**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| DEB WHITEWOOD, *et al*., | : | 1:13-CV-1861 |
| | : | |
| Plaintiffs, | : | Hon. John E. Jones, III |
| | : | |
| v. | : | |
| | : | |
| MICHAEL WOLF, in his official Capacity as Secretary, Pennsylvania Department of Health, et al., | : | |
| | : | |
| Defendants. | : | |

**INTERVENOR'S BRIEF IN SUPPORT OF MOTION FOR STAY**

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Intervenor, pursuant to Fed. R. Civ. P. 62(b) and (c), moves this Court for a stay of the Order dated May 20, 2014.

## I. PROCEDURAL HISTORY

Intervenor requests a stay of the Order enjoining enforcement of 23 Pa.C.S. §§1102 and 1704 ("Pennsylvania's Marriage Laws"). The facts giving rise to the instant need for this stay are these:

On May 20, 2014, this Court filed its Memorandum Opinion and Order ("Injunction") invalidating and enjoining enforcement of Pennsylvania's Marriage Laws, which preserve marriage as the union of a man and a woman. On the afternoon of May 21, 2014, Defendant, Governor Thomas W. Corbett, publicly indicated that he would not appeal the Injunction. Consequently, Intervenor filed the request to intervene and this accompanying request for a stay pending appeal.

This Court is aware of the history and scope of this litigation, which raises the question of whether the United States Constitution invalidates a State's laws preserving marriage as "the union of a man and a woman" and mandates redefinition to "the union of two persons." Just last Term, the United States Supreme Court granted certiorari from a decision of the Ninth Circuit for the purpose of resolving that issue but was precluded from doing so by justiciability issues. *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652 (2013). The Eighth

Circuit has already ruled in favor of man-woman marriage. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006). The issue is now pending post-oral argument before the Fourth and Tenth Circuits, *Bostic v. Harris*, Case No. 14-1167 (4th Cir.) (Virginia); *Bishop v. Smith*, Case No. 14-5003 (10th Cir.) (Oklahoma); *Kitchen v. Herbert*, Case No. 13-4178 (10th Cir.) (Utah), and is now pending pre-oral argument before the Ninth, Fifth, and Sixth Circuits. *Latta v. Otter*, Case No. 14-35420 (9th Cir.) (Idaho); *Sevcik v. Sandoval*, Case No. 12-17668 (9th Cir.) (Nevada); *Tanco v. Haslam*, Case No. 14-5297(6th Cir.) (Tennessee); *DeLeon v. Perry*, No. 14-50196 (5th Cir.) (Texas); *DeBoer v. Snyder*, Case No. 14-1341 (6th Cir.) (Michigan); *Obergefell v. Himes*, Case No. 14-3057 (6th Cir.) (Ohio); *Bourke v. Beshear*, Case No. 14-5291 (6th Cir.) (Kentucky).

## II. STATEMENT OF QUESTION INVOLVED

Whether a stay should be granted under Fed. R. Civ. P. 62(b) and (c)?

Suggested Answer: Yes.

## III. STANDARD FOR MOTION FOR STAY

### A. The Supreme Court's Decision in *Herbert* Requires a Stay Here.

On January 6, 2014, the United States Supreme Court made clear that it will decide the constitutionality of man-woman marriage and until that time no lower court decision holding against man-woman marriage should operate to allow same-sex couples to marry or have their marriages recognized contrary to the law of their

States. The Supreme Court did this by the extraordinary measure of staying the Utah district court's injunction against that State's man-woman marriage laws after both that court and the Tenth Circuit had refused to do so.

In *Herbert v. Kitchen*, 134 S. Ct. 893 (January 6, 2014) (mem.), the Supreme Court unanimously granted Utah's stay request as follows:

> *Application for stay presented to Justice SOTOMAYOR and by her referred to the Court granted. Permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13–cv–217, on December 20, 2013, stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.*

*Id*. The situation here is virtually identical to the situation in *Herbert*, and the Supreme Court's unanimous decision there makes it clear that in the limited context of an injunction prohibiting the enforcement of state man-woman marriage laws, a stay pending appeal should be issued upon the request of a government official tasked with enforcing the state's marriage laws.

Bolstering this conclusion is the fact that in those instances where district courts have refused to grant stays in similar circumstances, those decisions have been subsequently overturned by the respective circuit courts upon appeal. *See Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (granting the defendants' "motions to stay the district court's . . . order

pending appeal"); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014) (same).

**B. Four-Element Balancing Analysis under Rule 62(c)**

In the event that this Court declines to issue a stay pursuant to *Herbert*'s clear guidance, the following analysis independently establishes that Intervenor is entitled to one. In ruling on a motion pursuant Rule 62(c), the district court's objective is to preserve the status quo during the pendency of an appeal. *Newton v. Consolidated Gas Co.*, 258 U.S. 165 (1922); *Kawecki Berylco Industries, Inc. v. Fansteel, Inc.*, 517 F. Supp. 539, 542 (E.D. Pa. 1981). Four factors guide this Court's consideration of a motion for stay while Intervenor's request to intervene is pending through the exhaustion of all appeals: "(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 proceedings; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Feesers, Inc. v. Michael Foods, Inc.*, 2009 WL 1684650, at *1 (M.D. Pa. June 16, 2009) (unreported); *Sentry Ins. v. Pearl*, 662 F. Supp. 1171, 1173 (E.D. Pa. 1987). These factors all point to the same conclusion: This Court should "suspend[] judicial alteration of the status quo" on the important issues at stake in this

litigation by staying the Injunction. *Nken v. Holder*, 556 U.S. 418, 429 (2009) (quotation marks omitted).

## IV. ARGUMENT

### A. *Herbert* Establishes that Intervenor is Entitled to a Stay

As explained above, *Herbert*—months after the Supreme Court's ruling in *Windsor*—conclusively establishes that a stay should be granted under these circumstances. Indeed, just last month, the Ninth Circuit was asked to stay a similar injunction after the district court refused. The three-judge circuit panel issued the stay (without dissent). Judge Hurwitz concurred in the Order and provided the following rationale:

> I concur in the order granting the stay pending appeal. But I do so solely because I believe that the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays in the circumstances before us today.
>
> …
>
> … Just five months ago, a district court enjoined the State of Utah from enforcing its prohibition on same-sex marriage. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013). The district court denied the State's motion for a stay pending appeal, *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013), and the next day, two judges of the Tenth Circuit did the same, *Kitchen v. Herbert*, No. 13-4178 (10th Cir. Dec. 24, 2013).
>
> On January 6, 2014, the Supreme Court granted the State's application for a stay pending the disposition of the appeal in the Tenth Circuit. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014). Although the Supreme Court's terse two-sentence order did not offer a statement of reasons, I cannot identify any relevant differences between the situation before

> us today and *Herbert*. And, although the Supreme Court's order in *Herbert* is not in the strictest sense precedential, it provides a clear message—the Court (without noted dissent) decided that district court injunctions against the application of laws forbidding same-sex unions should be stayed at the request of state authorities pending court of appeals review.
>
> For that reason, I concur in the court's order today granting a stay pending resolution of this appeal.

*Latta v. Otter*, No. 14-35420 (9th Cir. May 20, 2014) (Hurwitz, J., concurring).

Thus, just as there were no relevant differences between *Herbert* and *Latta*, no material difference exists to distinguish the instant case. All three cases involved injunctions sought by governmental officials statutorily required to enforce the relevant state marriage laws in the course of executing their state statutory duties.[1] Consequently, the Supreme Court's decision in *Herbert* requires this Court to stay its Injunction pending appeal, to preserve the *status quo ante*.

The need for lower courts to apply *Herbert*'s logic and grant a stay in all like circumstances is particularly acute because this case implicates the important issue, which the Supreme Court expressly left open last Term in *United States v.*

[1] The appellate courts have declined to issue a stay only in litigation arising out of Oregon, where the stay was sought by a private organization—not a governmental official charged with enforcing the state's marriage laws. *Nat'l Org. for Marriage v. Geiger*, No. 13A1173 (U.S. June 4, 2014). That result followed from *Hollingsworth*'s recognition that private citizens and organizations lack standing to defend state marriage laws because they "have no role—special or otherwise—in the enforcement of [a state's marriage law]." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013). That ruling has no applicability to Intervenor-Defendant, who is statutorily charged with enforcing the Commonwealth's marriage laws as part of her official duties.

*Windsor*, 133 S. Ct. 2675 (2013), "whether the States, in the exercise of their historic and essential authority to define the marital relation, may continue to utilize the traditional definition of marriage." *Id.* at 2696 (Roberts, C.J., dissenting) (quotation omitted); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (declining to reach issue on jurisdictional grounds). Because only the Supreme Court can ultimately and definitively answer that question, *any* lower court ruling should be stayed until the Supreme Court settles the matter. The Order in *Herbert* clearly evidences the Supreme Court's intention that marriage licenses not be issued to same-sex-couples in contravention of state law during the months leading up to the Supreme Court's authoritative ruling.

In the alternative—*i.e.*, if this Court holds that *Herbert* does not require a stay—the four-element analysis compels this Court to issue the requested stay.

### B. Four-Element Balancing Analysis under Rule 62(c)

#### *1. Intervenor is Likely to Succeed on the Merits on Appeal*

Multiple reasons suggest that Intervenor is likely to succeed on the merits on appeal.

*First*: This case is a contest between two mutually exclusive and profoundly different social institutions, each vying to bear authoritatively the name of "marriage." One is constituted by the core meaning of the union of a man and a woman; the other, by the core meaning of the union of two persons without regard

to sex. The law's power—which is adequate to the task—either will perpetuate the former or will suppress the former and mandate the latter. This matters because the core meanings constituting fundamental social institutions like marriage affect us all greatly; they shape our beliefs, attitudes, projects, and ways of behaving. The institution of man-woman marriage, with the law's powerful help, recognizes and valorizes the roles of mother and of father and teaches that children generally should, if at all possible, be raised with both a mother and a father and thereby with the benefits of gender complementarity in child-rearing. A genderless marriage regime does just the opposite and thereby creates the risk of increased fatherlessness, with all its well-known attendant ills.

The only way Plaintiffs can be married (or have their foreign marriages recognized) in any intelligible sense in Pennsylvania is for the Commonwealth, by choice or judicial mandate, to substitute a genderless marriage regime for the institution of man-woman marriage. And that regime will be what marriage *is*—for *everybody*. *All* will come under its teaching and socializing influence. But that course will deprive the State of the valuable and compelling social benefits flowing uniquely from the institution of man-woman marriage. Consequently, under any standard of judicial scrutiny, Pennsylvania has sufficiently good reasons to preserve the institution of man-woman marriage.

*Second*: The various opinions in *Windsor* itself clearly indicate the likelihood of the Intervenor's ultimate success. As noted above, the majority's decision to invalidate Section 3 of DOMA—which implemented a federal policy of refusing to recognize state laws defining marriage to include same-sex unions—was based in significant part on federalism concerns. For example, the majority emphasized that, "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689-90. The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* at 2691 (quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84 (1930)). And the majority concluded that DOMA's refusal to respect the State's authority to define marriage as it sees fit represented a significant—and in the majority's view, unwarranted—"federal intrusion on state power." *Id.* at 2692.

Here, as previously noted, this Court's decision in favor of Plaintiffs altogether *abrogated* the decision of Pennsylvania and its citizens to define marriage in the traditional way. *See also Schuette v. Coalition to Defend Affirmative Action,* No. 12-682, slip op. at 16-17 (U.S. April 22, 2014) (stating

"[t]hat [the democratic] process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.").

*Third*: This Court's May 20, 2014 Memorandum Opinion departed from the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), which sets forth the "established method of substantive due process analysis," *id.* at 720. For example, the Memorandum Opinion fails to adhere to *Glucksberg*'s requirement that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. Rather than adhere to that requirement, Plaintiffs and this Court's Opinion conclude that fundamental rights and liberties can be created apart from tradition and history. Any claim that this erroneous belief is purportedly supported by *Lawrence v. Texas*, 539 U.S. 558 (2003), rests on a misreading of *Lawrence*, as well as of *Glucksberg.* In *Lawrence*, the Court emphasized that "our laws and traditions in the past half-century are of the most relevance here." *Lawrence*, 539 U.S. at 571-72. And there, the recent history demonstrated a decided trend *away* from criminalization of homosexual relations. *Id.* at 572. Here, by contrast, the relevant history and tradition are that *no* State permitted same-sex marriage until 2004.

And even abroad, no foreign nation allowed same-sex "marriage" until after the Netherlands did so in 2000. *Windsor*, 133 S.Ct. at 2715 (Alito, J., dissenting).

The fact that, in the last ten years of this Nation's 237-year history, a minority of States have implemented a genderless marriage regime does not transform access to such a regime into a "deeply rooted" historical and traditional right. No interest still inconsistent with the laws of over 30 States and with the ubiquitous legal traditions of this and virtually every other country until a decade ago can be called "deeply rooted."

*Fourth*: Another indication of a good prospect of reversal is the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972). There, the Supreme Court unanimously dismissed, for want of a substantial federal question, an appeal from the Minnesota Supreme Court squarely presenting the question of whether a State's refusal to recognize same-sex relationships as marriages violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Id.*; *see also* *Baker* v. *Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971). The Court's dismissal of the appeal in *Baker* was a decision on the merits that constitutes "controlling precedent unless and until re-examined by [the Supreme] *Court*." *Tully* v. *Griffin, Inc*., 429 U.S. 68, 74 (1976) (emphasis added). *Baker* thus is of much more "precedential

value" than any of the recent district court decisions ruling against state marriage laws defining marriage as the union of a man and a woman.

*Fifth*: *Windsor* will not sustain the May 20, 2014 Memorandum Opinion from reversal. A careful reading of *Windsor* does not condemn Pennsylvania's man-woman marriage laws. *Windsor* did not announce that laws imposing legal disadvantage on same-sex couples must be carefully scrutinized. Rather, *Windsor* focused on whether DOMA came within the rule that "discrimination of an *unusual character* especially suggests careful consideration to determine whether they are obnoxious to the constitutional provision." 133 S. Ct. at 2692 (emphasis added) (internal quotations omitted). Only after identifying DOMA's "unusual character" did the Court proceed—two sentences later—"to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment." *Id*. at 2692. Here, Plaintiffs and this Court are functionally inverting the Supreme Court's analytical process in *Windsor*, because nothing in that case remotely suggests that heightened scrutiny applies to distinctions based on sexual orientation absent "unusual" circumstances. And Pennsylvania's marriage laws are anything but unusual.

Moreover, the Commonwealth's laws do not seek to ostracize or punish same-sex couples in any way. On the contrary, they offer these couples plenty of alternative legal means to arrange their finances, households, and families, ranging

from wills and trusts, to joint tenancies and beneficiary designations, to health-care directives and powers of attorney. These marriage laws were passed by the very same legislators who repealed the Commonwealth's ban on same-sex sexual relations. They passed these laws not to harm same-sex couples in any way but to put into statute the existing and longstanding definition of marriage as a special encouragement and support for man-woman couples to form stable, sturdy marriages and families.

*Sixth*: Perhaps most importantly for these purposes, as stated above, the Supreme Court granted the application filed by the State of Utah to stay a district court's injunction enjoining enforcement of Utah's marriage laws. *Herbert v. Kitchen*, 134 S. Ct. 893 (mem.). Just last month in *Latta*, the Ninth Circuit followed *Herbert* in deciding to stay an injunction of Idaho's marriage laws. Those cases are particularly telling here because this Court's Injunction mirrors the district courts' injunctions in Utah and Idaho. This Court should thus follow the Supreme Court's example and stay the Injunction until the exhaustion of all appeals.

### *2. Irreparable Harm Will Result Absent a Stay*

Should this Court deny a stay, it will impose certain irreparable harm on Pennsylvania and its citizens. "[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." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland v. King*, 567 U.S. __, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. __, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in the denial of application to vacate stay); *see also Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). That principle supports a finding of irreparable injury in this case, because the Injunction prevents Pennsylvania officials from enforcing a statute of profound practical impact and import.

Further, absent an immediate stay of the Injunction, Pennsylvania will be subjected to the same chaos, confusion, uncertainty, conflict, and proliferation of litigation experienced in Utah. We are not talking possibilities here; history teaches that the same ills will certainly befall all connected to or interested in this case. Repeating the Utah experience in Pennsylvania would undoubtedly inflict harm on Plaintiffs and place enormous administrative burdens on the State. *See I.N.S. v. Legalization Assistance Project*, 510 U.S. 1303, 1305-06 (1993) (O'Connor, J., in chambers) (citing the "considerable administrative burden" on the government as a reason to grant the requested stay). Only a stay can mitigate that result.

### *3. A Stay Will Not Subject Plaintiffs to Substantial Harm*

As explained above, Pennsylvania and its citizens will suffer irreparable injury from halting the enforcement of the State's definition of marriage: Every marriage performed under that cloud of uncertainty before final resolution by the United States Supreme Court would be an affront to the sovereignty of Pennsylvania over its domestic-relations policies; the Commonwealth may also incur ever-increasing administrative and financial costs when addressing the marital status of same-sex unions performed before this case is finally concluded; and same-sex couples may be irreparably harmed if their marital status is retroactively voided.

By contrast, a stay would at most subject Plaintiffs to a minimal period of delay pending a final determination of whether they may enter a legally recognized marriage relationship or have their foreign marriages recognized in Pennsylvania. As demonstrated above, Intervenor has made a strong showing that she is likely to ultimately succeed on the merits. And that likelihood creates the uncertainty that a future court may "unwind" the marriages that Plaintiffs and other same-sex couples enter into in the interim.

### *4. The Public Interest Weighs in Favor of a Stay*

Avoiding the uncertainty discussed above weighs heavily in favor of staying the Injunction pending appeal. Given the Supreme Court's willingness to stay the Utah injunction pending appeal evinces the public interest in granting a stay.

Further, by reaffirming Pennsylvania's commitment to man-woman marriage in 1996, the people of Pennsylvania have declared clearly and consistently that the public interest lies with preserving the institution of marriage as it stands. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[T]he district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal.").

As explained above, if the Injunction is not stayed, Pennsylvania will experience the same unnecessary and avoidable chaos, confusion, conflict, uncertainty, and spawn of further litigation and administrative actions seen Utah. There, hundreds of same-sex couples got marriage licenses before the Supreme Court stayed the Utah district court's injunction. That caused significant damage to the rule of law and the orderly resolution of the important issue of the constitutionality of man-woman marriage. It plunged the State of Utah, its

administrative agencies, its same-sex couples, and its citizens generally into uncertainty, chaos, and confusion over the marital status of the same-sex-couples who got marriage licenses in that State before the Supreme Court stepped in. Granting a stay will help to mitigate the uncertainty experienced there.

Put simply, the people of Pennsylvania have expressed their concerns and beliefs about this sensitive area and have crafted Pennsylvania's Marriage Laws with the best interests of society in mind. There is nothing in the Fourteenth Amendment that compels this Court to second-guess the Pennsylvania Legislature's considered judgment of the public interest.

## V. CONCLUSION

For the foregoing reasons, Intervenor requests that this Court issue a stay of the Order dated May 20, 2014.

DATED: June 6, 2014 By: /s/ *Jeffrey A. Conrad*

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(2)**

I hereby certify that the foregoing document does not exceed 5,000 words as it contains 3,707 words in compliance with this Middle District's Local Rule 7.8(b)(2).

By: /s/ *James M. Smith*

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| | : | |
| MICHAEL WOLF, in his official Capacity as Secretary, Pennsylvania Department of Health, et al., | : | |
| | : | |
| Defendants. | : | |

## CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2014, I electronically filed the foregoing Brief in Support of Intervenor's Motion for Stay with the Clerk of Court using the ECF system, which will effectuate service of this filing on the following ECF-registered counsel by operation of the Court's electronic filing system:

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