PEGGY E. STONE (6658)
JONI J. JONES (7562)
Assistant Utah Attorneys General
SEAN D. REYES (7969)
Utah Attorney General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Facsimile: (801) 366-0101
e-mail: pstone@utah.gov
jonijones@utah.gov

IN THE UTAH SUPREME COURT

Utah Department of Health, Petitioner v. Honorable Judge Elizabeth A. Hruby-Mills, Third District Court Judge, Respondent	PETITION FOR EMERGENCY EXTRAORDINARY RELIEF Case No.

PETITION FOR EMERGENCY RELIEF PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 8A

COMES NOW the Utah Department of Health, Office of Vital Records and Statistics ("Department") and petitions the Court for emergency, provisional relief pursuant to Utah Rule of Appellate Procedure 8A. The Department of Health requests that the Court stay enforcement of the Order issued by the Honorable Elizabeth A. Hruby-Mills in Case No. [redacted], requiring the Department of Health, Bureau of Vital Records, to change the birth certificate of [redacted], a minor child, until such time as this Court may rule upon the validity of such an

order through full briefing and argument pursuant to a Petition for Extraordinary Writ, which will be filed by the Department forthwith.

SPECIFICATION OF THE ORDER FROM WHICH RELIEF IS SOUGHT AND A COPY OF ANY WRITTEN ORDER AT ISSUE
(Utah R. App. P. 8A(b)(1) & (2))

The Department seeks relief from the Decree of Adoption in *In the Matter of the Adoption of* [redacted], Case No. [redacted], entered by the Honorable Elizabeth A. Hruby-Mills on February 13, 2014. In particular, the Department of Health seeks relief from Paragraph 3, which requires the Bureau of Health and Vital Statistics to "issue a birth certificate recognizing [T.A.T.] as the adoptee's parent along with [redacted]." A redacted copy of the Order is provided as Addendum A.

A SPECIFIC AND CLEAR STATEMENT OF THE RELIEF SOUGHT
(Utah R. App. P. 8A(b)(3))

The Department of Health seeks, here, emergency and provisional relief—a stay of Judge Hruby-Mills' February 13, 2014 Order authorizing it to amend [redacted]'s birth certificate until such time as the Court can fully consider the Department of Health's Petition for Extraordinary Relief, pursuant to Utah Rule of Appellate Procedure 19.[1] The Department is preparing and expects to file forthwith its Petition.

[1] Though Rule 8A is not an independent basis for jurisdiction, this Court may enter "limited provisional forms of relief," such as an emergency stay to preserve the status quo, pursuant to Rule 8A. *Snow, Christensen & Martineau v. Lindberg*, 2009 UT 72, ¶ 6, 222 P.3d 1141, 1142 (per curiam). Thus, this Court may grant the relief requested in this Rule 8A petition, which merely requests that the status quo be preserved for full consideration, prior to submission or full briefing of a Rule 19 Petition. *Id.*

[redacted] [redacted]

[redacted]

[redacted]

A STATEMENT OF THE FACTUAL AND LEGAL GROUNDS ENTITLING THE PARTY TO RELIEF
(Utah R. App. P. 8A(b)(4))

On December 20, 2013, the United States District Court issued an order granting Plaintiffs' Motion for Summary Judgment in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013). In the ruling, the federal district court held that Utah's laws banning same-sex marriage violated the United States Constitution, and the district court enjoined them from being enforced. *Id.* at 1216 ("The court hereby enjoins the state from enforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex."). The State of Utah repeatedly requested a stay of that ruling, including orally on the date of its issue. On December 20, 2013, the State appealed and requested a stay from the Tenth Circuit Court of Appeals. *See Emergency Mot. for Temporary Stay*, *Kitchen v. Herbert*, No. 13-4178 (10th Cir. filed Dec. 20, 2013). On December 22, 2013, the Tenth Circuit denied the State's request for a stay pending the district court's ruling on the State's motion to stay before it, and on December 23, the district court denied the State's December 20, 2013 written motion for a stay. *See Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634, at * 4 (D. Utah Dec. 23, 2013) (ord. on mot. to stay not selected for publication). Finally, on December 24, 2013, the Tenth Circuit also denied the State's Motion for a stay pending appeal. *See* Ord. Denying Emergency Mot. for Stay & Temp. Mot. for Stay, *Kitchen v. Herbert*, No. 13-4178, at 2 (10th Cir. Dec. 24, 2013).

Though the appeal process was continuing, in compliance with the injunction in force at the time, a number of marriage licenses were issued to same-sex couples. On December 31,

2013, the State filed a request for stay with the United States Supreme Court. *See* Application for Stay Pending Appeal, *Herbert v. Kitchen*, 13A-687 (Dec. 31, 2013). On January 6, 2014, the Supreme Court issued a stay, stating:

> 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.

Application Granted by the Ct., *Herbert v. Kitchen*, No. 13A-687, 2014 WL 30367 (orders Jan. 6, 2013). The stay immediately suspended the effect of the district court's injunction, so that Utah laws banning same-sex marriage have been back in effect since January 6, 2014.

Subsequently, in accordance with Utah law, Governor Herbert directed state agencies to not provide benefits or otherwise recognize same-sex marriages performed in Utah between December 20, 2013 and January 6, 2014. The Governor directed that recognition of these marriages would be suspended, pending the outcome of the State's appeal to the Tenth Circuit Court. [2]

[redacted]. and [redacted]. are a same-sex couple who apparently married in the time between the *Kitchen* Order and the U.S. Supreme Court's stay of that Order. The Attorney General's office was not notified, pursuant to Utah R. Civ. P. 24(d)(1) of the pending adoption petition.

The trial court abused its discretion in ordering the Department to change the information on G.V.T.M.'s birth certificate. The Order authorizes the Department to violate the plain text of the Utah Constitution and Utah Law prohibiting recognition of same-sex marriage, which are

[2] Oral argument in *Kitchen* is set for April 10, 2014.

[redacted]

valid and in force because of the Supreme Court's stay. The legal effect of a stay is to take the parties back to the status quo, to "the state of affairs before the . . . order was entered." *Nken v. Holder*, 556 U.S. 418, 420 (2009). A stay "temporarily suspend[s] the source of authority to act—the order or judgment in question." *Id.* at 428-29. Thus as soon as the Supreme Court stay was issued, the *Kitchen* injunction was suspended, and no longer had any effect. The law went back to the status quo: resumption of Utah's statutes and Constitutional Amendment 3, which prohibit recognition of same-sex marriages.

Utah law which is now in effect expressly prohibits the State from recognizing same-sex marriage. Section 30-1-4.1 provides that except for marriages between a woman and a man, "this state will not recognize, enforce, or give legal effect" to any law that gives marriage rights to same-sex couples. Utah Code § 30-1-4.1(1)(b). Amendment 3, which also is currently in effect, similarly prevents the State from recognizing same-sex marriage. Article I, Section 29 of the Utah Constitution provides that "(1) Marriage consists of only the legal union between a man and a woman," and "(2) No other domestic union, however denominated, maybe be recognized as a marriage or given the same or substantially equivalent effect." Utah Const. art. I, § 29.

The Order presented to the Department of Health requires the Department to: "issue a birth certificate recognizing [[redacted].] as the adoptee's parent along with [redacted]." (Ord., Addendum A, at ¶ 3.) If the Department of Health complies with the Order, it will be recognizing same-sex marriage, which is expressly prohibited by Utah Code Ann. § 30-1-4.1 and Amendment 3 to the Utah Constitution. *See* Utah Code § 30-1-4.1(1)(b); Utah Const. art. I, § 29.

[redacted] [redacted]

At a minimum, Judge Hruby-Mills' Order authorizing a state agency take an action contrary to the plain language of Utah law, presents a serious issue deserving of this Court's full attention through a Petition for Extraordinary Writ. To protect that consideration, as described below, the Court should grant this Petition and temporarily stay the Decree of Adoption.

A STATEMENT OF FACTS JUSTIFYING EMERGENCY ACTION
(Utah R. App. P. 8A(b)(4))

In this case, the failure for this Court to act could cause significant harm to the Department, to the adoption petitioners below, and to Utah law generally.

Judge Hruby-Mills entered the Order on February 13, 2014. On or about April 4, 2014, the state Registrar received Judge Hruby-Mills' Order in the mail. The Order requires the Department to issue a new birth certificate recognizing two adult females as [redacted]'s parents. (Ord. ¶ 3.) Because the Order conflicts with the plain language of the Utah Constitution and Utah Law, the Department of Health sought advice from counsel on the best way to proceed, and has yet to issue the amended birth certificate.

If the Department of Health does not comply on the grounds that the judge has abused his discretion by issuing an order that violates the Utah Constitution and its laws, the Department of Health, and its agents, face the possibility of contempt sanctions. If the Department of Health is forced to comply with the Order, it risks violating Utah law. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Furthermore, if the Department of Health complies, the

controversy may effectively become moot. *See, e.g.*, *United States v. First State Bank of Clute*, 626 F.2d 1227, 1227–28 (5th Cir. 1980) (per curiam) (dismissing appeal of order enforcing IRS summons because the order was not stayed pending appeal and the respondents complied); *Burnett v. Kindt*, 780 F.2d 952, 954–55 (11th Cir. 1986) (holding that appeal of writ requiring that a prisoner be allowed a parole hearing was moot when the prison and Board of Pardons provided such a hearing instead of seeking a stay); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (noting that compliance with a court order moots an appeal when the appellate court cannot "grant 'any effectual relief whatever' to a prevailing party" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))).

In addition to the serious risk of harm that may result to the Department, if compliance is mandated before this Court has the opportunity to rule on the issue, the Co-Petitioners below may also be harmed, as they may wrongly rely upon an illegally-issued birth certificate for other benefits or protections not provided by Utah law.

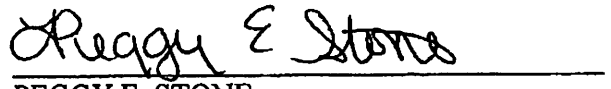
CONCLUSION

Providing emergency relief would preserve the status quo and provide this Court the opportunity to fully consider the propriety of the order to the Department, as well as the proprietary of the trial court's adoption order generally, through a fully briefed Petition for Extraordinary Relief. *See Snow, Christensen & Martineau*, 2009 UT 72, at ¶ 7 n.3, 222 P.3d at 1143 n.3 (noting that the Rule 8A petition may reference nonemergency claims, so long as it "recognize[s] that it is not the instrument for obtaining nonemergency relief"). Because the Department of Health was not a party, it cannot seek a stay with the lower court, and the ability

to obtain relief "will be irrevocably impaired if [the] imminent lower court order goes into effect." *Id.* at ¶ 7 n.5, 222 P.3d at 1143 n.5. The Court should therefore grant the Petition for Emergency Relief and stay the execution of the February 13, 2014 Order, in its entirety, or, alternatively, stay the execution of Paragraph 3 of the Order, until such time as the Court may consider and rule upon the Department of Health's Petition for Extraordinary Writ.

DATED this 8th day of April, 2014.

OFFICE OF THE UTAH ATTORNEY GENERAL



PEGGY E. STONE
Assistant Utah Attorney General

CERTIFICATE OF SERVICE

I certify that on April 8, 2014 I filed the foregoing, **PETITION FOR EMERGENCY EXTRAORDINARY RELIEF**, by hand-delivering documents to the Clerk of the Court and caused to be served to the following:

Judge Elizabeth A. Hruby-Mills
Third District Court
450 South State Street
4th Floor
Salt Lake City, UT 84114
Via Hand-Delivery

Laura M. Gray
LAURA MILLIKEN GRAY, P.C.
1555 East Stratford Ave., Suite 100
Salt Lake City, UT 84106
(801) 467-5170
Via Fax and U.S. Mail

Brent Johnson
Administrative Office of the Courts
450 South State Street
3rd Floor
Salt Lake City, UT 84114
Via Hand-Delivery

Cecilia Lesmes

ADDENDUM A

LAURA M. GRAY, No. 5960
1555 East Stratford Avenue, Suite 100
Salt Lake City, UT 84106
Telephone: (801) 983-3309
Facsimile: (801) 467-5170
Lgray@lmglaw.net
Attorney for Petitioners

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE ADOPTION OF:	DECREE OF ADOPTION
[redacted] , Date of Birth , Minor Child.	Case No.: [redacted] Judge: Elizabeth A. Hruby-Mills

DECREE OF ADOPTION

[redacted] and [redacted] 's petition to adopt the minor child [redacted] came on for hearing this 13th day of February, 2014, the Honorable Elizabeth A. Hruby-Mills presiding. Having made its Findings of Fact and Conclusions of Law,

THE COURT NOW ORDERS AND DECREES as follows:

[redacted] is hereby adopted by [redacted], and [redacted] shall henceforth be regarded and treated in all legal respects, including rights of inheritance, as the child of [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. Pursuant to statute, upon filing of this Decree, this file shall be sealed, and not opened except as provided by law.

3. The Department of Health shall issue a birth certificate recognizing Petitioner as the adoptee's parent along with [redacted].

4. The parental rights of N [redacted] shall not be affected by this adoption. The minor child has no legal father.

5. The child's name shall remain: [redacted]

Signed this 13th day of February, 2014.

BY THE COURT:

DISTRICT COURT JUDGE

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: 28 Feb 2014

DEPUTY COURT CLERK

STATE OF UTAH 3RD DISTRICT COURT SALT LAKE CITY