Case No. 14-35420

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, et al.

Plaintiffs-Appellees,

v.

GOVERNOR C.L. "BUTCH" OTTER,

Defendant-Appellant,

CHRISTOPHER RICH,

Defendant,

And

STATE OF IDAHO,

Intervenor-Defendant

On Appeal from the United States District Court
For the District of Idaho
Case No. 1:13-CV-00482-CWD
The Honorable Candy W. Dale, Magistrate Judge

DEFENDANT-APPELLANT GOVERNOR C.L. (BUTCH) OTTER'S REPLY TO PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION

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INTRODUCTION

Plaintiffs boldly contend that the State of Idaho should have no stay of the district court's order and injunction pending appeal, even though the Supreme Court of the United States issued such a stay under virtually identical circumstances only four months ago. *See Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014). A series of district court decisions overturning State marriage laws is sufficient reason, they say, to disregard the Supreme Court's order and commence "a substantive analysis of the required factors, including the required balancing of harms." Plaintiffs-Appellees' Response in Opposition to Motion of Defendants-Appellants for Stay Pending Appeal, *Latta v. Otter*, Nos. 14-35420, 14-35421, at 3 (9th Cir. May 15, 2014) ("Response").[1]

Plaintiffs' arguments obscure the considerations that should guide this Court's evaluation of Governor Otter's motion. First, the Supreme Court's grant of a stay pending appeal in *Kitchen*—which undoubtedly accounted for all relevant factors in the stay analysis, including likelihood of success on the merits following

[1] Unless stayed, the district court's injunction will impose irreparable harm on the State of Idaho. The district court acknowledged as much. Order, *Latta v. Otter*, No. 1:13-cv-00482-CWD, at 3 (D. Idaho May 15, 2014) ("[T]he State of Idaho has suffered an irreparable injury due to the Court's injunction."). Damaging the integrity of its democratic institutions is only one of many forms of injury that Idaho will suffer. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Voluminous briefing submitted to the district court identified numerous other ways that a judicial redefinition of marriage will harm the State and people of Idaho.

United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675 (2013)—warrants great deference. Substantial weight should be given to the fact that the full Court so recently granted a stay to secure the status quo during appellate review of the same constitutional issue disputed here. Second, district court decisions carry no precedential weight and cannot affect either the degree of deference owed to the stay in *Kitchen* or the application of the standard governing the issuance of a stay pending appeal. Third, the only consensus relevant to Governor Otter's motion is that federal courts universally agree—as this Court did in *Perry v. Brown*, No. 11-17255, at 1 (9th Cir. Oct. 24, 2011)) when it stayed the district court's opinion—that it is appropriate to stay an injunction mandating same-sex marriage pending appeal. The district court's denial of a stay means that this is now the only case in the federal judiciary where an injunction abrogating a State's definition of marriage is not stayed pending full appellate review.

ARGUMENT

I. The Supreme Court's Grant of a Stay Pending Appeal in *Herbert v. Kitchen* Warrants This Court's Deference.

A scant four months ago the Supreme Court issued a stay pending appeal in a case where Utah's marriage laws were declared unconstitutional to the extent they prohibited marriage between persons of the same sex. *See* Memorandum Decision and Order, *Kitchen* v. *Herbert*, No. 2:13-cv-00217-RJS, at 53 (D. Utah Dec. 20, 2013) ("Amendment 3 is unconstitutional because it denies the Plaintiffs

their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution."). In addition, the procedural posture closely resembled this case: the district court denied the State's repeated requests for a stay pending appeal. The full Supreme Court granted Utah's requested stay in an order containing no written dissent. *See Kitchen*, 134 S. Ct. at 893.

Although the grant of a stay in *Kitchen* is not binding, it persuasively indicates the High Court's assessment of the merits of Utah's request to maintain the *status quo ante* while it seeks appellate review. It is reasonable to presume that the grant of a stay rested on the Court's careful application of the relevant legal standard in light of its recent decision in *Windsor* and not on whether the Utah district court's decision "stood virtually alone." Response at 2. Given such a determination by the nation's highest court, the stay in *Kitchen* merits this Court's deference.

II. The District Court Decisions Cited by Plaintiffs Carry No Precedential Weight and Cannot Affect Either the Degree of Deference Owed to the Supreme Court's Grant of a Stay in *Kitchen* or the Application of the Standard for Obtaining a Stay Pending Appeal.

Plaintiffs' opposition ignores the bedrock principle that federal district court decisions hold *no* precedential value—not even for other judges within the same district, much less for courts of appeals. *See, e.g., Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other

judges, even members of the same court"). The precedential weightlessness of federal district court decisions means that Plaintiffs' central arguments against granting a stay must be rejected.

District court decisions can have no effect on the degree of deference owed to the Supreme Court's order granting a stay in *Kitchen*. That order indicates the High Court's assessment of the merits of granting a stay pending appeal under circumstances virtually indistinguishable from this case. Deference is owed to that assessment because the Supreme Court applied the governing legal standard to facts and circumstances all but identical to those now before this Court. Subsequent district court decisions have no bearing on the weight owed to that assessment.

Also, the number of federal district court cases declaring traditional marriage unconstitutional cannot conceivably alter the legal standard for granting a stay pending appeal. Plaintiffs go awry by insisting that the Supreme Court's consideration of Utah's application for a stay "had to be measured against a limited jurisprudence of a single case." Response at 2. To the contrary, that application was measured against the legal standard for granting a stay, no part of which had anything to do with the number of non-precedential district court decisions favoring the non-moving party. *See Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). Plaintiffs are equally mistaken that Idaho's request for a stay

"must be measured against a substantial body of doctrine." Response at 2. A few district court decisions do not a "body of doctrine" make—substantial or not. The only question before this Court is whether Governor Otter's motion for a stay satisfies the controlling four-part standard. *See Humane Soc'y of the U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009). No pattern of district court rulings, however uniform, can alter that standard or its application by this Court. The best evidence of how the Supreme Court would weigh those factors in light of *Windsor* is the Court's stay in *Kitchen*, not a handful of district court decisions.

III. Granting a Stay Pending Appeal Would Be Consistent with Similar Decisions From Other Federal Courts.

The "extraordinary consensus," Response at 2, that ought to matter in deciding the Governor's motion is the simple fact that all other federal same-sex marriage cases have been stayed pending appeal. Since the Supreme Court issued a stay in *Kitchen*, five federal district courts (including the decision below) have issued opinions squarely addressing the validity of the historic definition of marriage. *See Latta v. Otter*, __ F.Supp.2d __, 2014 WL 1909999 (D. Idaho May 13, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F.Supp.2d 1252 (N.D. Okla. 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456 (E.D. Va. 2014); *DeLeon v. Perry*, __ F.Supp.2d __, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *DeBoer v. Snyder*, __ F.Supp.2d __, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014). Only one—the Michigan court—failed to include a stay pending appeal in its original order. *See*

id. at *17. And the Sixth Circuit promptly corrected that error by granting a stay—specifically holding that "[t]here is no apparent basis to distinguish this case or to balance the equities any differently than the Supreme Court did in *Kitchen*." Order, *DeBoer v. Snyder*, No. 14-1341, at *3 (6th Cir. Mar. 25, 2014).

It is Plaintiffs who ask this Court to stand against the tide. Out of a half-dozen relevant cases now pending in federal courts across the country, only this one threatens to abrogate a State's definition of marriage without preserving the status quo during a full appellate review. A decision by this Court granting the Governor's motion for a stay, on the other hand, would be consistent with the approach set by the Supreme Court in *Kitchen* and now followed in every other case challenging the validity of State laws defining marriage as the union of a man and a woman.

CONCLUSION

If Plaintiffs' arguments against the Motion were correct, the Supreme Court would never have issued the stay in *Kitchen*. But it did, and that should end the debate. For all these reasons, and those contained in the Governor's Emergency Motion, this Court should stay the Injunction pending the exhaustion of all appeals or at least for a reasonable period to allow the Governor to seek a stay from the Circuit Justice and/or full Supreme Court.

DATED: May 16, 2014

By s/ *Thomas C. Perry*
Lawyers for Defendant-Appellant Governor Otter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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