, JUDGE, YOU OUGHT TO GRANT US A MOTION TO STAY BECAUSE
14 THIS IS A DIVISIVE AND IMPORTANT PUBLIC STATE INTEREST.

15 THE COURT: THAT SEEMS A REASONABLE REQUEST, DOES
16 IT?

17 MS. TOMSIC: ABSOLUTELY NOT, YOUR HONOR. IF THAT
18 WERE THE STANDARD, THE TENTH CIRCUIT WOULD NOT HAVE MANDATORY
19 FACTORS. THE IMPORTANCE OF THAT PARTICULAR FACTOR IS ONLY ONE
20 OF THEM, AND THAT IS THE PUBLIC'S INTEREST. AND, YOUR HONOR,
21 YOU KNOW BETTER THAN I DO BECAUSE YOU WROTE YOUR DECISION, ONE
22 OF THE ARGUMENTS THAT THE STATE MADE AS TO WHY YOU SHOULD DENY
23 OUR MOTION FOR SUMMARY JUDGMENT AND GRANT THEIRS IS PROCEEDING
24 WITH CAUTION. THIS IS JUST A REPACKAGED AND DRESSED-UP
25 VERSION OF THAT ARGUMENT, WHICH YOU HAVE ALREADY REJECTED.

1 AND TO SAY, JUDGE, THIS IS IMPORTANT SO LET'S IGNORE ALL
2 THE OTHER FACTORS THAT ARE MANDATORY. THEY'RE NOT SUGGESTED,
3 LIKE, OH, GEE, LOOK AT THESE, BUT IF YOU DON'T THINK THEY
4 APPLY, GO AHEAD AND ISSUE A STAY BECAUSE IT'S IMPORTANT.
5 THAT'S NOT THE LAW. AND THE REASON THEY MAKE THAT IMPASSIONED
6 PLEA IS BECAUSE THEY CANNOT AND HAVE NOT MET THE MANDATORY
7 FACTORS THAT THE TENTH CIRCUIT REQUIRES THIS COURT TO APPLY.

8 THE COURT: IF I AGREE WITH YOU, WHAT AM I TO MAKE
9 OF THE STATE'S ALTERNATIVE REQUEST THAT WE AT LEAST IMPOSE A
10 TEMPORARY STAY TO ALLOW THE TENTH CIRCUIT TO DECIDE HOW IT
11 WISHES TO PROCEED?

12 MS. TOMSIC: YOUR HONOR, NUMBER ONE, A REQUEST THAT
13 THIS COURT DO TEMPORARILY WHAT IT CAN'T DO PERMANENTLY IS NO
14 BETTER THAN THE INITIAL REQUEST. YOU STILL HAVE TO MAKE A
15 DEMONSTRATION WARRANTING A STAY, AND THE TENTH CIRCUIT TWICE
16 NOW HAS TOLD THESE GUYS WE'RE NOT GOING TO DO THAT, AND IT
17 WOULD BE WHOLLY IMPROPER FOR THIS COURT TO DO IT.

18 AND THEY TALK ABOUT THIS CLOUD OF CONFUSION. WELL, THE
19 CLOUD OF CONFUSION, WHICH I'LL GET TO, IS IN THEIR MINDS.
20 IT'S NOT IN ANYBODY ELSE'S. BUT THE BOTTOM LINE IS, YOUR
21 HONOR, THE STATUS QUO IN THIS CASE, THE LAW IN THIS
22 JURISDICTION RIGHT NOW IS YOUR ORDER. AND --

23 THE COURT: I THINK THIS IS MR. LOTT'S POINT. BUT
24 MY ORDER IS ONLY THE FIRST RULING IN THIS CASE. IT IS
25 CERTAINLY NOT GOING TO BE THE LAST. I THINK THE STATE'S POINT

1 IS EXACTLY THAT, SHOULDN'T WE ALLOW SOMEBODY ABOVE ME TO WEIGH
2 IN ON THAT?

3 MS. TOMSIC: YOUR HONOR, THEY'RE GOING TO WEIGH IN
4 ON IT, AND YOU KNOW WHAT, NOTHING IS GOING TO CHANGE BETWEEN
5 NOW AND THERE, NOTHING. I MEAN WHAT THE STATE HAS TO SHOW
6 EVEN FOR A TEMPORARY STAY -- WHICH THEY HAVEN'T CITED
7 AUTHORITY. THEY WENT TO JUDGE WALKER'S OPINION IN THE PROP 8
8 CASE. JUDGE, BUT REMEMBER, HIS OPINION WAS BEFORE WINDSOR.
9 IT WAS BEFORE ALL THESE OTHER CASES THAT HAVE COME DOWN AFTER
10 WINDSOR. IT'S NOT A TENTH CIRCUIT DECISION.

11 THE COURT: BUT WINDSOR DIDN'T ANSWER THE QUESTION
12 THAT THIS CASE PRESENTED TO ME. AND I DID THE BEST I COULD TO
13 INTERPRET HOW I THOUGHT I WAS SUPPOSED TO RULE IN LIGHT OF
14 WINDSOR. BUT MR. LOTT IS CORRECT, THE STATE OF UTAH IS
15 CORRECT, RIGHT, THE TENTH -- NEITHER THE TENTH CIRCUIT NOR THE
16 SUPREME COURT HAS ANSWERED THE QUESTION THAT I WAS REQUIRED TO
17 ANSWER IN THIS CASE?

18 MS. TOMSIC: YOUR HONOR, I WOULD ABSOLUTELY BE
19 CANDID AND AGREE WITH YOU, BUT WOULD YOU TELL ME A SINGLE CASE
20 IN THIS CIRCUIT OR FROM THE SUPREME COURT WHERE A COURT HAD
21 SAID, GOSH, IF YOUR CIRCUIT HASN'T RULED, AND THE SUPREME
22 COURT HASN'T RULED, YOU BETTER GRANT A STAY? BECAUSE YOU KNOW
23 WHAT, IF THAT WAS THE STANDARD, WE WOULD HAVE STAYS ISSUED
24 ALMOST IN EVERY CASE. EVERY CASE STANDS ON ITS OWN. THAT
25 ISN'T THE STANDARD, YOUR HONOR, AND THERE ISN'T A CASE THAT

1 STANDS FOR THAT PROPOSITION.

2 YOUR HONOR, HAD YOU BELIEVED THAT THERE SHOULD BE A STAY
3 IN PLACE, REGARDLESS OF ANY PENDING MOTION, SO THE TENTH
4 CIRCUIT WOULD HAVE AN OPPORTUNITY TO RULE ON THIS ISSUE, IT
5 SURE AS HECK COULD HAVE DONE A TEMPORARY STAY IN ITS ORDER AND
6 IT DIDN'T DO IT. IT DID NOT DO IT, AND THE STATUS QUO HAS
7 CHANGED.

8 THE COURT: WHAT IS THE STATUS QUO?

9 MS. TOMSIC: THE STATUS QUO RIGHT NOW IS THE LAW IN
10 UTAH IS THAT COUNTY CLERKS ARE OBLIGATED TO ISSUE LICENSES TO
11 SAME-SEX COUPLES TO GET MARRIED. SAME-SEX COUPLES ARE GETTING
12 MARRIED, ARE MARRIED. THERE WERE HUNDREDS OF SAME-SEX COUPLES
13 MARRIED BY THE END OF THE DAY ON FRIDAY. THAT IS THE STATUS
14 QUO. AND TO NOW SAY, GOSH, I WAS JUST KIDDING, FOLKS. I'M
15 GOING TO STOP THE IMPORT OF MY RULING, AND LET'S CHANGE IT NOW
16 BACK TO THE WAY IT WAS AND LET THE TENTH CIRCUIT DO IT.

17 THE COURT: IT'S NOT.

18 MS. TOMSIC: WAIT, LET ME JUST --

19 THE COURT: IT'S NOT A QUESTION THAT I WAS KIDDING.
20 IT'S THERE WAS NO MOTION FOR A STAY PENDING BEFORE I ENTERED
21 MY RULING. THERE IS NOW.

22 MS. TOMSIC: AND I UNDERSTAND IT. AND IN THAT
23 INTERIM, THE STATUS QUO HAS CHANGED, YOUR HONOR. AND WHAT THE
24 STATE IS ASKING YOU TO DO IS PUT THEM IN A POSITION WHERE THEY
25 CAN ARGUE TO THE TENTH CIRCUIT, GOSH, JUDGE SHELBY HAS NOW

1 ISSUED AN INTERIM TEMPORARY STAY, EVEN THOUGH THERE'S NO
2 AUTHORITY TO DO THAT. AND GUESS WHAT, THE STATUS QUO IN UTAH
3 NOW IS SAME-SEX COUPLES CAN GET MARRIED, AND WE ARE JUST
4 ASKING YOU TO MAINTAIN THE STATUS QUO. THEY ARE TRYING TO
5 AVOID THEIR BURDEN, WHICH IS YOU SHOW ME HOW THE STATE IS
6 GOING TO BE IRREPARABLY HARMED BY MORE SAME-SEX MARRIAGES
7 OCCURRING. THE STATUS QUO IS THE STATUS QUO.

8 AND I WANT TO COME BACK AND PUT ON THE RECORD, YOUR
9 HONOR, KIND OF THE CHRONOLOGY OF HOW WE GOT HERE. WHEN YOUR
10 HONOR ASKED FOR BRIEFING ON SUMMARY JUDGMENTS, THERE WAS NO
11 QUESTION THAT THERE WAS AN ABSOLUTE RISK AND POSSIBILITY FOR
12 BOTH SIDES THAT YOU WERE GOING TO ISSUE A SELF-EXECUTING
13 OPINION. I MEAN, MY GOSH, JUDGE, YOU DON'T HAVE TO BE MORE
14 THAN A LAW STUDENT TO KNOW THAT.

15 SECOND, WE'VE ALL MADE IT CLEAR, YOUR HONOR IS CLEAR,
16 THIS THING IS NOT GOING TO END HERE, AND WE KNOW THAT. THE
17 APPEAL NOTICE WAS FILED ON FRIDAY. IT'S GOING TO GO TO THE
18 TENTH CIRCUIT FOR FINAL RESOLUTION IN THIS CIRCUIT, UNLESS THE
19 SUPREME COURT GRANTS CERT. AND WE ALL KNOW THAT. YET THE
20 STATE NEVER ONCE RAISED THE ISSUE OF A STAY.

21 AND WE KNEW WHEN WE ENDED OUR HEARING ON DECEMBER 4TH
22 THAT THERE WASN'T GOING TO BE ANY WARNING ABOUT YOUR DECISION
23 COMING OUT. YOU WERE GOING TO ISSUE AN OPINION AND WE WOULD
24 GET IT ELECTRONICALLY. WE KNOW THAT. SO IF THE STATE DID
25 NOTHING TO PROTECT THE STATUS QUO, I THINK THIS COURT CAN

1 INFER THAT IN REALITY IT WAS NOT CONCERNED ABOUT IRREPARABLE
2 HARM.

3 AND I THINK THE OTHER THING THAT'S IMPORTANT, YOUR HONOR,
4 IS WHEN YOUR HONOR ISSUED THIS OPINION, AND IT CAME TO US ALL
5 AT THE SAME TIME ELECTRONICALLY, THE STATE DIDN'T DO ANYTHING
6 FOR A COUPLE OF HOURS. THEY COULD HAVE FILED A STAY. THEY
7 COULD HAVE SAID, JUDGE, MAKE THEM BRIEF IT IN TWO HOURS.
8 LET'S HAVE THIS HEARD NOW. THINGS ARE GOING NUTS. PEOPLE ARE
9 GETTING MARRIED. LET'S DO IT NOW BEFORE THERE'S MORE CHAOS
10 AND HARM, AS THEY CALL IT. THEY DIDN'T DO IT.

11 WHAT HAPPENED INSTEAD IS YOU ON YOUR OWN INITIATIVE
12 PLACED A CONFERENCE CALL AND HAD US ON THE PHONE, AND YOU WERE
13 CRYSTAL CLEAR IN THAT CONFERENCE CALL THAT YOU BELIEVED YOU
14 NEEDED A WRITTEN MOTION SO YOU UNDERSTOOD WHAT THE STANDARDS
15 WERE AND WHETHER THEY WERE MET.

16 AND IF YOU WILL RECALL, WHICH I'M SURE YOU DO, YOUR
17 HONOR, YOU ASKED THE STATE WHEN -- WHAT ARE YOU GOING TO DO?
18 ARE YOU GOING TO FILE A MOTION? WHEN ARE YOU GOING TO FILE
19 IT? I'LL SET AN EXPEDITED BRIEFING SCHEDULE. LET'S GET THIS
20 TAKEN CARE OF.

21 WHAT THE STATE TOLD YOU IS, GOSH, WE DON'T KNOW WHAT
22 WE'RE GOING TO DO OR WHEN. AND WE ENDED THE CALL WITH NO
23 SCHEDULE, NO HEARING, BECAUSE THE STATE IN THE FACE OF MY
24 STATEMENT, JUDGE, PEOPLE ARE GETTING MARRIED, SAME-SEX COUPLES
25 ARE GETTING MARRIED NOW, DID NOTHING, NOTHING. AND WHAT THEY

1 LET THE COUNTY CLERKS, INCLUDING -- EXCLUDING UTAH COUNTY, DO
2 WAS ISSUE MARRIAGE LICENSES TO SAME-SEX COUPLES, ALLOWED THEM
3 TO GET MARRIED, DIDN'T FILE A MOTION FOR A STAY. THEY FILED A
4 MOTION FOR -- OR A NOTICE OF APPEAL. THEY DIDN'T EVEN FILE
5 THEIR MOTION UNTIL AFTER THE OFFICES HAD CLOSED AT ABOUT 8:30
6 AT NIGHT.

7 NOW, IF THIS MOTION WOULD HAVE BEEN A 20 PAGE BLOCKBUSTER
8 INTELLECTUALLY CHALLENGING MOTION, GOSH, MAYBE YOU CAN SAY
9 MAYBE IT'S OKAY THAT THEY WAITED, BUT IT'S A FIVE PAGE MEMO,
10 JUDGE. COME ON. IF THEY WERE WORRIED ABOUT IRREPARABLE HARM
11 AND TRYING TO MAINTAIN SOME STATUS QUO THAT EXISTED BEFORE
12 THIS ORDER, THEY SURE AS HECK HAD THE OPPORTUNITY TO MAKE IT
13 HAPPEN. WELL, THEY DIDN'T. WE'RE IN A SITUATION WHERE WE
14 HAVE A DIFFERENT STATUS QUO. WE NEED TO KEEP THAT STATUS QUO
15 UNLESS A HIGHER COURT DETERMINES THAT IT SHOULD CHANGE.

16 THIS CONCEPT OF PING-PONGING, JUDGE, NOW STAY IT. GOSH,
17 LET'S GO TO THE TENTH CIRCUIT. WHAT IF THEY DON'T STAY IT?
18 THEN WE'RE BACK TO THIS -- I MEAN YOU TALK ABOUT CONFUSION AND
19 UNCERTAINTY. THAT'S EXACTLY WHAT THEY'RE ASKING.

20 AND I WOULD ASK YOUR HONOR TO UPHOLD THE MERITS OF YOUR
21 DECISION, STAND BEHIND THEM, BECAUSE THERE IS NO LIKELIHOOD
22 IT'S GOING TO BE REVERSED ON APPEAL, AND THERE SURE AS HECK
23 ISN'T ANY STRONG SHOWING IT WILL BE REVERSED. AND THE FAILURE
24 TO ESTABLISH THAT FUNDAMENTAL CRITICAL FACTOR IS ABSOLUTELY
25 DEVASTATING TO THIS MOTION. IF YOU CANNOT DEMONSTRATE THAT,

1 YOU ARE NOT ENTITLED TO A STAY AND YOU'RE SURE AS HECK NOT
2 ENTITLED TO UPSET THE STATUS QUO TEMPORARILY WHILE WE HAVE
3 THEM MAKE EXACTLY THE SAME INEFFECTIVE AND MERITLESS ARGUMENTS
4 TO THE TENTH CIRCUIT. PLEASE DO NOT CHANGE THE STATUS QUO
5 BASED ON ARGUMENTS THAT HAVE NO MERIT HERE AND CAN'T MEET THE
6 STANDARDS OF THE TENTH CIRCUIT UNDER RULE 8.

7 BUT LET ME TALK ABOUT THE OTHER FACTORS, YOUR HONOR,
8 BECAUSE IT'S NOT JUST THAT FACTOR. I MEAN THE REASON THEY
9 WANT TO KIND OF CLOUD EVERYTHING AND SAY, GOSH, THERE'S THIS
10 CLOUD OF CONFUSION. YOU NEED TO CLEAR IT UP. WELL, YOU KNOW
11 WHAT, THERE IS NO CLOUD OF CONFUSION. THERE IS A FEDERAL
12 ORDER THAT DECLARES THE LAW IN UTAH. THE COUNTIES, INCLUDING
13 SALT LAKE COUNTY, HAS NO QUESTION ABOUT WHAT THEIR OBLIGATION
14 TO FOLLOW THE LAW IS. THEY'RE DOING EXACTLY WHAT THE LAW IS,
15 AS I UNDERSTAND MOST OF THE OTHER COUNTIES IN THIS STATE ARE
16 DOING, OTHER THAN UTAH COUNTY.

17 AND, YOUR HONOR, WHILE I'M ON THIS, WHILE IT'S A LITTLE
18 BIT OF AN OFF POINT, IT'S SOMETHING I WANT IN THIS RECORD.
19 THE DEFENDANT GOVERNOR HERBERT IN THIS CASE ON SATURDAY -- MAY
20 I APPROACH?

21 THE COURT: PLEASE.

22 MS. TOMSIC: ISSUED A LETTER TO ALL OF THE COUNTY
23 CLERKS. NOW, THIS IS AFTER YOUR ORDER HAS BEEN
24 SELF-EFFECTUATING SINCE BETWEEN 1:30 AND 2:00 FRIDAY
25 AFTERNOON, AFTER PEOPLE HAVE BEEN GRANTED MARRIAGE LICENSES,

1 AFTER THEY'VE BEEN MARRIED, HE SENDS OUT THIS LETTER.

2 AND, YOUR HONOR, I WANT YOU TO LOOK AT THE SECOND
3 PARAGRAPH OF THIS LETTER, AND PARTICULARLY THE LAST SENTENCE.
4 GOVERNOR HERBERT, THE DEFENDANT IN THIS ACTION, THE GOVERNOR
5 OF THE STATE OF UTAH, REQUIRED TO FOLLOW UTAH LAW IS TELLING
6 THESE CLERKS, PENDING A DETERMINATION OF THE STAY, PLEASE
7 CONSULT WITH YOUR COUNTY ATTORNEY AND COUNCIL -- COUNTY
8 COUNCIL OR COMMISSION FOR DIRECTION OF HOW TO PROCEED, END
9 QUOTE.

10 YOUR HONOR, HE IMPLICITLY IS TELLING THEM NOT TO FOLLOW
11 YOUR ORDER. THIS IS NO DIFFERENT THAN GOVERNOR WALLACE
12 STANDING IN FRONT OF THAT YOUNG BLACK WOMAN IN ALABAMA AND
13 SAYING, I DON'T CARE IF A FEDERAL COURT DETERMINED THAT THIS
14 GIRL HAS A CONSTITUTIONAL RIGHT TO ENTER OUR ALL WHITE SCHOOL.
15 YOU'RE NOT COMING IN BECAUSE THE PEOPLE OF THIS STATE SAY YOU
16 CAN'T. WELL, YOU KNOW WHAT, YOUR HONOR, GOVERNOR HERBERT
17 DOESN'T GET TO DECIDE WHAT THE LAW IS. YOU DO AND YOU HAVE.
18 AND THE STATE OFFICIALS IN THIS STATE NEED TO ABIDE BY THEIR
19 OATH OF OFFICE AND WHAT THE LAW OF THIS STATE IS.

20 AND I WANT TO TURN TO IRREPARABLE HARM. YOUR HONOR, THE
21 STATE SKIRTS THE ISSUE THAT WE RAISED AND THE QUESTION YOU
22 POSED TO THEM, WHICH IS WHAT IS THE STATUS QUO? AND THE
23 REASON THAT'S IMPORTANT FOR IRREPARABLE HARM, YOUR HONOR, IS
24 BECAUSE YOU NEED TO LOOK AT WHAT WOULD HAPPEN IF YOU ISSUE
25 THIS STAY NOW. THIS ISN'T LIKE GOING BACK IN TIME BEFORE YOUR

1 DECISION WAS ISSUED AND SAYING, NOPE, WE'RE GOING TO JUST HOLD
2 STILL. WE'RE NOT GOING TO DO ANYTHING. THIS IS A SITUATION
3 WHERE YOUR ORDER HAS NOW BEEN IN EFFECT, GOSH, MOST OF FRIDAY
4 AFTERNOON AND PART OF MONDAY MORNING. IT IS THE STATUS QUO.
5 IT IS THE LAW IN UTAH. AND THE STATE MUST DEMONSTRATE HOW
6 PERMITTING ADDITIONAL SAME-SEX COUPLES TO MARRY WILL HARM ITS
7 INTEREST, WILL CREATE IRREPARABLE HARM. AND, YOUR HONOR, THEY
8 HAVE NOT MADE THAT SHOWING.

9 IN FACT YOUR POINTED QUESTION ABOUT, GOSH, IF YOU'RE
10 SAYING ALL THESE MARRIAGES ARE INVALID, IF THE TENTH CIRCUIT
11 REVERSES ME, WHAT'S YOUR HARM?

12 AND, YOUR HONOR, I WOULD ASK YOU TO LOOK BACK AT YOUR
13 OPINION AGAIN IN TERMS OF IRREPARABLE HARM OF THE STATE. THE
14 STATE'S ARGUMENT ABOUT PROTECTING THE PUBLIC WILL, AND
15 PROTECTING THE TRADITIONAL FAMILY, AND PROTECTING THE PUBLIC
16 PROCESS ARE ALL THE STATE INTERESTS THAT THE STATE ARGUED TO
17 THIS COURT AS JUSTIFICATION FOR THE DISCRIMINATORY MARRIAGE
18 LAWS IN UTAH.

19 AND YOUR HONOR SQUARELY HELD THAT THE STATE WHOLLY FAILED
20 TO DEMONSTRATE THAT EVEN ASSUMING THOSE WERE LEGITIMATE STATE
21 INTERESTS, THAT THERE WAS ANY RATIONAL RELATIONSHIP BETWEEN
22 BANNING SAME-SEX MARRIAGE AND ACCOMPLISHING THOSE OBJECTIVES.
23 IF THE STATE CANNOT MEET THAT STANDARD, WHEN NO SAME-SEX
24 MARRIAGES HAVE TAKEN PLACE, THEY SURE AS HECK CAN'T SHOW THEY
25 MEET A STANDARD OF SHOWING HOW MORE SAME-SEX MARRIAGES WILL

1 HARM THE STATE'S INTERESTS.

2 AND I WOULD ASK YOUR HONOR, IF YOU ARE LOOKING AT THIS IN
3 TERMS OF HARMS -- AND YOU AGAIN ASKED THE QUESTION, GOSH, HOW
4 DO YOU BALANCE, IF THE STATE IS ARGUING THAT IT IS GOING TO BE
5 HARMED HERE BECAUSE THE -- YOU'VE GOT ALL THESE ARGUMENTS
6 ABOUT TRADITIONAL MARRIAGE AND PUBLIC SUPPORT FOR
7 DISCRIMINATING AGAINST SAME-SEX COUPLES, HOW DO YOU BALANCE
8 THAT AGAINST MY FINDING THAT THE PLAINTIFFS IN THIS CASE HAVE
9 TWO FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION THAT ARE BEING
10 VIOLATED? HOW CAN YOU JUSTIFY, WHEN I HAVE FOUND AS A FEDERAL
11 JUDGE, MANDATED BY ARTICLE 3, NOT TO CARRY OUT THE WILL OF THE
12 PEOPLE, THAT'S THE LEGISLATURE AND GOVERNOR'S JOB. IT IS MY
13 JOB AS A FEDERAL JUDGE TO HONOR AND IMPLEMENT THE PROTECTIONS
14 OF THE UNITED STATES CONSTITUTION. IF I FIND THOSE
15 CONSTITUTIONAL RIGHTS EXIST AND THEY ARE BEING DEPRIVED, HOW
16 CAN YOU POSSIBLY WEIGH WHAT I FOUND TO BE INSUFFICIENT TO
17 JUSTIFY THESE DISCRIMINATORY LAWS WOULD IN ANY WAY OUTWEIGH
18 THE DEPRIVATION OF CONSTITUTIONAL RIGHTS UNTIL THE TENTH
19 CIRCUIT APPELLATE PROCESS RUNS ITS COURSE, WHICH MAY BE YEARS?

20 AND I WOULD POINT OUT AGAIN, YOUR HONOR, THIS CONCEPT
21 THAT, GOSH, ALL WE'RE TALKING ABOUT IS DELAYING LETTING THESE
22 FOLKS EXERCISE THEIR CONSTITUTIONAL RIGHTS. WELL, TO ME THAT
23 ARGUMENT IS JUST ALMOST THE SAME AS THEIR ARGUMENT IN THEIR
24 PAPERS THAT THERE'S NOT A LONG ENOUGH HISTORY OF
25 DISCRIMINATION. LET'S MAKE IT LONGER. THAT'S NOT A GOOD

1 ARGUMENT, YOUR HONOR. IT'S NOT A FAIR ARGUMENT. YEAH, THAT'S
2 WHAT THEY THINK, BUT THAT'S NOT A LEGAL JUSTIFICATION.

3 AND I WOULD POINT OUT AGAIN, AS I DID IN MY PAPERS, AS I
4 DID IN MY ORAL ARGUMENT BEFORE, I HAVE TWO PLAINTIFFS, ONE OF
5 WHOM IS TERMINALLY ILL AND DYING. AND THEY ARE SAYING, OH,
6 GOSH, YOU KNOW, TOO BAD. IF THAT HAPPENS TO ALL THESE OTHER
7 SAME-SEX COUPLES WHO AREN'T MARRIED, IT'S JUST THE BREAKS.
8 WELL, IT'S NOT THE BREAKS.

9 JUDGE, YOU BALANCE THOSE HARMS. OURS WIN. THEIRS ARE
10 SHALLOW AND NONEXISTENT. AND I WOULD ASK YOU TO SAY TO
11 YOURSELF, IF I STAY THIS ACTION, WHAT IS THE WORST THAT'S
12 GOING TO HAPPEN TO THE STATE? AND BALANCE IT AGAINST WHAT IS
13 THE WORST THAT'S GOING TO HAPPEN TO SAME-SEX COUPLES? AND
14 LIKE YOUR DECISION, IT IS NOT A CLOSE CALL.

15 AND FINALLY, YOUR HONOR, LET'S TALK ABOUT THE PUBLIC
16 INTEREST. THEY TALK ABOUT WANTING TO PROTECT ALL OF UTAH'S
17 CITIZENS BECAUSE, GOSH, THERE'S THIS WHOLE GROUP OF PEOPLE WHO
18 BELIEVE THAT THIS ORDER IS VIOLATING GOD'S LAW. AND THEY WANT
19 TO PROTECT THOSE CITIZENS. WELL, YOU KNOW WHAT, YOUR HONOR,
20 IT'S NOT THIS COURT'S PLACE TO PROTECT A MORAL MAJORITY'S
21 VIEWPOINT. THE LAW IS CLEAR ON THAT. IT'S TO PROTECT THE
22 CONSTITUTIONAL RIGHTS OF OUR CITIZENS.

23 AND WHEN WE'RE TALKING ABOUT THE PUBLIC INTEREST HERE,
24 THIS COURT FOUND, AND THE STATE ADMITTED, THAT THE PLAINTIFFS
25 AND OTHER SAME-SEX COUPLES, BY BEING KEPT FROM MARRIAGE, WERE

1 SUFFERING CONSTITUTIONAL INJURIES. AND THE LANGUAGE YOU QUOTE
2 IS OUT OF WINDSOR. IT IS A CONSTITUTIONAL INJURY, YOUR HONOR,
3 AND IT IS AN INJURY THAT WILL HAPPEN EVERY DAY A STAY IS IN
4 PLACE, JUST LIKE IT DID BEFORE YOUR RULING. AND THERE IS NO
5 JUSTIFICATION FOR THAT.

6 BUT, MORE IMPORTANTLY, WHEN THE STATE SAYS THEY WANT TO
7 PROTECT ALL ITS CITIZENS, THAT IS BALONEY. LOOK AT THE
8 UNCONTROVERTED RECORD IN THIS CASE, WHICH IS CITED IN YOUR
9 OPINION, WHICH IS THERE ARE AROUND 3,000 CHILDREN OF SAME-SEX
10 COUPLES WHO ARE EXPERIENCING ON A DAILY BASIS THE KIND OF
11 HARM, DISCRIMINATION AND INSECURITY THAT NO CHILD, NO CHILD,
12 SHOULD EVER HAVE TO ENDURE. PROTECT THOSE KIDS.

13 YOUR HONOR, AND FINALLY THEIR EFFORT TO RELY ON DECISIONS
14 IN HAWAII AND NEVADA THAT ARE CURRENTLY PENDING BEFORE THE
15 NINTH CIRCUIT, AND ALSO THE EIGHTH CIRCUIT OPINION.

16 THE COURT: BUT THE JACKSON DECISION IS RENDERED
17 MOOT, IS IT NOT, BY THE ACTION OF --

18 MS. TOMSIC: IT IS. IT ABSOLUTELY IS. SO WE'RE
19 REALLY TALKING ABOUT THE NEVADA DECISION AND THE EIGHTH
20 CIRCUIT DECISION. AND I WOULD SAY A COUPLE THINGS ABOUT THAT.
21 NUMBER ONE, YOUR HONOR, THOSE COURTS ARE NOT IN OUR
22 JURISDICTION.

23 NUMBER TWO, THOSE CASES WERE -- AND I KNOW YOU DON'T LOVE
24 WINDSOR THE WAY I LOVE WINDSOR, BUT THEY WERE CLEARLY BEFORE
25 WINDSOR, AND THEY WERE CLEARLY BEFORE THE SUPREME COURT LEFT

1 JUDGE WALKER'S DECISION IN PROP 8 INTACT. AND I WOULD SAY
2 THAT IF YOU LOOK AT ACTUALLY THE DECISIONS THAT WERE DECIDED
3 AFTER WINDSOR, INCLUDING THE NEW JERSEY CASE, THOSE CASES HAVE
4 REFUSED TO ISSUE INJUNCTIONS FOR THE SAME TYPE OF -- I MEAN
5 STAYS FOR THE SAME REASONS YOU SHOULD.

6 AND THE EFFORT OF THE STATE IN THE PLEADINGS THEY FILED
7 THIS MORNING AND IN ORAL ARGUMENT AND SAY, OH, GOSH, THEY'RE
8 DISTINGUISHABLE. NO, THEY'RE NOT, JUDGE. IF YOU READ THE
9 ORDER IN NEW JERSEY, THE STANDARDS FOR STAY IN NEW JERSEY ARE
10 THE SAME WHETHER IT'S A STATE LAW OR A FEDERAL LAW. IT'S THE
11 SAME. IT IS NO DIFFERENT.

12 AND I WOULD JUST SAY TO YOUR HONOR, PLEASE, DO THE RIGHT
13 THING.

14 THE COURT: THANK YOU, MS. TOMSIC.

15 MR. LOTT.

16 MR. LOTT: JUST A COUPLE OF POINTS IN RESPONSE.

17 THE COURT: WOULD YOU MOVE THE MICROPHONE A LITTLE
18 CLOSER.

19 MR. LOTT: JUST A COUPLE OF POINTS IN RESPONSE.
20 REGARDING THE TIMING OF THE COURT'S ORDER ISSUING, IT WAS THE
21 FRIDAY BEFORE CHRISTMAS, AND IT WOULD HAVE BEEN NICE TO HAVE
22 RECEIVED NOTICE OF THE COURT'S GOING TO BE ISSUING A RULING
23 AND TO HAVE SOME EXPECTATION. I THINK THE CHRONOLOGY MAY HAVE
24 WORKED OUT A LITTLE BIT DIFFERENTLY HAD THAT HAPPENED.

25 ON THE CHARACTERIZATION OF THE TENTH CIRCUIT'S CURRENT

1 RULING, AGAIN, IT'S WITHOUT PREJUDICE, AND I DON'T THINK
2 ANYTHING MORE THAN THAT NEEDS TO BE READ INTO IT. THE STATE
3 IS NOT --

4 THE COURT: I DON'T READ EITHER OF THE TENTH CIRCUIT
5 ORDERS TO BE SUBSTANTIVE ORDERS. THE FIRST WAS CLEARLY
6 PROCEDURAL. THE RULING WAS THAT THE APPLICATION WAS
7 INSUFFICIENT, AND SO IT WAS DENIED FOR THAT REASON. IT DIDN'T
8 MEET THE LEGAL REQUIREMENTS. AND THE ONE THIS MORNING IS NOT
9 MUCH EXPLANATION, EXCEPT TO SAY THAT I THINK, AS BEST I CAN
10 READ IT, IS THEY WANTED THIS HEARING TO PROCEED BEFORE THEY
11 MADE A DECISION. BUT IN BOTH INSTANCES THEIR ORDERS DENYING
12 THE STATE'S REQUEST ARE WITHOUT PREJUDICE, WHICH INVITES THE
13 STATE TO RENEW THOSE MOTIONS. IS THAT WHAT THE STATE INTENDS
14 TO DO IF I DENY THE STATE'S MOTION FOR A STAY?

15 MR. LOTT: YES.

16 THE COURT: ALL RIGHT.

17 MR. LOTT: THE STATE HAS NOT CITED TO OR RELIED UPON
18 GOD'S LAW IN THIS, AND I THINK THAT'S AN IRRELEVANT ASSERTION.
19 AND AS TO THE GOVERNOR'S LETTER, I HADN'T SEEN THAT BEFORE
20 TODAY, BUT --

21 THE COURT: NEITHER HAD I.

22 MR. LOTT: IN MY VIEW THE GOVERNOR'S ADVICE TO A
23 COUNTY CLERK TO CHECK WITH A COUNTY ATTORNEY SEEMS LIKE A
24 REASONABLE ADVICE TO ME. I DON'T SEE --

25 THE COURT: I DON'T SEE THAT IT'S PARTICULARLY

1 RELEVANT TO WHAT WE'RE DOING TODAY. MS. TOMSIC WANTED IT IN
2 THE RECORD, AND IT WILL BE RECEIVED FOR THAT REASON.

3 MR. LOTT: THANK YOU, YOUR HONOR.

4 THE COURT: THANK YOU. ALL RIGHT. LET'S DO THIS.
5 LET'S TAKE A -- LET'S TAKE A BRIEF RECESS.

6 MS. GODDARD: YOUR HONOR, I'M SO SORRY. THIS IS
7 GOING TO BE A LITTLE ANTICLIMACTIC, BUT I DO THINK THERE IS
8 SOMETHING THE COUNTY IS UNIQUELY POSITIONED TO ADDRESS.

9 THE COURT: MY APOLOGIES. PLEASE, THE PODIUM IS
10 YOURS.

11 MS. GODDARD: YOUR HONOR ASKED EARLIER WHAT THE
12 STATUS QUO IS, AND I THINK BOTH PARTIES ANSWERED IT TO THE
13 BEST THEY COULD. I THINK THAT SALT LAKE COUNTY AS THE FIRST
14 ENTITY TO ISSUE THE MARRIAGE LICENSES MIGHT BE THE BEST TO
15 GIVE YOU THE ACTUAL NUMBERS.

16 ON FRIDAY WE ISSUED OVER 100 MARRIAGE LICENSES TO
17 SAME-SEX COUPLES. THE FIRST ONE WAS ISSUED WITHIN I WOULD SAY
18 PROBABLY 45 MINUTES OF OUR RECEIVING NOTICE OF THE COURT'S
19 ORDER.

20 AS OF THIS MORNING WE HAVE ISSUED OVER 90 I AM TOLD
21 ALREADY, AND THAT NUMBER IS PROBABLY A LITTLE BIT STALE. WHEN
22 WE CAME HERE THIS MORNING THERE WAS -- THERE WAS A LINE OF
23 PEOPLE STRETCHING THROUGH ALL THREE FLOORS OF OUR BUILDING.

24 BUT MORE THAN THAT, YOUR HONOR, THERE IS ACTUALLY SOME
25 CONFUSION AMONG THE COUNTY CLERKS THAT I THINK WOULD BE

1 HELPFUL FOR YOU TO ADDRESS. THERE IS A PROVISION IN THE UTAH
2 CODE THAT ALSO AFFECTS THE ABILITY OF CLERKS TO ISSUE LICENSES
3 TO SAME-SEX COUPLES THAT IS NOT EXPLICITLY ADDRESSED IN YOUR
4 RULING.

5 THIS CODE SECTION IS 31-8, AND IT IS APPLICATION FOR A
6 LICENSE. AND TWICE IN THAT SECTION OF THE CODE IT REFERENCES
7 THAT A MARRIAGE LICENSE MAY BE ISSUED BY THE COUNTY CLERK TO A
8 MAN AND A WOMAN. THAT IS IN THE FIRST SECTION. IT IS ALSO IN
9 THE NEXT SUBSECTION THAT TALKS ABOUT THE FULL NAMES OF A MAN
10 AND A WOMAN.

11 NOW, OUR INTERPRETATION IN SALT LAKE COUNTY OF YOUR ORDER
12 ON FRIDAY, WHEN IN FOOTNOTE ONE ON PAGE EIGHT YOU INDICATED
13 THAT YOU WERE ADDRESSING ALL OF THE LAWS THAT WOULD RESTRICT
14 THE ISSUANCE OF LICENSES TO SAME-SEX COUPLES, WAS THAT YOU
15 MEANT WHAT YOU SAID. AND SO WE INTERPRETED IT, AND WE ADVISED
16 OUR CLERK THAT REGARDLESS OF THIS SEPARATE SECTION IN THE
17 CODE, SHE NEEDED TO COMPLY WITH YOUR ORDER.

18 THAT SAID, OVER THE WEEKEND WE BECAME AWARE THAT THIS IS
19 AN ISSUE IN A NUMBER OF COUNTY CLERKS OFFICES THROUGHOUT THE
20 STATE OF UTAH WHERE THEY ARE CONCERNED ABOUT THE LANGUAGE THAT
21 WAS UNADDRESSED IN YOUR OPINION, AND IN PARTICULAR THEY ARE
22 CONCERNED BECAUSE IT IS A CLASS-A MISDEMEANOR FOR CLERKS TO
23 ISSUE LICENSES IN VIOLATION OF THE LAW.

24 AND BECAUSE THAT CODE SECTION IS NOT SPECIFICALLY
25 MENTIONED, I THINK THERE IS SOME CONFUSION, NOT THE CONFUSION

1 THE STATE OR MS. TOMSIC IS TALKING ABOUT, BUT A CONFUSION
2 AMONG THE COUNTY ATTORNEYS AND THE COUNTY CLERKS AS TO WHETHER
3 THEY COULD POTENTIALLY BE CRIMINALLY LIABLE UNDER THAT
4 SEPARATE PROVISION.

5 NOW, AGAIN, SALT LAKE COUNTY VIEWS YOUR ORDER AS
6 ENCOMPASSING ALL THE LAWS THAT WOULD PURPORT TO LIMIT THE
7 ABILITY OF THE CLERKS TO ISSUE LICENSES TO SAME-SEX COUPLES.
8 BUT TO THE EXTENT YOU ARE NOT INCLINED TO STAY YOUR RULING
9 TODAY, AND SO WE ALL LEAVE THIS COURTROOM AND CLERKS ARE
10 CONTINUING TO ISSUE LICENSES, WE THINK IT WOULD BE HELPFUL NOT
11 JUST IN SALT LAKE COUNTY BUT TO OTHER CLERKS THROUGHOUT THE
12 STATE FOR YOU TO CLARIFY THAT YOUR RULING ENCOMPASSES THAT
13 SECTION OF THE CODE AS WELL.

14 THE COURT: ALL RIGHT, THANK YOU, MS. GODDARD. OF
15 COURSE THAT SECTION OF THE CODE WASN'T RAISED BY ANY OF THE
16 PARTIES IN THE BRIEFING, AND I WAS COMPLETELY UNAWARE OF IT
17 UNTIL THIS MORNING.

18 MS. TOMSIC: MEA CULPA, YOUR HONOR.

19 THE COURT: ALL RIGHT. ANYTHING MORE IN LIGHT OF
20 THAT, MR. LOTT, MS. TOMSIC?

21 MS. TOMSIC: NO, YOUR HONOR.

22 MR. LOTT: NO.

23 THE COURT: LET'S TAKE A BRIEF RECESS FOR 15 OR 20
24 MINUTES AND WE'LL COME BACK.

25 (RECESS FROM 10:19 A.M. UNTIL 11:08 A.M.)

1 THE COURT: ALL RIGHT. THANK YOU ALL FOR YOUR
2 PATIENCE. ONCE AGAIN THE PARTIES HAVE GIVEN ME A GREAT DEAL
3 TO CONSIDER.

4 AT THE OUTSET LET ME FIRST ADDRESS THE ISSUE RAISED BY
5 SALT LAKE COUNTY AT THE CONCLUSION OF OUR ARGUMENT. TO THE
6 EXTENT THAT IT'S NOT ALREADY CLEAR FROM THE COURT'S RULING, MY
7 INTENT AND THE EFFECT OF MY RULING ON FRIDAY WAS TO FIND THAT
8 THE LAWS OF THE STATE OF UTAH THAT OPERATE TO DENY SAME-SEX
9 COUPLES THE OPPORTUNITY TO MARRY OPERATE IN VIOLATION OF THE
10 DUE PROCESS PROTECTIONS AND EQUAL PROTECTION UNDER THE UNITED
11 STATES CONSTITUTION. FOR THAT REASON, THEY COULD NOT BE
12 APPLIED.

13 WHILE I DID NOT ATTEMPT TO IDENTIFY OR SPECIFY EVERY
14 PROVISION OF THE STATE CODE THAT MIGHT OPERATE IN VIOLENCE TO
15 THOSE CONSTITUTIONAL GUARANTEES, THE INTENT AND EFFECT OF MY
16 ORDER IS TO PREVENT THE STATE OF UTAH OR ANYONE ACTING ON
17 BEHALF OF THE STATE OF UTAH FROM ENFORCING ANY LAW THAT WOULD
18 DEPRIVE SAME-SEX COUPLES OF THOSE CONSTITUTIONAL GUARANTEES,
19 INCLUDING THAT PROVISION THAT MS. GODDARD SPECIFICALLY RAISED
20 AT THE CONCLUSION OF OUR ARGUMENT.

21 BUT TURNING TO THE ISSUE BEFORE US, THE -- BEFORE THE
22 COURT IS THE STATE DEFENDANTS' MOTION FOR A STAY PENDING
23 APPEAL. WE HAVE CAREFULLY REVIEWED THE BRIEFS SUBMITTED BY
24 THE PARTIES, BOTH IN SUPPORT OF AND IN OPPOSITION TO THAT
25 MOTION, AND OF COURSE HAVE CONSIDERED THE ARGUMENTS PRESENTED

1 HERE THIS MORNING. WE'VE ALSO CONSIDERED THE LEGAL
2 AUTHORITIES CITED BY THE PARTIES AND THE STANDARDS THAT GOVERN
3 APPLICATIONS FOR STAYS PENDING APPEAL.

4 I'LL NOTE THAT I THINK MS. TOMSIC'S DISCUSSION CONCERNING
5 THE PROCEDURAL HISTORY THAT LED US TO THIS POINT WAS CORRECT
6 AND APT, AND I ADOPT THAT DISCUSSION. AND OUR REALITY, OF
7 COURSE, IS THAT THIS IS SOMETHING OF A MESS, FOR THOSE REASONS
8 I THINK THAT MS. TOMSIC EXPLAINED.

9 I'LL NOTE THAT THERE IS NO DISPUTE AMONGST THE PARTIES
10 ABOUT THE STANDARD THAT I AM REQUIRED TO APPLY IN ADDRESSING
11 AND RESOLVING THIS MOTION FOR A STAY PRESENTED BY THE STATE
12 DEFENDANTS. EVERYONE AGREES WHAT THOSE FACTORS ARE.

13 BEFORE I ANNOUNCE MY RULING, I'LL JUST NOTE THAT
14 ULTIMATELY THE STATE DEFENDANTS ENCOURAGE ME TO FOLLOW THE
15 COURSE TAKEN BY JUDGE WALKER IN CALIFORNIA IN DECIDING THE
16 PROPOSITION 8 LITIGATION. BUT, IMPORTANTLY, WE ARE IN A
17 DIFFERENT PROCEDURAL POSTURE THAN JUDGE WALKER WAS, FOR THE
18 REASON THAT THE PARTIES IN THAT CASE CONSIDERED AND HAD
19 PREPARED TO FILE A MOTION REQUESTING THAT THE COURT STAY THE
20 EFFECT OF ITS ORDER EVEN BEFORE THE COURT ISSUED ITS RULING.
21 THE INTERVENOR DEFENDANTS IN THE PROPOSITION 8 LITIGATION MADE
22 THAT REQUEST IN A MANNER THAT PERMITTED JUDGE WALKER TO
23 CONSIDER IT SIMULTANEOUSLY WITH THE ISSUANCE OF HIS RULING ON
24 THE MERITS.

25 AND OF COURSE JUDGE WALKER DID THAT. HE ISSUED TWO

1 ORDERS ESSENTIALLY SIMULTANEOUSLY, ONE RESOLVING THE LEGAL
2 ISSUES ADDRESSED, AND THEN, SECOND, A SECOND ORDER STAYING THE
3 EFFECT OF THAT RULING TO PRESERVE THE STATUS QUO UNTIL THE
4 PARTIES HAD AN OPPORTUNITY FULLY TO BRIEF A REQUEST FOR A
5 STAY.

6 AND IN THIS INSTANCE WE HAD NO SUCH REQUEST FROM ANY
7 PARTY, EITHER PRIOR TO THE COURT'S SUBSTANTIVE RULING FRIDAY
8 OR IMMEDIATELY THEREAFTER. SO THIS COURT DID WHAT IT HAS DONE
9 IN EVERY CASE, IN EVERY ORDER THAT I HAVE ISSUED SINCE I TOOK
10 MY OATH AND TOOK THIS POSITION, AND THAT WAS TO ISSUE AN ORDER
11 RESOLVING THE ISSUES PRESENTED BY THE PARTIES, AND NOTHING
12 ELSE, AND THAT'S EXACTLY WHAT WE DID.

13 AND I'LL NOTE THAT AT ITS CORE I BELIEVE MS. TOMSIC IS
14 CORRECT, THAT THE STATE ESSENTIALLY RELIES AND REASSERTS HERE
15 ARGUMENTS THAT IT PREVIOUSLY SUBMITTED IN OPPOSITION TO THE
16 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, ARGUMENTS THAT I
17 PREVIOUSLY CONSIDERED AND DECIDED ON THE MERITS. AND THOSE
18 FINDINGS -- PARDON ME -- THOSE FINDINGS PREVENT ME FROM
19 PROVIDING THE RELIEF THAT THE STATE IS REQUESTING TODAY.

20 FOR REASONS THAT I WILL FURTHER AND MORE COMPLETELY
21 ARTICULATE IN A BRIEF WRITTEN RULING THAT I'LL ISSUE BEFORE
22 THE END OF THE DAY TODAY, I CONCLUDE THAT THE STATE HAS FAILED
23 TO CARRY ITS BURDEN AS THE MOVING PARTY TO DEMONSTRATE AND
24 SATISFY THE FACTORS IT IS REQUIRED TO MEET IN ORDER TO OBTAIN
25 A STAY PENDING RESOLUTION OF THE DEFENDANTS' APPEAL TO THE

1 TENTH CIRCUIT.

2 AND IMPORTANTLY I'LL NOTE THAT THERE IS NO AUTHORITY
3 CITED BY THE PARTIES, AND I AM AWARE OF NO AUTHORITY, THAT
4 OTHERWISE GRANTS ME A LEGAL BASIS TO PROVIDE A TEMPORARY STAY
5 WHILE THE TENTH CIRCUIT CONSIDERS WHAT I EXPECT WILL BE AN
6 EXPEDITIOUSLY FORTHCOMING MOTION FROM THE STATE OF UTAH.

7 IN LIGHT OF THAT, IT SEEMS TO ME THAT MY OBLIGATION AS A
8 DISTRICT COURT JUDGE IS TO MAKE A SUBSTANTIVE RULING ON THE
9 MERITS AS QUICKLY AS POSSIBLE AND THEN TO STEP ASIDE AND ALLOW
10 THE TENTH CIRCUIT TO WEIGH IN AND DETERMINE HOW BEST TO
11 PROCEED.

12 AND SO WHILE THERE WILL BE A BRIEF WRITTEN ORDER
13 FORTHCOMING, THE ORDER THAT I'VE JUST ARTICULATED IS THE
14 RULING OF THE COURT, AND THE STATE IS WELCOME TO PROCEED
15 IMMEDIATELY WITH ANY APPLICATION FOR ANY FURTHER RELIEF IT
16 WOULD LIKE FROM THE TENTH CIRCUIT OR ANYONE ELSE.

17 IN LIGHT OF THAT RULING, ARE THERE ANY FURTHER -- ARE
18 THERE ANY QUESTIONS OR ANYTHING MORE WE SHOULD TAKE UP TODAY?

19 MR. LOTT?

20 MR. LOTT: NOT ON BEHALF OF THE STATE DEFENDANTS.
21 WE THANK THE COURT FOR THE CLARITY OF THE RULING.

22 THE COURT: THANK YOU, AND THANK YOU BOTH, BOTH
23 PARTIES, FOR -- YOU HAVE BOTH WORKED OVER THE WEEKEND AND LATE
24 AT NIGHT TO PREPARE YOUR BRIEFS AND ARGUMENTS, AND I VERY MUCH
25 APPRECIATE THAT.

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MS. TOMSIC, IS THERE ANYTHING FURTHER?

MS. TOMSIC: NO, YOUR HONOR. THANK YOU FOR THE TIME
THIS MORNING.

THE COURT: THANK YOU. WE'LL BE IN RECESS.

(HEARING CONCLUDED AT 11:16 A.M.)

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CERTIFICATE OF REPORTER

I, RAYMOND P. FENLON, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH, DO HEREBY CERTIFY THAT I REPORTED IN MY OFFICIAL CAPACITY, THE PROCEEDINGS HAD UPON THE HEARING IN THE CASE OF KITCHEN, ET AL. VS. HERBERT, ET AL., CASE NO. 2:13-CV-217, IN SAID COURT, ON THE 23RD DAY OF DECEMBER, 2013.

I FURTHER CERTIFY THAT THE FOREGOING PAGES CONSTITUTE THE OFFICIAL TRANSCRIPT OF SAID PROCEEDINGS AS TAKEN FROM MY MACHINE SHORTHAND NOTES.

IN WITNESS WHEREOF, I HAVE HERETO SUBSCRIBED MY NAME THIS 23RD DAY OF DECEMBER, 2013.

/S/ RAYMOND P. FENLON