

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

SUSAN LATTA, et al., )  
 ) **No. 14-35421**  
 Plaintiffs - Appellees, )  
 vs. ) D.C. No. 1:13-cv-00482-CWD  
 )  
 C.L. "BUTCH" OTTER, et al., ) U.S. District Court for Idaho,  
 ) Boise  
 Defendants - Appellants, )  
 and )  
 )  
 STATE OF IDAHO, )  
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 )  
 Defendant - Intervenor - Appellant. )

Appeal from the United States District Court for the District of Idaho  
(Dale, M.J. Presiding)

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**REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT  
RULE 27-3 FOR STAY PENDING APPEAL**

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## INTRODUCTION

Two core points in the response by Plaintiffs-Appellees (“Appellees”) to the emergency stay motions in this appeal and No. 14-35420 warrant a brief reply.

*First*, it beggars logic to suggest that the stay granted by the Supreme Court in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), loses any of its practical significance by virtue of subsequent district court decision-making with respect to the validity of state-law restrictions on the availability of civil marriage to same-sex couples or the recognition by one State of a same-sex marriage entered into under the laws of another State. The significance of the *Herbert* stay lies in the commonality of the issues (and attendant legal analysis) in the Utah and Idaho litigation.

*Second*, the Appellees’ portrayal of the potential injury to the Appellants and the public interest if no stay is granted and the district court’s judgment eventually is reversed asks this Court to ignore reality. As Appellees themselves allege in the amended complaint below (D.C. Doc. 42 ¶ 37), civil marital status has ramifications across a broad range of legal and non-legal matters. The specter of undoing same-sex marriages entered into between May 16, 2014 and the date on which the district court judgment ceases to have effect counsels extreme caution in the exercise of the federal judiciary’s equitable authority.

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## REPLY ARGUMENT

1. Appellees' invocation of an "extraordinary consensus" (9th Cir. Dkt. 5 at 2) concerning challenges to state same-sex civil marriage prohibitions as undermining the significance of the *Herbert* stay rests on the premise that the Supreme Court is in the business of counting district court noses. It is not.

The issuance of a stay in the Utah litigation, fairly viewed, reflected the fact that the Supreme Court explicitly left open in *United States v. Windsor*, 133 S. Ct. 2675 (2013), whether such prohibitions could be given effect in the administration of federal statutes and regulations pursuant to section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. 133 S. Ct. at 2696. Implicit in that careful reservation was the anticipated future resolution of whether the deference paid to New York with respect to its determination to authorize same-sex marriages would be paid to the determination by a State like Idaho that chose a contrary path.

It should come as no surprise that the *Windsor* majority took the time to cabin its holding given the Court's unanimous dismissal of the appeal from a Fourteenth Amendment due process and equal protection challenge to Minnesota's same-sex civil marriage prohibition. *Baker v. Nelson*, 409 U.S. 810 (1972). The majority opinion, of course, contained no reference to *Baker* because, to resolve the DOMA section 3 attack, it had no reason to discuss the earlier decision. Any contention that *Windsor* undermined *Baker* means that the Court invoked the

national government's traditional respect for state policymaking in the domestic relations arena only as to States that adhered to New York's choice. *Windsor*, 133 S. Ct. at 2659-60. But the Court plainly was quite serious about its adherence to such deference and, in Appellants' view, was leaving the continuing viability of the judgment in *Baker* as an issue to be resolved *by it* when squarely presented. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

Against this backdrop and given the Utah district court's assigning camel's back-straw weight to *Windsor* concerning *Baker* as binding authority (*Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 ((D. Utah. 2013))), the granting of a stay by the Supreme Court allowed the ordinary appellate process to be followed in resolving the challenge to the Utah law but, simultaneously and just as importantly, maintained the *status quo ante* in an area historically committed to the States' regulation until completion of that process. As Appellants have pointed out (9th Cir. Dkt. 3 at 7-8) and Appellees do not contest (9th Cir. Dkt. 5 at 2-3), the district court stands virtually alone in not recognizing that the *Herbert* stay order represents an unmistakable signal by the Supreme Court that lower federal courts should not disrupt the *status quo* through intrusive injunctive relief. If noses are to be counted, it is those that have acknowledged the significance of the *Herbert* stay.

2. Appellees contend that Appellants "have offered no evidence that they will suffer any harm, much less irreparable harm, if the District Court's injunction

remains in effect while this appeal is pending.” 9th Cir. Dkt. 5 at 13-14. This argument is striking given their allegation that Idaho same-sex civil marriage prohibition “deprive[s] same-sex couples of critically important rights and responsibilities that married couples rely upon to secure their marriage commitment and safeguard their families.” D.C. Dkt. 42 ¶ 37. The allegation has double-edged consequences.

The “rights and responsibilities” that Appellees identify implicate in sizable measure Idaho statutory or regulatory provisions that must be administered by state and local governmental entities. So, for example, if a joint state tax income return is filed based upon a marriage entered into or recognized pursuant to the district court’s injunction (D.C. Dkt. 42 ¶ 37.h), later *vacatur* would present the Idaho Tax Commission with the task of determining whether any such returns remain valid. If a same-sex partner has “received certain worker’s compensation benefits for a deceased spouse who has died on the job” (*id.* ¶ 37.n), the Idaho Industrial Commission would be required to determine whether those benefits should be recouped. More generally, state and local government records that reflect civil marital status would no longer be accurate and would have to be modified or, conceivably, left inaccurate. The list can be added to, but the bottom line does not change: A State’s decision to predicate various “rights and responsibilities” on marital status implicates significant public resources to administer, and those

resources will be taxed doubly if governmental entities must undo actions taken on the basis for such status shortly (as a relative matter) after they have been taken.

**CONCLUSION**

Appellants' emergency motion to stay should be granted.

DATED this 15th day of May 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 15, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ W. Scott Zanzig*

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