Case No. 13-4178

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEREK KITCHEN, *et al.*,

Plaintiffs and Appellees,

v.

GARY R. HERBERT, *et al.*,

Defendants and Appellants.

On Appeal from the United States District Court, District of Utah
Case No. 2:13-CV-217, Honorable Robert J. Shelby

BRIEF OF *AMICUS CURIAE* ALLIANCE FOR A BETTER UTAH IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE OF ORDER

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT v

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. UTAH'S POLITICAL SYSTEM, DOMINATED BY A SINGLE IDEOLOGY, SILENCES MINORITIES AND DEPRIVES THEM OF FUNDAMENTAL RIGHTS 3

A. Utah's Political System Shuts Out Minority Perspectives 3

B. Utah's Political Structure has Allowed its Insulated Majority to Promulgate Laws That Unduly Burden Gays and Lesbians 9

II. THE JUDICIARY MUST PROTECT FUNDAMENTAL RIGHTS IN THE FACE OF MAJORITARIAN POLITICAL OPPRESSION 17

III. THE MARRIAGE BANS UNCONSTITUTIONALLY DEPRIVE UTAHNS OF THE FUNDAMENTAL RIGHT TO MARRY 20

A. The U.S. Constitution Guarantees a Fundamental Right to Marry… 20

B. The Marriage Bans Impinge upon the Right to Marry 23

1. The Marriage Bans Deprive Gay and Lesbian Utahns of Significant Government Benefits 24

2. The Marriage Bans Cannot Survive Strict Scrutiny 26

CONCLUSION 29

CERTIFICATE OF COMPLIANCE

ECF CERTIFICATIONS

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Carey v. Population Servs. Int'l.,
431 U.S. 678 (1977).....22

Cleveland Bd. of Educ. v. LaFleur,
414 U.S. 632 (1974).....22

Griswold v. Connecticut,
381 U.S. 479 (1965).....20, 22

Hodgson v. Minnesota,
497 U.S. 417 (1990).....22

Kitchen v. Herbert,
No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013).....26, 27

Kusper v. Pontikes,
414 U.S. 51 (1973).....27

Lawrence v. Texas,
539 U.S. 558 (2003).....22

Loving v. Virginia,
388 U.S. 1 (1967).....20, 22, 28

M.L.B. v. S.L.J.,
519 U.S. 102 (1996).....20, 22, 28

Maynard v. Hill,
125 U.S. 190 (1888).....20

McCreary County v. Am. Civil Liberties Union,
545 U.S. 844 (2005).....18

Meyer v. Nebraska,
262 U.S. 390 (1923).....21, 22

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010).....25

Planned Parenthood v. Casey,
505 U.S. 833 (1992).....21

Turner v. Safley,
482 U.S. 78 (1987).....20, 23

U.S. v. Windsor,
133 S. Ct. 2675 (2013).....25, 26, 28

W. Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943).....18

Washington v. Glucksberg,
521 U.S. 702 (1997).....21, 26

Zablocki v. Redhail,
434 U.S. 374 (1978).....20, 22

STATE CASES

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993).....10

STATUTES

Utah Code
§ 30-1-2.....10
§ 30-1-2(5).....10
§ 30-1-4.....10
§ 30-1-4.1.....10, 12
§ 30-1-4.5.....12
§ 30-1-8.....12
§ 63I-3-203.....15
§ 75-2-103 (1998).....24
§ 75-2a-108 (2007).....24

OTHER AUTHORITIES

Federal Rules of Appellate Procedure

Rule 26.1 v
Rule 29 ..... v, 1

Utah Constitution Article I, § 29 ..... 10, 12

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Alliance for a Better UTAH is a non-profit organization headquartered in Salt Lake City, Utah. Pursuant to Fed. R. App. P. 26.1 and 29(c), *Amicus* does not have a parent corporation or stock which a publicly held corporation can hold.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Alliance for a Better UTAH is a nonprofit, nonpartisan organization that works toward increased political balance, transparency, and accountability in Utah government. In accordance with this mission, *Amicus* opposes laws that deprive Utahns of fundamental rights. For these reasons, *Amicus* submits this brief in support of Appellees and the recognition of the right of gay and lesbian Utahns to marry.

In accordance with Fed. R. App. P. 29, the parties have consented to the filing of this *amicus curiae* brief. (Joint Notice of Consent to File Br. of Amicus Curiae.) No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the brief's preparation or submission to the Court. No person other than *Amicus*, its members, or its counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Fundamental rights may not be subject to a popularity contest. In this case, the fundamental rights of gay and lesbian Utahns have been trampled on by the State's insulated political and social majority. This Court has a constitutionally commissioned role to defend those rights.

Utah's Legislature—the source of nearly four decades of unvarnished discrimination against gays and lesbians—is singularly accountable to the State's partisan and religious majority. By virtue of structural protections such as indefinite terms, gerrymandered legislative districts, and a convention system for candidate nomination, the State's Republican majority faces no real opposition at the ballot box, and little policy challenge or competition in the committees and on the floors of the Legislature.

Secure in its majority, the Legislature has shunned minority viewpoints and deprived those with whom it disagrees—or does not approve of—of fundamental rights. The Legislature promulgated the laws Appellees challenge in this case—the prohibition of gay and lesbian marriages in Utah—with awareness that a fundamental right was at stake and without any articulable rational basis. It then submitted the issue to Utah's citizens for a vote. Utah's predominant religion ensured that the measure passed, thereby codifying the cultural animus of the majority into Utah's state constitution.

The Legislature's deeply entrenched politics of discrimination have deprived gay and lesbian Utahns of their fundamental right to marry, as well as access to substantial state and federal benefits. The State has no justification for doing so. When the majority demonstrates itself to be unwilling or incapable of protecting the rights of the minority, it is the role of the judiciary to do so. The District Court assumed this responsibility and appropriately found the State's actions an unconstitutional infringement on the fundamental rights of gay and lesbian Utahns.

This Court should affirm the order on appeal.

ARGUMENT

I. UTAH'S POLITICAL SYSTEM, DOMINATED BY A SINGLE IDEOLOGY, SILENCES MINORITIES AND DEPRIVES THEM OF FUNDAMENTAL RIGHTS

A. Utah's Political System Shuts Out Minority Perspectives

Utahns do not have one political voice. Utah's Legislature, however, fails to represent the multiplicity of its citizens' perspectives. Instead, it is controlled by a Republican majority that has quashed any opportunity for healthy political discourse.[1] Utah's political unaccountability to minorities is exacerbated by the State's religious homogeny, especially on social issues, such as the rights of its gay

[1] The current Legislature is comprised of 85 Republicans and 19 Democrats. *See Representatives*, State of Utah House of Representatives, http://le.utah.gov:443/house2/representatives.jsp (last visited Feb. 22, 2014); *Utah State Senate Roster*, Utah State Senate, http://www.utahsenate.org/aspx/roster.aspx (last visited Feb. 22, 2014).

and lesbian citizens. Utah's political processes are thus ill-suited to protect the rights of gays and lesbians.

Utah's political majority has consistently, with hegemonic self-interest, insulated itself from minority challenge. Foremost among its tactics of structural exclusion is partisan legislative districting. Utah is one of only two states in the Western United States to allow a single political party to control legislative districting.[2] In establishing legislative districts—and in stark contrast to all but one of Utah's neighboring states—the ruling majority is free to ignore established communities of interest and has little accountability to the public.[3] Utah's

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[2] *See* Matthew May & Gary F. Moncrief, *Reapportionment and Redistricting in the West*, *in* Reapportionment and Redistricting in the West 39, 53 (Gary F. Moncrief ed., 2011). Notably, Utah residents are opposed to this redistricting process, with 73% of residents favoring the creation of an independent redistricting commission. *See id.*

[3] Utah is one of only two states in the West that does not require state legislative boundaries to account for communities of interest. Justin Levitt, *Redistricting and the West: The Legal Context*, *in* Reapportionment and Redistricting in the West 15, 36 n.61 (Gary F. Moncrief ed., 2011). Although public hearings were held before the most recent redistricting was completed in 2011, the interests of the majority in further weakening political opposition outweighed the interests of the public in contiguous representative districts, resulting in the redistricting committee ignoring public input. *See* David F. Damore, *Reapportionment and Redistricting in the Mountain West*, *in* America's New Swing Region: Changing Politics and Demographics in the Mountain West 153, 171, 177–78 (Ruy Teixeira ed., 2012). Further delegitimizing the redistricting process in Utah is the secrecy surrounding the process. In the 2011 redistricting process, after all the public hearings had concluded, the Utah Legislature adjourned a public legislative session in order to resolve disagreements about the redistricting within the Republican Party behind

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Republican majority has used its redistricting power to gerrymander state legislative districts and ensure that "Democratic voters [are] distributed as inefficiently as possible."[4] The effect of this gerrymandering has only been made worse by the Legislature's repeal of its own term limits in 2003.[5] As a result of redistricting abuses, minority viewpoints—often, but not exclusively, represented by the State's Democratic party[6]—have, put generously, "little hope" of being represented in state government "beyond threats of legal action."[7]

(footnote continued…)

closed doors. *See* Adam R. Brown, *Utah: Pizza Slices, Doughnut Holes, and One-Party Dominance, in* The Political Battle over Congressional Redistricting 17, 35 (William J. Miller & Jeremy D. Walling eds., 2013).

[4] *See* David F. Damore, *Reapportionment and Redistricting in the Mountain West, in* America's New Swing Region: Changing Politics and Demographics in the Mountain West 153, 164 (Ruy Teixeira ed., 2012).

[5] *Id*. at 179; *see also* Term Limit Repeal, S.B. 240, 55th Leg., 2003 Gen. Sess. (Utah 2003), *available at* http://le.utah.gov/~2003/bills/sbillenr/sb0240.htm.

[6] Even when Republican legislators propose legislation designed to protect minorities, it is often stifled by the majority. This legislative session, Republican State Senator Stephen Urquhart reintroduced a bill that would prevent discrimination in housing and employment based on sexual orientation, after the bill failed during last year's legislative session. *See* Antidiscrimination Amendments, S.B. 100, 60th Leg., 2014 Gen. Sess. (Utah 2014), *available at* http://le.utah.gov/~2014/bills/static/SB0100.html; Employment and Housing Antidiscrimination Amendments, S.B. 262, 60th Leg., 2013 Gen. Sess. (Utah 2013), *available at* http://le.utah.gov/~2013/bills/sbillint/SB0262.htm. Rather than allow the bill to make its way through the legislative process, Utah's legislative majority has effectively put the bill on hold. It did so on the advice of Appellants' counsel because public debate on the bill would reveal the Legislature's animus towards gay and lesbian Utahns and undermine this appeal. *See* Robert Gehrke,

(cont.…)

Even among members of the State's majority Republican Party, moderate voices receptive to minority viewpoints are drowned out as a result of Utah's convention system for candidate selection. Given Utahns' general predisposition to vote Republican, the process of nominating that party's candidates for the Legislature is more determinative of the State's legislative makeup than the general election.[8] A tiny fraction of Utahns participate in the convention system responsible for selecting legislative candidates, with "99.8% of the population being treated as irrelevant during the most determinative stage in [Utah's] election

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(footnote continued…)

Urquhart Wants Public Outpouring on Discrimination Bill, Salt Lake Tribune, Jan. 31, 2014, *available at* http://www.sltrib.com/sltrib/politics/57479273-90/attorney-ban-bill-bills.html.csp; Robert Gehrke, *Senator Says Attorney in Gay Marriage Case Has Conflict of Interest*, Salt Lake Tribune (Feb. 5, 2014), *available at* http://www.sltrib.com/sltrib/politics/57500631-90/bill-schaerr-urquhart-attorney.html.csp.

[7] David F. Damore, *Reapportionment and Redistricting in the Mountain West*, *in* America's New Swing Region: Changing Politics and Demographics in the Mountain West 153, 178 (Ruy Teixeira ed., 2012).

[8] Robert Bennett, *Caucuses Overshadow the Elections, Count My Vote Aims To Empower Voters*, Deseret News, Feb. 3, 2014, *available at* http://www.deseretnews.com/article/865595485/Caucuses-overshadow-the-elections-Count-My-Vote-aims-to-empower-voters.html?pg=all ("Since winning the Republican nomination almost always means winning the election in one-party Utah, what happens in Republican caucuses usually determines who the office holders will be.").

process."[9] The system is thus susceptible to being controlled by organized interest groups and incumbents.[10] As a result, Utah's legislators are selected by delegates who are more ideologically extreme than the citizens they represent, keeping moderate political newcomers from appearing on the ballot.[11] Utah's convention system also insulates the State's legislators from accountability to minorities, who are underrepresented among the delegates selecting those legislators.[12]

Utah's lack of political accountability to minority views is exacerbated by the State's overwhelming religious homogeny. Almost two-thirds of Utahns are members of the Church of Jesus Christ of Latter-Day Saints (the "LDS Church").[13] This religious uniformity is reflected in the Legislature as well, where the majority

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[9] *See* Amie Richards, *Controversy and Constitutionality: An Analysis of the Convention System in Utah*, 12 Hinckley Journal of Politics 29, 32 (2011).

[10] *Id.* at 31-32.

[11] *Id.* at 31-33.

[12] *Id.* at 33 ("The current system under represents women, ethnic minorities, and people who are not members of The Church of Jesus Christ of Latter-day Saints ….").

[13] *See* Matt Canham, *Census: Share of Utah's Mormon Residents Holds Steady*, Salt Lake Tribune, Apr. 17, 2012, *available at* http://www.sltrib.com/sltrib/home3/53909710-200/population-lds-county-utah.html.csp ("Utah's population is 62.2 percent LDS and that percentage hasn't moved much in the past three years.").

of legislators are LDS.[14] LDS theology, therefore, indirectly affects state law as a result of this overwhelming affiliation of Utah voters and legislators.[15] The LDS Church also takes a direct role on certain social issues.[16] For example, the LDS Church often takes a vocal position on legislation concerning issues such as alcohol, gambling, and gay and lesbian rights, with legislators at times refusing to enact legislation on these issues without the approval of the Church's leadership.[17] When the LDS Church sets out official positions on matters of public policy, members of the LDS community adhere to those positions to a degree uncommon

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[14] *See* Lee Davidson, *How Utah's Capitol Marches to a Mormon Beat*, Salt Lake Tribune, Mar. 28, 2012, *available at* http://www.sltrib.com/sltrib/home3/53709967-200/lds-church-says-position.html.csp.

[15] *Id.*

[16] *Id.*; *see also* David E. Campbell & J. Quin Monson, *Following the Leader? Mormon Voting on Ballot Propositions*, 42 J. Sci. Study Religion 605, 606 (2003) (documenting LDS Church's involvement in legislation concerning women's rights, marriage equality, and gambling). For a recent example of the LDS Church's direct intervention in state legislation, *see* Press Release, Church of Jesus Christ of Latter-Day Saints, Church Says Existing Alcohol Laws Benefit Utah (Jan. 21, 2014) (available at http://www.mormonnewsroom.org/alcohol-laws-utah) ("The Church is opposed to any legislation that will weaken Utah's alcohol laws and regulations ….").

[17] Lee Davidson, *How Utah's Capitol Marches to a Mormon Beat*, Salt Lake Tribune, Mar. 28, 2012, *available at* http://www.sltrib.com/sltrib/home3/53709967-200/lds-church-says-position.html.csp.

in other faiths.[18] The effect of the LDS Church taking a stance on an issue like same-sex marriage can be seen on the floor of the Legislature and at the ballot box, further undermining any ability for minorities in Utah to protect their rights through political processes.

B. Utah's Political Structure has Allowed its Insulated Majority to Promulgate Laws That Unduly Burden Gays and Lesbians

Over a period of nearly four decades, the State of Utah has utilized its highly majoritarian political structure and cultural identity to systematically deprive gays and lesbians of their fundamental right to marriage and its associated benefits. Beginning in the 1970s, the State enacted a series of laws preventing same-sex

[18] *See* David E. Campbell & J. Quin Monson, *Following the Leader? Mormon Voting on Ballot Propositions*, 42 J. Sci. Study Religion 605, 608, 615–17 (2003) (concluding that, when LDS Church leadership speaks out on public policy issues, LDS members are likely to support that position in political processes). This adherence to the political directives of LDS leadership by the faithful has its origins in the religion's unique theology. The LDS Church is led by a "First Presidency," comprised of the President of the LDS Church and his two counselors. Church of Jesus Christ of Latter-Day Saints, *First Presidency*, *available at* http://www.lds.org/topics/first-presidency?lang=eng. LDS doctrine teaches that the members of the First Presidency are also "prophets, seers and revelators," guiding the church through divine inspiration, and that official statements from LDS leadership are considered commandments from God. *Id.*; *see also* Church of Jesus Christ of Latter-Day Saints, *Prophets*, *available at* http://www.lds.org/topics/prophets?lang=eng&query=prophet. Thus, "[w]hen the prophet speaks, . . . the debate is over." N. Eldon Tanner, First Counselor in the First Presidency, *First Presidency Message: The Debate Is Over*, Ensign, Aug. 1979, *available at* https://www.lds.org/ensign/1979/08/the-debate-is-over?lang=eng.

couples from marrying in Utah and refusing to recognize same-sex marriages and unions entered into in other jurisdictions.[19] The Legislature did so aware of the fundamental right it was foreclosing from its citizens.

In 1977, the Utah Legislature first formally prohibited same-sex marriage with a provision added unceremoniously as an amendment to a bill ostensibly designed to prohibit marriages of children under the age of fourteen.[20] Removal of Age Distinctions Regarding Void and Prohibited Marriage, H.B. 3, 42nd Leg., 1977 1st Spec. Sess. (Utah 1977) (enacted at Utah Code § 30-1-2(5)). In 1995, in response to the judicial challenge to Hawaii's prohibition of same-sex marriages, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), Utah became the first state to enact legislation specifically designed to deny recognition of out-of-state same-sex marriages. Recognition of Marriage, H.B. 366, 51st Leg., 1995 Gen. Sess. (Utah 1995) (enacted at Utah Code § 30-1-4).[21] The Legislature did so notwithstanding

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[19] These statutes include Utah Code §§ 30-1-2, 30-1-4, 30-1-4.1 and Utah Constitution Article I, § 29. These laws are collectively referred to herein as the "Marriage Bans."

[20] *See* Removal of Age Distinctions Regarding Void and Prohibited Marriage, H.B. 3, 42nd Leg., 1977 1st Spec. Sess. (Utah 1977) (bill as amended) (ban on same-sex marriage visibly pasted onto bill). A copy of the amended bill is attached as Addendum Exhibit 1.

[21] *See also* William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender, and the Law 545 (abridged ed. 2006). Appellees correctly note that the 1995 ban was a significant departure from Utah's then-existing "place of celebration rule" (or "lex loci celebrationis"). (Br. of Appellees 89–91.) In a memorandum to State Senator

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acknowledgement by its General Counsel's office that "marriage is a fundamental constitutional right" and that the bill presented "known constitutional or statutory conflicts or problems," including "[p]ossible due process issues since marriage is a fundamental constitutional right" and "[f]ull faith & credit issues."[22] In contrast to Appellants' current litigation position,[23] the State recognized nearly two decades ago that marriage bans like the 1995 ban could only withstand a constitutional

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(footnote continued…)

LeRay McAllister, Brigham Young University professor Lynn Wardle proposed legislation that would eventually become the 1995 ban because "UCA [Utah Code Annotated] 30-1-4 correctly states the general choice of law rule of lex loci celebrationis, but it fails to also express the well-established [public policy] exception." Memorandum from Lynn D. Wardle, Professor, Brigham Young University J. Reuben Clark Law School, to LeRay McAllister, Senator, Utah Senate (Jan. 19, 1995). This letter is included in the State's legislative file for H.B. 366, available at http://le.utah.gov/Documents/bills.htm by following the "1990-Ongoing: Bill Files" hyperlink and searching the 1995 General Session files for H.B. 366. A copy of the Legislative Review Letter is attached as Addendum Exhibit 2. Professor Wardle believed codifying a public policy exception to Utah's marriage recognition statute was necessary because, "unless changed, [the statute] could lead to Utah courts having to recognize as valid in Utah same-sex marriages." *Id*.

[22] Janetha W. Hancock, Utah Office of Legislative Research & General Counsel, Legislative Review Letter (Feb. 14, 1995). This letter is included in the State's legislative file for H.B. 366, *available at* http://le.utah.gov/Documents/bills.htm by following the "1990-Ongoing: Bill Files" hyperlink and searching the 1995 General Session files for H.B. 366. A copy of the Legislative Review Letter is attached as Addendum Exhibit 3.

[23] Appellants now deny that the Marriage Bans must survive strict scrutiny review, arguing that the bans are subject only to rational basis review. (Br. of Appellants 43-46.)

challenge if they survived a strict scrutiny analysis, because "the right to marry is a fundamental constitutional right requiring that a strict scrutiny standard be applied to any legislation that may be alleged to diminish that right."[24]

In 2004, the Legislature enacted a statute establishing as "the policy of this state" that only marriages between a man and woman would be recognized and amending existing marriage statutes to apply only to marriages between a man and a woman. Marriage Recognition Policy, S.B. 24, 55th Leg., 2004 Gen. Sess. (Utah 2004) (enacted at Utah Code §§ 30-1-4.1, 30-1-4.5, 30-1-8), *available at* http://le.utah.gov/~2004/bills/sbillenr/sb0024.htm. It also directed the Lieutenant Governor to submit to a public vote a state constitutional amendment purporting to define "marriage" as "the legal union between a man and a woman" and prohibiting recognition in the state of Utah of any other domestic union, an amendment commonly referred to as Amendment 3. Joint Resolution on Marriage, H.J.R. 25, 55th Leg., 2004 Gen. Sess. (Utah 2004), *available at* http://le.utah.gov/~2004/bills/hbillenr/hjr025.htm; *see* Utah Const. art. I, § 29.

[24] Letter from Janetha W. Hancock, Associate General Counsel, Utah Office of Legislative Research & General Counsel, to Norm Nielsen, Representative, Utah House of Representatives (Feb. 8, 1995). This letter is included in the State's legislative file for H.B. 366, *available at* http://le.utah.gov/Documents/bills.htm by following the "1990-Ongoing: Bill Files" hyperlink and searching the 1995 General Session files for H.B. 366. A copy of the letter is attached as Addendum Exhibit 4.

As reflected in the legislative history, the Legislature enacted the 2004 Marriage Ban and proposed Amendment 3, knowing that marriage is a fundamental right and that the bans were susceptible to constitutional challenge under federal due process or equal protection grounds.[25] Specifically, Amendment 3 was opposed by Utah's legislative minority on the grounds that the amendment discriminated against gays and lesbians and had no rational basis. Utah Senator Gene Davis stated his belief that the amendment was a form of discrimination against gays and lesbians that was being considered simply because the Legislature did not approve of their lifestyle.[26] More to the point, Utah State Representative David Litvack questioned the constitutionality of the amendment by asking Representative LaVar Christensen, the amendment's sponsor, to provide a rational

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[25] *See* Legislative Review Note, included with H.J.R. 25, 55th Leg., 2004 Gen. Sess. (Utah 2004) (bill as introduced) (App. in Support of Defs.' Mot. for Summ. J. 4-5, D. Ct. Dkt. 34) ("If the amendment to the Utah Constitution proposed by this joint resolution is approved by voters and becomes part of the Utah Constitution, it may be susceptible to challenge under federal due process or equal protection grounds."); Legislative Review Note, included with S.B. 24, 55th Leg., 2004 Gen. Sess. (Utah 2004) (bill as introduced) (recognizing that "marriage is a fundamental right" and that the amendment implicated the due process and equal protection clauses of the U.S. Constitution), *available at* http://le.utah.gov/~2004/bills/sbillint/sb0024s01.htm.

[26] Addendum Ex. 5 at 16 (statements of Sen. Davis). Audio recordings of the legislative debates on Amendment 3 are available at http://le.utah.gov/jsp/jdisplay/billaudio.jsp?sess=2004GS&bill=hjr025&Headers=true. For the Court's convenience, unofficial transcriptions of the excerpts of the Legislative debates quoted herein are attached as Addendum Exhibit 5.

basis for the amendment. Representative Christensen said that he was unable to do so—or even "engage in such a discussion"—if he had to "take God and religion and constitutional authority out of the picture" and explain the basis for the amendment "'with just intellectualism, logic, and reasoning.'"[27]

In addition to its substantive unfairness and constitutional infirmities, Amendment 3 was opposed because it was unnecessarily rushed through the legislative process.[28] Most notably, the Legislature refused to submit the resolution to Utah's bipartisan Constitutional Revision Committee (the body charged with reviewing and advising the Legislature on state constitutional amendments) for study, a significant deviation from the standard practice at the

[27] Addendum Ex. 5 at 3–5 (statements of Reps. Litvack and Christensen). Representative Litvack responded in part by urging "[f]or years we fought the battle for equal rights. Let's leave room for justice, for equality. Let's leave room to evolve as a people, as a community." *Id.*

[28] The debates surrounding the resolution at both the House and Senate levels reflect legislators' concerns about the abbreviated timeframe for consideration and debate of the amendment's language. *See, e.g.*, Addendum Ex. 5 at 17 (statements of Rep. Daniels) (cautioning against "the folly in rushing this through on the last night of the legislative session without having the Constitutional Revision Commission look at it, consider each word carefully, consider the effect, think about the way it affects the Constitution and may create consequences that we haven't thought through completely."). In the Senate, even senators supporting the substance of the amendment questioned its hasty legislative path. *See, e.g.*, Addendum Ex. 5 at 11–15 (statements of Sen. Evans).

time.[29] In the House, Representative (and former state judge) Scott Daniels urged that the amendment be reviewed by the Constitutional Revision Committee, and that it otherwise would be "a real mistake to submit [Amendment 3] to the voters without [the Constitutional Revision Committee] having an opportunity to look at it."[30] Even Utah's then-Attorney General Mark Shurtleff—despite openly opposing same-sex marriage—condemned Amendment 3 precisely because of the Legislature's procedural shortcuts, especially since it was "the first time a proposed constitutional amendment ha[d] not gone through the statutorily created Constitutional Revision Commission."[31] Notwithstanding vocal opposition to its substantive and procedural flaws, Utah's legislative majority passed the resolution.

When the Legislature put Amendment 3 before Utah voters, the LDS Church all but ensured its passage by announcing its support in two official statements. The first was made by the LDS Church's First Presidency on July 7, 2004 and

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[29] The Utah Legislature has since effectively removed this independent check on its majoritarian activities by amending away the bulk of the Constitutional Revision Commission's statutory authority. State Commission Amendments, S.B. 44, 59th Leg., 2011 Gen. Sess. (Utah 2011) (enacted at Utah Code § 63I-3-203), *available at* http://le.utah.gov/~2011/bills/sbillenr/sb0044.htm. This move was viewed by many as serving no purpose other than to protect legislators' "gut feelings and political grandstanding" on constitutional issues from unbiased reasoned review. *See, e.g.*, Editorial, *Just Wing It*, Salt Lake Tribune, Jan. 31, 2011, *available at* http://archive.sltrib.com/article.php?id=13292427&itype=storyID.

[30] Addendum Ex. 5 at 3 (statements of Rep. Daniels).

[31] App. in Support of State Defs.' Mot. for Summ. J. 186, D. Ct. Dkt. 36.

simply said, "The Church of Jesus Christ of Latter-day Saints favors a constitutional amendment preserving marriage as the lawful union of a man and a woman."[32] Again on October 20, 2004, less than two weeks before Utahns would vote on Amendment 3, the LDS Church reiterated its position in another statement by the First Presidency:

> Any other sexual relations, including those between persons of the same gender, undermine the divinely created institution of the family. The Church accordingly favors measures that define marriage as the union of a man and a woman and that do not confer legal status on any other sexual relationship.[33]

By expressly supporting Amendment 3, the LDS Church ensured that many faithful LDS Utahns would vote for its adoption.[34] The measure passed with the approval of 65.9% of Utah voters.[35]

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[32] Press Release, Church of Jesus Christ of Latter-Day Saints, First Presidency Statement: Constitutional Amendment (July 7, 2004), *available at* http://www.ldschurchnews.com/articles/45827/First-Presidency-statement-Constitutional-amendment.html.

[33] Press Release, Church of Jesus Christ of Latter-Day Saints, First Presidency Statement on Same-Gender Marriage (Oct. 20, 2004), *available at* http://www.mormonnewsroom.org/article/first-presidency-statement-on-same-gender-marriage.

[34] *See generally* David E. Campbell & J. Quin Monson, *Following the Leader? Mormon Voting on Ballot Propositions*, 42 J. Sci. Study Religion 605 (2003) (detailing LDS adherence to official LDS policy positions in voting behavior).

[35] Utah Lieutenant Governor's Office, 2004 Election Results, *available at* http://elections.utah.gov/Media/Default/Documents/Election_Results/General/2004Gen.pdf. As Appellees note, Utah voters, like the Legislature, approved Amendment 3 despite being told in official ballot materials that the Amendment

(cont…)

II. THE JUDICIARY MUST PROTECT FUNDAMENTAL RIGHTS IN THE FACE OF MAJORITARIAN POLITICAL OPPRESSION

The unbridled majoritarian will of Utah's Legislature and voters demonstrates precisely why, "when it comes to politically powerless minorities, or ensuring the proper workings of the political process, or safeguarding fundamental rights, the political process—and popular constitutionalism—cannot be trusted." Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 Calif. L. Rev. 1013, 1022 (2004) (citing *U.S. v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938)). In such circumstances, the constitutional role of the judiciary is acutely necessary to protect minorities.

According to Appellants, it "is not the place or function of the judiciary" to interfere with public discourse on divisive social issues. (Brief of Appellants 98–100.) Rather, they argue, society's treatment of individual rights must be "reserved for the political branches or for the People speaking at the ballot box." *Id.* at 100. This position is directly at odds with the protections afforded by the United States Constitution.

It is the "very purpose" of our Constitutional form of government "to withdraw certain subjects from the vicissitudes of political controversy, to place

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(footnote continued…)

was in "potential conflict" with the U.S. Constitution and was "subject to challenge" on that basis. (Br. of Appellees 7–8.)

them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Fundamental rights defining an individual's life, liberty, and identity are simply too important to be submitted to a popularity contest. *See id.* ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *see also McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844, 884 (2005) (O'Connor, J. concurring) (noting that the Justices "do not count heads" before enforcing fundamental rights).

Appellants are not mistaken that public discourse about such topics as the nature of fundamental rights is beneficial to society. They are flatly wrong, however, when they assert that those who are deprived of those rights must step aside while the then-dominant societal view prevails. Because majoritarian political processes can threaten individual rights, the venerable charge of protecting those rights lies with the judiciary.

The United States Constitution established an independent judiciary precisely to avoid majoritarian oppression like that manifest in the Marriage Bans. As Alexander Hamilton observed in 1788:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves,

> and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

The Federalist No. 78 (Alexander Hamilton). The mistaken conjunctures underlying the laws challenged by Appellees—and forming the so-called "factual" bases of Appellants' brief—are giving way to better information, both nationally and in Utah but not in the Legislature or at the ballot box.[36] The District Court therefore properly refused to defer to the approach advocated by Appellants when it invalidated the laws that unconstitutionally deprive Utahns of essential individual rights.

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[36] In the ten years since Amendment 3 was enacted, popular approval of same-sex marriage has increased substantially among Utahns, if not within state government. When asked in a recent poll "Should same-sex couples in Utah be allowed to get state-issued marriage licenses?", Utahns were split evenly—48% to 48%—in their support and opposition for marriage equality. *See* Brooke Adams, *Poll: Utahns Evenly Split on Same-Sex Marriage*, Salt Lake Tribune, Jan. 14, 2014, *available at* http://www.sltrib.com/sltrib/news/57391605-78/marriage-sex-percent-state.html.csp. Notwithstanding this shift in Utah public sentiment, the Legislature nonetheless maintains its support for discriminatory laws, with 81 of the 85 Republican Utah legislators currently in office vocally supporting the Marriage Bans in an *amicus curiae* brief filed in support of Appellants. (Br. of Amici Curiae Eighty One Utah State Legislators in Support of Defendants-Appellants and Reversal.)

In stark contrast to Utah's leadership, several states with same-sex marriage bans have decided not to defend those laws in judicial challenges, including recent decisions by Oregon, Nevada, and Virginia. *See Oregon: Attorney General Won't Defend Ban on Gay Marriage*, N.Y. Times, Feb. 20, 2014, *available at* http://www.nytimes.com/2014/02/21/us/oregon-attorney-general-wont-defend-ban-on-gay-marriage.html.

The District Court correctly guarded the right of gay and lesbian Utahns to marry, when political processes failed to do so. That Order should be affirmed.

III. THE MARRIAGE BANS UNCONSTITUTIONALLY DEPRIVE UTAHNS OF THE FUNDAMENTAL RIGHT TO MARRY

A. The U.S. Constitution Guarantees a Fundamental Right to Marry

As its General Counsel has acknowledged several times to the State Legislature, marriage is a fundamental right. Marriage is at once deeply personal and "intimate to the degree of being sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), while also forming "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Accordingly, "the right to marry is of fundamental importance for ***all*** individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added). Marriage, then, is a liberty the Constitution protects "against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). It is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as a "fundamental freedom."); *see also M.L.B.*, 519 U.S. at 116 (stating that "[c]hoices about marriage" are among the "rights sheltered by the Fourteenth Amendment."); *Zablocki*, 434 U.S. at 383 (citing *Loving* in support of the proposition that "the freedom to marry" is "a fundamental liberty protected by the Due Process Clause."); *Turner v. Safley*, 482 U.S. 78, 95 (1987)

(in which petitioners conceded that the *Zablocki* and *Loving* decisions hold that "the decision to marry is a fundamental right."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the "liberty" protected by the Fourteenth Amendment "[w]ithout doubt" includes the right to marry.). The Marriage Bans violate this fundamental principle and deprive gay and lesbian Utahns of their constitutionally guaranteed right to marry.[37]

The Due Process Clause also protects highly personal and private decisions that marriage necessarily entails—for *any* person, regardless of sexual orientation—such as a person's choice of whom to wed, a couple's physical intimacy, a couple's decision of when, if at all, to have children, and a couple's decisions about how to raise and educate its children. The Court has held that these decisions are "central to personal dignity and autonomy" and involve "the most intimate and personal choices a person may make in a lifetime," and accordingly "are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (the Fourteenth

[37] Because the Supreme Court has already declared that the right to marry is fundamental, Appellees are correct in noting that there is no need to reassess the issue under the two-step process outlined in *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). (Br. of Appellees 34 n.5.)

Amendment protects "decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").[38]

State laws that restrict the right to marry, like Utah's Marriage Bans, have been routinely overturned. In 1967, the Supreme Court struck down Virginia's anti-miscegenation law holding that the statute impermissibly deprived interracial couples of the "freedom to marry" they were guaranteed under the Due Process Clause. *Loving*, 388 U.S. at 12. Eleven years later, the Supreme Court struck down a Wisconsin law requiring residents whose children were not in their custody to obtain court orders before they could wed because the statute "interfere[d] directly and substantially with the right to marry." *Zablocki*, 434 U.S. at 387. In

[38] *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (the Supreme Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (Constitution protects right to express sexuality "in intimate conduct with another person."); *Meyer*, 262 U.S. at 399 (the Fourteenth Amendment protects the right to marry and to "establish a home and bring up children," among others); *M.L.B.*, 519 U.S. at 116 (the Fourteenth Amendment protects "[c]hoices about marriage, family life, and the upbringing of children."); *Griswold*, 381 U.S. at 485 (married couples' decisions about the use of contraception are constitutionally protected because marriage is "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."); *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 684–85 (1977) (decisions regarding marriage, procreation, contraception, family relationships, child rearing and education are constitutionally protected from government interference under the Due Process Clause of the Fourteenth Amendment); *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (families have constitutionally-protected privacy interests "in the upbringing and education of children and the intimacies of the marital relationship.").

1987, the Supreme Court struck down a Missouri regulation prohibiting prison inmates from marrying without the approval of the prison superintendent, because the security concerns the regulation purportedly addressed did not provide a sufficient basis for depriving incarcerated individuals of their fundamental right to marry. *Turner*, 482 U.S. at 97-98.

There is nothing new about the right to marry. Appellees in this case assert this same fundamental right grounded in the same constitutional protections as the plaintiffs in these previous cases that recognize a right to marry.

B. The Marriage Bans Impinge upon the Right to Marry

Marriage plays an integral role in Utah society and culture, which the Marriage Bans unconstitutionally prohibit for gays and lesbians. Utahns embrace the institution of marriage to a remarkable degree. Utah's marriage rate is the sixth highest in the country.[39] Utahns also marry at a younger average age than do citizens of any other state in the nation.[40] Most households in the State are headed

[39] Centers for Disease Control and Prevention, Marriage Rates by State: 1990, 1995, and 1999-2011, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf.

[40] Lee Davidson, *Census Snapshot: Utahns Again a Peculiar People*, Salt Lake Tribune, Sept. 19, 2013, *available at* http://www.sltrib.com/sltrib/politics/56888040-90/average-utah-percent-national.html.csp.

by married couples.[41] The implication of these statistics is clear: Marriage is a central aspect of life in Utah. By forbidding same-sex marriage, the Marriage Bans infringe on the fundamental rights of same-sex couples and specifically exclude those couples from participating in an integral aspect of their state's culture.

1. The Marriage Bans Deprive Gay and Lesbian Utahns of Significant Government Benefits

By denying gays and lesbians their fundamental right to marry, the State also deprives them of much more. The Marriage Bans prevent same-sex couples from accessing a panoply of special legal benefits and protections bestowed on married couples under Utah and federal laws.

As Utah's legislators themselves have documented, by denying same-sex couples the right to marry, the Marriage Bans also deny those couples benefits under Utah law, including adoption, automatic parental rights for children born through fertility treatment, premarital counseling, and the protections afforded by divorce laws. (Br. of *Amici Curiae* Eighty One Utah State Legislators in Support of Defendants-Appellants and Reversal 6-17.) Additionally, same-sex couples are denied rights afforded to married couples that facilitate end-of-life decisions and protect the surviving spouse in the event of a death without a will. *See*, *e.g.*, Utah Code §§ 75-2a-108 (2007), 75-2-103 (1998).

[41] *Id.*

Additionally, because same-sex couples in Utah are unable to marry, they are precluded from taking advantage of the considerable federal benefits available to legally married same-sex couples. *See U.S. v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (striking down as unconstitutional Section 3 of the Defense of Marriage Act, thereby effectively making federal benefits available to same-sex couples in valid marriages). Same-sex couples in Utah therefore are foreclosed from receiving federal tax, Social Security, inheritance, and other benefits reserved for married couples.[42] *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010) (outlining some of the federal benefits reserved for married couples); *see also Windsor*, 133 S. Ct. at 2683 (plaintiff had to pay over $350,000 in federal estate taxes because, at the time, the federal government did not recognize her marriage to her same-sex partner).

[42] On January 10, 2014, U.S. Attorney General Eric Holder announced that the same-sex marriages performed in Utah during the 17 days between the District Court's Order and the Supreme Court's stay would be recognized under federal law and that those couples would receive "every federal benefit to which Utah couples and couples throughout the country are entitled – regardless of whether they are in same-sex or opposite-sex marriages." Press Release, Dep't of Justice, Statement by Attorney General Eric Holder on Federal Recognition of Same-Sex Marriages in Utah (Jan. 10, 2014) *available at* http://www.justice.gov/opa/pr/2014/January/14-ag-031.html. The federal government stands ready and willing to provide federal benefits to same-sex couples in Utah; only the Marriage Bans prevent it from doing so.

The Marriage Bans therefore do more than deny same-sex couples their fundamental right to marry. They also exclude them from participating in an institution at the heart of Utah's cultural life and preclude them from taking advantage of tangible legal benefits and protections meant to support devoted couples—all on the basis of sexual orientation.[43]

2. The Marriage Bans Cannot Survive Strict Scrutiny

As recognized by the Utah Office of Legislative Research and General Counsel, laws like the Marriage Bans that diminish the fundamental right to marry must survive strict scrutiny. *See* Addendum Ex. 4. Under that standard, the laws must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721. Because the State has failed to provide any compelling state interest

[43] In this regard, the District Court correctly recognized parallels with the Supreme Court's recent *Windsor* decision. In *Windsor*, the Supreme Court held that Section 3 of the federal Defense of Marriage Act (DOMA), which denied recognition of, and withheld federal marriage benefits from, same-sex married couples, was unconstitutional because it infringed same-sex couples' right to due process under the Fifth Amendment. *Windsor*, 133 S. Ct. at 2695-96. In so holding, the *Windsor* Court recognized that Section 3 treated same-sex unions as "second-class marriages for purposes of federal law" and that Section 3's "principal purpose [was] to impose inequality." *Id*. at 2693-94. The District Court followed the Supreme Court's precedent in *Windsor* and struck down Amendment 3 because, like DOMA's Section 3, the Utah law harmed same-sex couples by relegating their relationships to second-class status, something that could not constitutionally be permitted. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *81 (D. Utah Dec. 20, 2013). Utah's Amendment 3, like DOMA's Section 3, thus harms same-sex couples by denying them benefits solely on the basis of sexual orientation and therefore should be ruled unconstitutional.

justifying the Marriage Bans—let alone shown there is no "less drastic way" of protecting that interest—the laws challenged by Appellees fail strict scrutiny and were properly struck down. *See Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.").

With the Parties' undisputed evidence before it on motions for summary judgment, the District Court appropriately determined that the Marriage Bans could not pass the much more deferential rational basis standard, which requires that a law merely be "rationally relate[d] to some legitimate governmental purpose." *Kitchen*, 2013 WL 6697874, at *68. In so holding, the District Court determined that the Marriage Bans were not rationally related to the State's purported interests, such as promoting "responsible procreation and optimal child-rearing," because forbidding same-sex couples from marrying likely would have no effect on these goals and therefore was too attenuated to be considered a rational means for achieving these ends. *Id*. at *69, *80-82. Furthermore, the District Court noted that while the concerns purportedly addressed by the Marriage Bans were merely "speculative" in nature, "the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed." *Id*. at *81.

Since the Marriage Bans cannot even pass rational basis review, they cannot survive strict scrutiny and therefore should be struck down.

The Marriage Bans are unconstitutional because "the freedom to marry, or not marry … resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12. By denying this fundamental right to individuals simply on the basis of sexual orientation, the Marriage Bans do nothing but "impose inequality" on a specific segment of the State's population. *Windsor*, 133 S. Ct. at 2694. Not even the sponsor of Amendment 3 could provide a rational basis for its enactment when asked to do so using "'just intellectualism, logic, and reasoning.'"[44] The Marriage Bans are nothing more than sad examples of the type of "unwarranted usurpation, disregard, or disrespect" of a right that the Constitution is designed to prevent. *M.L.B.*, 519 U.S. at 116. The laws, therefore, were properly struck down.

[44] Addendum Ex. 5 at 5 (statement of Rep. Christensen).

CONCLUSION

For the foregoing reasons, *Amicus* Alliance for a Better UTAH urges the Court to affirm the order on appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(c), (d) and Fed. R. App. P. 32(a)(5), (a)(6), (a)(7)(B), the undersigned certifies that this brief:

1. has been prepared in a proportionally spaced typeface using Microsoft Word and a 14 point Times New Roman font; and

2. contains 6976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In making this statement, the undersigned relies upon the word count feature of Microsoft Word.

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Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that this brief:

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. Section II(D) of the Court's CM/ECF User's Manual, the undersigned certifies that on February 28, 2014, a true, correct, and complete copy of the foregoing Brief of *Amicus Curiae* Alliance for a Better UTAH was filed with the Court and served upon the following via the Court's ECF system:

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Addendum

Addendum Index

Exhibit 1: Removal of Age Distinctions Regarding Void and Prohibited Marriage, H.B. 3, 42nd Leg., 1977 1st Spec. Sess. (Utah 1977) (bill as amended)

Exhibit 2: Memorandum from Lynn D. Wardle, Professor, Brigham Young University J. Reuben Clark Law School, to LeRay McAllister, Senator, Utah Senate (Jan. 19, 1995)

Exhibit 3: Janetha W. Hancock, Utah Office of Legislative Research & General Counsel, Legislative Review Letter (Feb. 14, 1995)

Exhibit 4: Letter from Janetha W. Hancock, Associate General Counsel, Utah Office of Legislative Research & General Counsel, to Norm Nielsen, Representative, Utah House of Representatives (Feb. 8, 1995)

Exhibit 5: Unofficial Transcription of Excerpts of Legislative Debates on Joint Resolution on Marriage, H.J.R. 25, 55th Leg., 2004 Gen. Sess. (Utah 2004) (Amendment 3)

Exhibit 1

LEGISLATIVE GENERAL COUNSEL
Approved
Proofread
Indexed 6-28-77

(REMOVAL OF AGE DISTINCTIONS
REGARDING VOID AND PROHIBITED MARRIAGE)
1977
FIRST SPECIAL SESSION

Substitute
H. B. No. 3 By Georgia Peterson

AN ACT AMENDING SECTION 30-1-2, UTAH CODE ANNOTATED 1953, AS AMENDED BY CHAPTERS 42 AND 43, LAWS OF UTAH 1963, AS AMENDED BY CHAPTER 67, LAWS OF UTAH 1975, AS AMENDED BY CHAPTER 122, LAWS OF UTAH 1977; RELATING TO MARRIAGE; PROVIDING FOR REMOVAL OF CERTAIN AGE DISTINCTIONS BASED UPON SEX WITH RESPECT TO PROHIBITED AND VOID MARRIAGES; AND PROVIDING REQIREMENTS FOR VALID MARRIAGES OF PERSONS BETWEEN THE AGES OF 14 AND 16 YEARS.

14-18 -
16-18

Be it enacted by the Legislature of the State of Utah:

Section 1. Section 30-1-2, Utah Code Annotated 1953, as amended by Chapters 42 and 43, Laws of Utah 1963, as amended by Chapter 67, Laws of Utah 1975, as amended by Chapter 122, Laws of Utah 1977, is amended to read:

30-1-2. The following marriages are prohibited and declared void:

(1) With a person afflicted with syphilis or gonorrhea that is communicable or that may become communicable.

(2) When there is a husband or wife living from whom the person marrying has not been divorced.

(3) When not solemnized by an authorized person, except as provided in section 30-1-5.

(4) When ~~[at the time of marriage]~~ the male or female is under sixteen years of age ~~[with the consent of either parent having custody of the male or female and certification of pregnancy furnished to the county clerk by a licensed physician~~

Substitute

H. B. No. 3

~~and--when--neither--party--is--under--the-age-of-fourteen~~] unless consent is obtained as provided in section 30-1-9 [and certification of pregnancy is furnished to the county clerk by a licensed physician.]

(5) When the male or female is under 14 years of age.

[~~(5)~~] (6) Between a divorced person and any person other than the one from whom the divorce was secured until the divorce decree becomes absolute, and, if an appeal is taken, until after the affirmance of the decree.

(7) Between persons of the same sex.

3. This bill to become effective immediately. 6/23/77

...OFFICE OF THE LEGISLATIVE FISCAL ANALYST

H. B. No. 3

...ther required.

OFFICE OF THE LEGISLATIVE FISCAL ANALYST

LEGISLATIVE GENERAL COUNSEL
Approved
Proofread
Indexed

SUMMARY OF PROPOSED LEGISLATION Substitute H. B. NO. 3

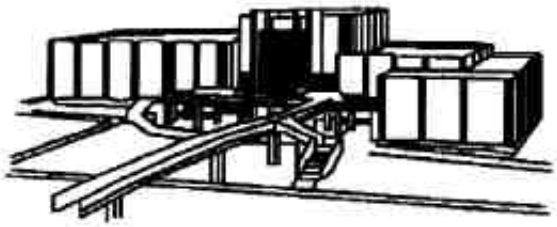
BY: Georgia Peterson

The following is a brief summary of (REMOVAL OF AGE DISTINCTIONS REGARDING VOID AND PROHIBITED MARRIAGE) This bill removes certain age distinctions based upon sex with respect to prohibited and void marriages and provides requirements for valid marriages of persons 14-16 years of age.

Exhibit 2

J. Reuben Clark Law School

Brigham Young University



7033 LAN Fax Server

DATE: Thursday, Jan 19, 1995 8:47 p.m

TO: Sen. LeRay McAllister

COMPANY: Utah Senate
FAX #: 918015381414241876

FROM: Lynn D. Wardle
FAX #: (801) 378-3595

DESCRIPTION:

PAGES SENT:

MESSAGE:

MEMO TO: SENATOR LERAY MCALLISTER fax (801) 538-1414
FROM: LYNN D. WARDLE tel 221-1130 fax 378-3595
DATE: January 19, 1995
RE: Necessary Revision of Utah Marriage Code re: Recognition of Same-Sex Marriage

Utah Code Annotated (UCA) § 30-1-4 needs to be amended during this session of the Utah legislature. Section 30-1-4 provides:

> Marriages solemnized in any other country, state or territory, if valid where solemnized, are valid here.

I believe that this provision needs to be amended by adding the following language: "unless the marriage would violate strong Utah public policy."

There are two reasons why this amendment is needed at this time. First, § 30-1-4 missttes the long-established American rule regarding recognition of marriages because it omits the long-recognized, still-followed exception for marriages which violate strong public policy. Second, unless changed, it could lead to Utah courts having to recognize as valid in Utah same-sex marriages.

To take the second reason first, there is a strong movement to legalize same-sex marriage. Denmark, Norway and Sweden have enacted very broad same-sex domestic partnership laws permitting homosexual couples to register as domestic partnerships and treating those unions for most purposes in law (except adoption and joint custody) as marriages. In the United States, the California legislature passed a domestic partnership bill in 1994 that would have provided official state registration of same-sex couples and extended to them limited marital rights and privileges (re: hospitals visitation, and power of attorney); however, Governor Wilson vetoed the bill. Lawsuits have been filed recently in the District of Columbia, and Arizona seeking judicial legalization of same-sex marriage.

In 1993 the Hawaii Supreme Court ruled that Hawaii's marriage license law allowing only heterosexual couples but not homosexual couples to obtain a marriage license constitutes sex discrimination under the state constitution (equal protection provision and the Equal Rights Amendment). Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). The Hawaii Supreme Court held that the heterosexual-marriage-only law can be upheld only if the state proves that it is necessary to effectuate a compelling state interest. The remanded case is scheduled for trial this year (1995). Given the tremendous lobying and advocacy effort that gays and lesbians have launched, it is quite possible that the Hawaii trial court could rule that Hawaii must allow same-sex marriage. If that were the court's ruling, it is likely that immediately many same-sex couples would fly to Hawaii to be united in "marriage."

Thus, before the end of this year it is possible that Utah courts could be faced with cases in which homosexual couples with valid Hawaiian same-sex marriages demand that the Utah courts recognize their "marriage." They would cite UCA 30-1-4: "Marriages solemnized in any other country, state or territory, if valid where solemnized, are valid here." Since their "marriage" had been solemnized in a state where it was valid, they would argue that the statute

makes the marriage "valid here."

Utah law does not allow same-sex marriage. Utah Code Annotated (UCA) § 30-1-2 specifically provides that a marriage is "prohibited and declared void" if "(5) between persons of the same sex." However, it is generally presumed that state legislation was meant to cover acts done within the jurisdiction only. And UCA § 30-1-4 is the specific provision that governs questions regarding validity of marriages performed out-of-state; it says if valid were solemnized the marriage is valid here.

Those arguing against recognition of the same-sex marriage might argue in court that same-sex unions are not within the definition of "marriage." They might argue that UCA 30-1-4 was not intended to repeal the historic, common law "exception" for marriages violating strong public policy. But if the court looked only at the face of the statute, it migh: reject those arguments.

For many decades the established rule in American law regarding recognition of marriages contracted out of the jurisdiction has been to apply the law of the state of celebration to determine whether a marriage was valid (lex loci celebrationis), subject to the exception that if the out-of-state marriage violates a strong public policy of the forum, courts of that state will refuse to recognize the validity of the marriage (particularly if it was a state of domicile of one of the parties at the time of marriage). See generally Robert A. Leflar, American Conflicts Law § 221 (4th ed. 1986); Vol. 1, Lynn D. Wardle, Christopher A. Blakesley, & Jacqueline Y. Parker, Contemporary Family Laws §2.03 (1988); Russell J. Weintraub, comentary on the Conflict of Laws 230-233 (3d ed. 1986); William M. Richman & William L. Reynolds, Understanding Conflict of Laws 362-363 (2d ed. 1993).

The Restatement (Second) of Conflict of Laws §283(2) (1971) states the general rule as follows:

> A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

Id. While the Restatement's proposed "most significant relationship" standard is not accepted by all states, the statement of the general rule of marriage validation and the general public policy exception noted by the Restatement are.

UCA 30-1-4 correctly states the general choice of law rule of lex loci celebrationis, but it fails to also express the well-established exception. The amendment that I propose above would bring Utah law back in line with the established choice-of-law rules. It would also insure that Utah courts would not have to subordinate strong Utah policies just because a party got married in a State or nation with another policy. Same-sex marriages is not the only issue. In some nations of the world children may be "married;" in other nations polygamy is legal, including some forms of marriage that are essentially concubinage; and other nations allow other marriage customs that deeply contradict strong public policy in Utah. The amendment would preserve the presumption of validity, but allow room for courts to deal with the exceptional cases.

Exhibit 3

JWH

STATE OF UTAH
OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL

LEGISLATIVE REVIEW LETTER

Date Feb 14 19 95 General SESSION

HB No. 366 Title Recognition Of Marriages

Rep Norm Nielsen

Joint Rule 4.22 requires the Legislative General Counsel or his designee to review and approve all legislation and, with the approval of the sponsor, to make those changes necessary to: (a) insure that it is in proper legal form; (b) remove any ambiguities; and (c) avoid constitutional or statutory conflicts.

The Legislative General Counsel or his designee has reviewed and approved this legislation. The following information outlines the considerations on which the approval was given.

☑ yes ☐ no 1. The bill contains a "single subject" which is clearly expressed in the title as required by the Utah Constitution, Article VI, Sec. 22.

☑ yes ☐ no 2. The bill meets all the form requirements prescribed by legislative rule.

☐ no conflicts 3. The bill does not have state or federal constitutional conflicts. (Judgments regarding constitutionality address only obvious constitutional problems and do not represent a detailed review of all issues.)

☑ possible conflicts

Explanation (Cite known constitutional or statutory conflicts or problems.)

Possible due process issues since marriage is a fundamental constitutional right, but there are strong arguments that the state's interest outweighs any infringement.

3/1/95 Full faith & credit issues

Samantha W. Howard
Office of Legislative Research and General Counsel

Exhibit 4

STATE OF UTAH
OFFICE OF LEGISLATIVE RESEARCH & GENERAL COUNSEL

RICHARD V. STRONG
Director

M. GAY TAYLOR
General Counsel

February 8, 1995

Representative Norm Nielson,
730 South 200 West
Orem, Utah 84058

Dear Representative Nielsen:

I have drafted H.B. 366, "Recognition of Marriages" a bit differently than the language proposed by Mr. Wardle, and I wanted to let you know my reasons for doing so. I am concerned that a statutory provision making marriages invalid if they violate "strong Utah public policy" would be void for vagueness, violating due process protections -- especially since the right to marry is a fundamental constitutional right requiring that a strict scrutiny standard be applied to any legislation that may be alleged to diminish that right.

I do agree that the state has a compelling interest in prohibiting certain marriages, thus meeting that strict scrutiny standard. But I think those prohibitions need to be clear. Therefore, I have drafted the legislation so as to protect Utah's interest and right in prohibiting certain marriages -- identifying those described in Utah Code Section 30-1-2 -- regardless of where the marriage was solemnized.

I want to make sure that you know, however, that I will draft this however you choose. If you would like to make any changes or have any questions, please let me know.

Sincerely,

Jānetha W. Hancock
Associate General Counsel

Exhibit 5

Unofficial Transcription of Excerpts of Legislative Debates

Debate of Utah House of Representatives on Joint Resolution of Marriage, H.J.R. 25 (February 24, 2004 – Introduction of H.J.R. 25)

REP. DANIELS: **[7:12]** Thank you, Mr. Speaker. I want to say before I say anything else that I am philosophically opposed to this constitutional amendment, but that's not what I want to talk to you about this morning. I want to talk to you about the process and about the practicalities of this, rather than the philosophy of it. We're talking about changing the Constitution here. That's a very serious matter and it's not easy to change. It has, we have to vote by two-thirds vote. It has to be placed before the voters. If we make a mistake, it's not easy to change it back. In changing the Constitution, among all the things that we do, this is the place where we really should be careful, where we really should, as they say, measure twice and cut once. We want to do it right. Now as I said I'm philosophically opposed to

this. But let me say, even if I were not—if I were the person who was making this change and I wanted to make this change—I would do it a different way. First of all, we have in this state a Constitutional Revision Commission. That commission is composed of, of, people who are experts in this field. It has the President of Utah State University, the Chief Justice of the Supreme Court, Representative Curtis. We have two representatives. I serve on it as well; two senators do. There's some law professors. There are some business people. And they look at constitutional changes and go over them with a fine tooth comb, and they're very careful about them. This constitutional change we're proposing that has to do with lending credit at the university and so on we talked about a few days ago, we've spent nearly a year on that, one meeting a month, 12 meetings. We've talked about that, talked about it word by word. It's a very

deliberative process. This constitutional amendment, on the other hand, has never been to the CRC. It came up very recently, and it was proposed after the last meeting of the CRC. They've never had a chance to look at it, and I think it's a real mistake to submit this to the voters without them having an opportunity to look at it…**[9:09]**

REP. DANIELS: **[35:29]** Just let me say that this motion to amend is helpful but it's not the full discussion we need. We don't need five minutes of discussion on this motion to amend. We need several months of thought on this, the type of motion, this type of motion, and the wording of it. Thank you. **[35:50]**

REP. LITVACK: **[50:53]** Can you—Representative I've heard you speak on this issue many times. I sat in at a committee hearing and I'm very familiar with the court rulings

that you've stated. Without referring to the court rulings I'm just curious as far as to, in your opinion, the rational basis for this amendment.

REP. CHRISTENSEN: With all due respect, you just posed another rhetorical question. To set aside all constitutional authority and say pull it out of the air is what this debate's all about. I can't believe the characterization, and with all due respect to Representative Biskupski, I just heard an entire distortion of previous statements, including the Speaker's, which is consistent with the distortion of the Constitution. To then ask me to set it aside and to try to give you additional rational basis I would tell you this, what you're really asking is, how did we get here in the first place? Well just go back to 1954. Let's just stop there, a grateful nation on the heels of World War II, after Churchill concludes his multivolume treatise on the democracies of the world he says his closing line, "And thus were the

democracies of the world free to resume the follies that so nearly cost them their lives." What did our nation do, the so-called greatest generation? They add the words "under God" to the pledge of allegiance. What happens if you come forward? You've got a national nervous breakdown in the sixties. You got radical individualism and moral relativism gone mad. You've got separation of church and state turned on its head. And then we're supposed to have a reasonable discussion in 2004 that makes any sense whatsoever when you take God and religion and constitutional authority out of the picture and say, "Now with just intellectualism, logic, and reasoning can you try and tell me why I can't have my way, why one percent of the population doesn't have an affirmative right to transform all of civilization?" So I would just say that it's very difficult to engage in such a discussion. I don't think I can do so today.

REP. LITVACK: Okay, well, let me apologize, let me reframe the question and maybe make it a little bit easier for you. I've heard stated over and again, this is about civilization. This is to prevent the downfall of our civilization. This is to protect marriage—as stated in the language and placing it, in your rationale placing it where we do, where you are proposing the Constitution is about protecting marriage. I'm having a hard time, I'm struggling, and if maybe you can put it down to an individual level for me, how is my life, my marriage, going to be made more stable or stronger by this amendment?

REP. CHRISTENSEN: If you believe in radical individualism you can go off in a private corner and you can answer that question. If you believe, as the founders did, that the reasons self-government could work, and let me answer it this way if I might. In 1837—we've talked about other nations—we have a famous Australian immigrant who

comes to our country, great scholar Francis Grund. After spending time here like Tocqueville did, this was his conclusion. Reflecting the morality of those who have gone before us, he said, "In all of the world, few people have so great respect for the law and are so well able to govern themselves. Perhaps they are the only people capable of enjoying so large a portion of liberty without abusing it. I consider domestic virtue of the Americans as the principle source of all their other qualities. It acts as a promoter of industry, a stimulus to enterprise, the most powerful restraint on public vice, which is the collective exercise of individual choice and agency and how it translates into public virtue." But listen to this: "No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity but it can only suffice a people habitually correct in

their actions. It would be utterly inadequate to the wants of a different nation." Switzerland, Norway, all the ones you heard about. And then this amazing warning: "Change the domestic habits of the Americans, their religious devotion, their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole…"

SPEAKER: Representative Litvack your time is expired.

REP. LITVACK: I only got 30 seconds?

SPEAKER: Thirty seconds?

REP. LITVACK: No, get back to—extend for maybe two minutes I'd appreciate it.

SPEAKER: I didn't hear how many minutes?

REP. LITVACK: Two minutes.

SPEAKER: Representative Litvack moves that he be extended for two minutes. Discussion of the motion. Seeing none,

all in favor say aye.

VOICES: Aye.

SPEAKER: Opposed say no. Motion passes. Representative Litvack.

REP. LITVACK: Thank you, Mr. Speaker. I'm not going to place my amendment because I know what the results of it will be. But maybe the more appropriate place for this in our Constitution is under Article 3, where we also forbid polygamy. Because what this should be properly titled is "Same-Sex Marriage Forbidden." I asked a simple question: How is my marriage going to be made more stable? How is my life going to be better by this amendment and I didn't get an answer. Because it's not. Our civilization is not going to become more stable by this amendment. This is very simply about forbidding an action, whichever way we feel about it. I've heard a lot of talk about judicial activism over this entire session and it's interesting in

comments made to my first question the year 1954 was brought up. A very important year, because what some may dismiss as judicial activism I look at a ruling that changed this country for the better forever. That was the year, if I'm correct in my history, of Brown versus Board of Education. Was that judicial activism? Breaking down the walls of separate but equal? Where would be today if it wasn't for that ruling?

SPEAKER: Representative Litvack your time has expired. You want to move to extend for how long?

REP. LITVACK: Forty-five seconds, if possible.

SPEAKER: Representative Litvack would like to extend for an additional 45 seconds. Those in favor of the motion say aye.

VOICES: Aye.

SPEAKER: Opposed say no.

VOICES: No.

SPEAKER: We'll rule the motion passes. Proceed.

REP. LITVACK: Thank you, Mr. Speaker. We are and have always been in an evolving nation. We have never been perfect, nor will we ever be. At the same time that the founders and the framers of our Constitution talked about what we've been talking about today, we had slavery. For years we fought the battle for equal rights. Let's leave room for justice, for equality. Let's leave room to evolve as a people, as a community. This amendment does not allow that. This amendment leaves us stuck. **[58:35]**

Debate of Utah Senate on Joint Resolution of Marriage, H.J.R. 25 (March 3, 2004 – Passage of H.J.R. 25)

SEN. EVANS: **[22:54]** Thank you, Mr. President. I debated back and forth whether I was even going to speak on this issue. And as you probably figured out, I've decided to speak. Senator Buttars

passed Senate Bill 24, which I supported. I think it addressed the question about marriage, its definition, and the position of the state. I think where I'm a little uncomfortable, and I've never been uncomfortable in this body, is the sense of urgency—that, somehow, someone's out to get us, or someone is after us. And as a legislature, as servants of the people, it's our fundamental responsibility to moderate the passions of the people. We get hit up from all sides on issues all the time. People are passionate about them. But if we give in to that passion, sometimes we end up doing things in haste that perhaps, with more deliberation we would do differently. I looked at H.J.R. 25. The bill file was open on February 20th. It's been about twenty-three days that this bill has officially been under consideration. My question is not about whether we should recognize marriage as between a man and a woman. I think we all agree on that. My question is as the body of the people, do we have a responsibility to be judicious, to be deliberative, and to ensure that we're not being perceived or in effect unfair? It's okay if people disagree with

our choices. But there should never be any question as to how we come to our choices. Perhaps I'm the only one in this body that is sensitive to the process of being considered a threat. That's not a very good feeling, especially if you don't see yourself as a threat. The defensive Senate Bill 24, the definition of marriage, I believe addresses our question in the immediate term about ensuring that we do not have to recognize marriages from other states that are not between a man and a woman. To allow our normal process going through a Constitutional Review Commission [*sic*] or more deliberations—I don't think it harms the process; I think it helps the process. I'll give you an example. We passed a joint resolution on calling the legislature into session. I voted for that resolution because it went through the process. But as a citizen, when I mark my ballot, perhaps, I'm almost certain, that I will vote against it. So what I was voting for in this body was that, yes, we did our due diligence, we've gone through the process in a deliberative way. As public servants we can now place before the people a well-studied, and

a well-reasoned, suggestion to amend the Constitution. Twenty-three days, H.J.R. 25 has been under consideration. It's had one hearing in the House, no hearing in the Senate. Now what we're saying is that, because of Massachusetts, we have to hurry up, because they're going to get us. Or we have to hurry up, because our way of life is, is under imminent threat. That is not the message that I think our legislature should be sending, because that is not the people I have come to know and admire in this Senate. So I ask you to consider a perspective from someone who has been under threat and ask yourself is that the message we want to send? Or do we want to continue our process the way we've always done it. We can come to the same conclusion and still we would be deliberative, and we will be fair in our process. That's my objection to this bill at this time—not the merits of the bill, but the way we're doing business regarding this bill. So with that I ask that you consider my perspective and also consider the good men and women that I know you all are, that I've come to admire and respect, have come to look up to and

depend on. So I ask that you consider that when you vote on H.J.R. 25. **[28:32]**

SEN. DAVIS **[37:18]** Thank you, Mr. President. I rise to talk also about my love for the Constitution and what I believe that it stands for. Sen. Gladwell raised some great questions. Those questions were not questions of constitutionality. Those were questions raised in a court over a statute. A statute which we adopted a number of years ago. And this year, during this session, we adopted an even stronger statute on marriage and what that sanctity of that marriage is, what we mean by it. Now we rush to judgment over a constitutional amendment. As I read this Constitution of the United States of America, I don't see things in the Bill of Rights for individuals that bars them from living their life in liberty. As I read the Utah Constitution and our Declaration of Rights, I don't see anything in there that is prohibited, except for perhaps plural marriages, which has been banned. But I ask you, have we got strict laws on that? How

strong is that constitutional amendment there? It isn't. It has no strength, because the people make that decision of whether they're going to abide by it or not. And we've been pretty lax in prosecuting on that issue of plural marriage. If we look at the US Constitution, the prohibition of alcohol was also there. What did people do to that? It didn't work. Do we believe that if we change the Constitution that we're going to be able to change people's lifestyles? Because that's what we're trying to say in this, that we're going to prohibit certain activities. And you know something? It's not going to work, because people—and it's a great thing that both of these Constitutions state—people have their right to liberty. Yes we can ban things. We can stand in the way of many different things. We can pass all kinds of laws, and we should do, and we have done. Why are we so afraid that we have to actually take the Constitution of the State of Utah, a great document of freedom, which is tied directly by our Constitution to the US Constitution, that people have a right to liberty. That's what we're talking about here, is liberty, our

freedom. And I think it's wrong to try to discriminate against groups and classes of people because we may not agree with the way they live their lives. I encourage you to vote no. **[40:51]**

Debate of Utah House of Representatives on Joint Resolution of Marriage, H.J.R. 25 (March 3, 2004 – Motion to Concur with Senate Amendments)

REP. DANIELS: **[5:40]** Thank you, Mr. Speaker. I would also resist the motion to concur with the Senate amendments. As I look at the amendment, it changes "status" to "union." I'm not sure I know what the difference between a "status" and a "union" is. I think it illustrates the folly in rushing this through on the last night of the legislative session without having the Constitutional Revision Commission look at it, consider each word carefully, consider the effect, think about the way it affects the Constitution and may create consequences that we haven't thought through completely. This is the Constitution we are, excuse me, fooling around

with, and let's do it right the first time. Thank you.

[6:33]